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COMPLIMENTS OF

HALL HAMMOND

ATTORNEY GENERAL

# ANNUAL REPORT

AND

# OFFICIAL OPINIONS

OF THE

# ATTORNEY GENERAL

OF

# MARYLAND

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# 1950

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HALL HAMMOND
ATTORNEY GENERAL

20th Century Printing Co., Inc.
Baltimore, Md.

## ATTORNEYS GENERAL OF MARYLAND

| | |
|---|---|
| Luther Martin | 1778 |
| William Pinkney | 1805 |
| John Thomas Mason | 1806 |
| John Johnson | 1806 |
| John Montgomery | 1811 |
| [1]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 |
| [2]Alexander Randall | 1864 |
| Isaac D. 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 |
| Isidor Rayner | 1900 |
| William S. Bryan, Jr. | 1904 |
| Isaac Lobe Straus | 1908 |
| Edgar Allan Poe | 1912 |
| [3]Albert C. Ritchie | 1916 |
| Ogle Marbury | 1918 |
| 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 |

[1]During the physical incapacity of Luther Martin, 1820-1822, the Governor appointed Nathaniel Williams, Assistant Attorney General, to act as Attorney General.

[2]The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864 (Art. V, Sec. 1).

[3]During Mr. Ritchie's absence, June, 1918-January, 1919, while serving as General Counsel of the United States War Industries Board, Mr. Ogle Marbury became Acting Attorney General.

## STATE LAW DEPARTMENT

| | |
|---|---|
| Hall Hammond | Attorney General |
| J. Edgar Harvey | Deputy Attorney General |
| Harrison L. Winter | Assistant Attorney General |
| Kenneth C. Proctor | Assistant Attorney General |
| Ward B. Coe, Jr. | Special Assistant Attorney General for the Comptroller of the Treasury |
| Joseph D. Buscher | Special Assistant Attorney General for the State Roads Commission. |
| Aaron A. Baer | Special Assistant Attorney General for the Employment Security Board |
| O. Bowie Duckett[1] | Special Assistant Attorney General in Charge of Subversive Activities. |
| Philip T. McCusker | Special Attorney for the State Accident Fund |
| John B. Russell | Law Clerk.[2] |
| Malcolm B. Smith | Law Clerk.[3] |
| Mrs. Anne Davis Greer | Chief Clerk |
| Miss L. Erma Leonard | Law Stenographer |
| Miss Margaret E. Holliday | Law Stenographer |
| Miss Agnes T. Conroy | Senior Typist |

[1]Appointed April 17, 1950.

[2]Transferred on May 7th, 1950, to State Roads Commission.

[3]Appointed June 1st, 1950; Resigned August 31st, 1950, because of recall to active duty in Air Force.

Offices: 1201 Mathieson Building
Baltimore 2, Md.

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# Annual Report for 1950

January 1, 1951

*Hon. William Preston Lane, Jr.,*
*Governor of Maryland.*
*Annapolis, Md.*

DEAR GOVERNOR LANE:

In compliance with Section 8 of Article 32A of the Annotated Code of Maryland, I am submitting herewith, a report of the business and proceedings of the State Law Department for the year beginning January 1st, 1950, and ending December 31st, 1950, together with an itemized statement of the receipts and disbursements for the fiscal year beginning July 1st, 1949, and ending June 30th, 1950. The official opinions rendered by the Department during the year follow this report.

There were one hundred and thirty-five cases disposed of during the year, and seventy-six are still pending, although partially tried. We have not included in this number the cases tried by the Assistants assigned to the State Roads Commission, the Employment Security Board and the State Accident Fund. Each of these Assistants has submitted a report of the activities of the Department to which he is assigned, and the same are included herewith.

There were twenty-one criminal cases disposed of in the Court of Appeals and twenty-three civil cases, and we appeared on behalf of the State in all of them. We represented the State in cases in the Supreme Court of the United States, the Court of Appeals of the United States for the Fourth Circuit, the United States District Court for the District of Maryland, as well as the Circuit Courts for the various Counties and the Courts of Baltimore City. In pro-

secutions of persons before some of the Magistrates for violations of the water pollution laws we appeared on behalf of the Water Pollution Commission. As in previous years, the cases covered a variety of subjects, among them being murder, false pretenses, keeping a disorderly house, disorderly conduct, gambling, including lotteries and bookmaking, selling alcoholic beverages without a license, receiving stolen goods, violations of the fish and game laws, violation of parole and violations of the water pollution laws. We represented the State in petitions for certiorari, mandamus, replevins, attachments, injunctions, habeas corpus, declaratory judgments, and cases involving taxation, including gross receipts, sales and use, income, admissions, alcoholic beverages, recordation, inheritance, titling, gasoline; constitutional law, testamentary law, election laws, motor vehicle suspensions and revocations and claims for damage to State property.

On April 17, 1950, I appointed Mr. O. Bowie Duckett, Assistant Attorney General in Charge of Subversive Activities, in accordance with Chapter 86 of the Acts of the General Assembly of 1949. On May 7th, 1950, I transferred Mr. John B. Russell, Law Clerk, to the State Roads Commission as a Special Attorney to assist Mr. Buscher. On June 1st, 1950, I appointed Mr. Malcolm B. Smith in Mr. Russell's place, and on August 31st, 1950, Mr. Smith resigned because of recall to active duty in the Air Force.

All bonds given to or for the use of the State were submitted to this Department for approval as to form and legal sufficiency prior to their acceptance. Inasmuch as practically all public officials as well as employees who handle State revenues are bonded, the number of these documents will amount to as many as one thousand in the course of the year. From their very nature the utmost care is required in their examination and the duty of supervising this work is assigned to the Special Assistant Attorney General for the Comptroller of the treasury. Furthermore, all leases,

contracts, deeds, agreements and other similar documents are approved for form and legal sufficiency prior to their execution or acceptance by the State.

Pursuant to the requirements of Chapter 738 of the Acts of 1949, amending Section 7A of Article 41 of the Code, this Department has examined as to legality, all rules and regulations proposed by any Department, Bureau or Officer of the executive branch of the State Government clothed with authority to promulgate any rules or regulations.

In my report of January 1st, 1950, page 3, Volume 34, I referred to the cases of *Hammond vs. Lancaster* and *Hammond vs. Frankfeld*, involving the constitutionality of the Subversive Act of 1949, which cases were then pending in the Court of Appeals of Maryland. During the year 1950, the Court of Appeals reversed the decrees of the Baltimore City Court and dismissed the bills of complaint which challenged the constitutionality of that law. Prior to the election in 1950, there was filed in the Circuit Court for Anne Arundel County, a petition for a writ of mandamus to compel the Secretary of State to accept certificates nominating four candidates of the Progressive Party. These certificates were not accompanied by the affidavits required by Section 15 of Article 85A of the Code. Before the case came on for hearing before Judge James Clarke, two of the candidates filed the affidavits and as to them the proceeding was dismissed. As to the other parties, one of whom was a candidate for Governor and the other, the United States Senate, the petition was dismissed in the lower Court and an appeal was taken to the Court of Appeals of Maryland. The Court of Appeals affirmed the order of the lower Court in dismissing the petition as to the two candidates who had filed the affidavits and as to the candidate for Governor, but reversed the order dismissing the petition in so far as it related to the candidate for United States Senator, upon the ground that it was beyond the power of the General Assembly of Maryland to prescribe require-

ments for Federal office. From the decision of the Court of Appeals an appeal was taken by the Progressive Party's candidate for Governor and a petition for a writ of certiorari was filed by the Secretary of State. The Supreme Court declined to advance the case for argument and after the November election the appeal was dismissed and the petition for certiorari denied.

During the year the first of the thirty day sessions of the General Assembly was held, beginning on the 1st of February and ending on March 2nd, 1950; following our established custom, we again opened an office in the State House, with Mr. Buscher in charge and assisted by Mr. Russell. Because of the limitations upon the power of the General Assembly to enact laws at the so called "short sessions" we were presented with many questions concerning the legality of a great many bills which had been prepared for introduction. By Chapter 30 of the Acts of 1950, the General Assembly passed an Act creating a Commission on Prevailing Wages, and provided that all contractors on certain State work were required to pay wages prescribed by the Commission. The constitutionality of the Act was challenged in a proceeding instituted in the Circuit Court No. 2 of Baltimore City, and following a full argument on the questions presented, the Court held that the act was invalid because the General Assembly had no power to pass legislation of that character at a short session. From the decree striking down the law an appeal was taken to the Court of Appeals of Maryland where the case is now pending.

Matters involving the Blue Sky Law and its enforcement show an even greater increase than last year, and more companies and individuals have been registered as dealers or brokers under this law. As has been our custom for many years, we have continued to cooperate with the Securities and Exchange Commission in Washington in this connection.

I have continued as Chairman of the Drafting Committee and Chairman of the Submerged Lands Committee of the National Association of Attorneys General, and have attended a great many meetings in Washington in connection with matters pertaining to both Committees.

On December 9th to December 12th, 1950, accompanied by Mr. J. Edgar Harvey, Deputy Attorney General, and Mr. Harrison L. Winter, Assistant Attorney General, I attended the Annual Meeting of the National Association of Attorneys General held in Miami Beach. Many vital problems confronting the States and Nation were discussed, such as preparation for civil defense, the control of organized crime, the administration of justice and federal-state relations in various fields.

Our policy of conferring with officials and State departments rather than duplicate official written opinions has been very effective. We have assisted State officials with their many problems by meeting with them, attending hearings and conferences, and aiding them in every way possible towards their satisfactory conclusion, and efficient handling of the State's business.

With kind regards, I am,

Sincerely yours,

HALL HAMMOND,

*Attorney General.*

## Summary of Litigation for 1950

### Cases Disposed of in the Supreme Court of the United States

*Capitol Greyhound Lines, Pennsylvania Greyhound Lines, Inc. and Red Star Motor Coach, Inc. vs. Arthur H. Brice, Commissioner of Motor Vehicles, State of Maryland.* No. 118, October Term, 1949. These were three appeals in one record from decrees of the Court of Appeals of Maryland reversing orders of the Superior Court of Baltimore City. The latter orders directed the issuance of writs of mandamus against the appellee, the Commissioner of Motor Vehicles of the State of Maryland, commanding him (i) to accept Appellants' applications for certificates of title for certain public passenger motor vehicles, and (ii) to issue said certificates without the payment by appellants of a tax in the amount of 2% of the fair market value of each of said motor vehicles, which tax is provided for in Section 25(a) of Article 66½ of the 1947 Cumulative Supplement to the Annotated Code of Public General Laws of Maryland. Appellants are engaged in carrying passengers for hire in interstate commerce by passenger motor vehicles or buses over Maryland roads. This Court's jurisdiction is invoked under U. S. C. A. Title 28, Section 1257(2) upon the alleged ground that said 2% "titling tax", adjudged by the Court of Appeals of Maryland to be payable by appellants as a condition precedent to the issuance of certificates of title for their buses which in turn is necessary to enable said buses to operate on Maryland highways, violates the "Commerce Clause" of Article 1, Section 8 of the United States Constitution. The decision of the lower Court was affirmed. The Attorney General and Mr. Coe represented the Commissioner of Motor Vehicles.

*Irvin Winkler, Stanley Askin, Harold Buchman, et al. vs. State of Maryland.* No. 572, October Term, 1949. On February 1st, 1950, a petition for certiorari was filed in

this Court, and on March 27th, 1950, the petition was denied.

*State of Maryland ex. Relatione Randall Winegard vs. Edwin T. Swenson, Warden, Maryland Penitentiary.* No. 406, Miscellaneous. The Court, on April 17th, 1950, denied the petition for writ of certiorari.

*Malichi Holiday vs. State of Maryland.* No. 508, October Term, 1949, Miscellaneous. On May 29th, 1950, the Court denied the petition for a writ of certiorari.

*William F. Hopkins vs. State of Maryland.* No. 727, October Term, 1949. On April 24th, 1950, the Court entered the following order: "Per Curiam: The appeal is dismissed for want of a substantial federal question."

*Harry C. Byrd, President, et al., vs. Esther McCready, minor, by Elizabeth McCready, her next friend and parent.* No. 219, October Term, 1950. This was a petition for a writ of certiorari to review the final decision of the Court of Appeals of Maryland, reversing the order of the Baltimore City Court dismissing a petition for mandamus compelling the University of Maryland to admit Esther McCready into the School of Nursing of the University. On October 9th, 1950, the Supreme Court dismissed the petition. The Attorney General and Mr. Proctor represented the University.

*Louis Shub vs. Vivian V. Simpson, Secretary of State of Maryland.* No. 371, October Term, 1950. This was an appeal from the order of the Court of Appeals of Maryland, affirming the dismissal of the petition for a writ of mandamus by the Circuit Court for Anne Arundel County. The appellant's motion to advance the case was overruled and following the election held on November 7th, 1950, the Court entered a per curiam opinion dismissing the appeal on the ground that the Federal questions had become moot.

The Attorney General and Mr. Harvey represented the Secretary of State.

*Vivian V. Simpson, Secretary of State of Maryland vs. Thelma Gerende.* No. 372, October Term, 1950. This was a petition for a writ of certiorari to review the order of the Court of Appeals in reversing the dismissal of a petition for a writ of mandamus by the Circuit Court for Anne Arundel County. The petition was denied. The Attorney General and Mr. Harvey represented the Secretary of State.

*Canton Railroad Company vs. Joseph H. A. Rogan, et al. State Tax Commission of Maryland.* No. 96, October Term, 1950. *Western Maryland Railway Company vs. Joseph H. A. Rogan, et al. State Tax Commission of Maryland.* No. 205, October Term, 1950. These were appeals from the Court of Appeals to the Supreme Court of the United States. The Court of Appeals affirmed an assessment for franchise taxes measured by gross receipts of the two railroads against the contention that the tax might not properly be measured by gross receipts derived from the import and export process, as the railroads had made the contention before the State Tax Commission, the Circuit Court No. 2 of Baltimore City and the Court of Appeals that the Import and Export Clause of the Federal Constitution prevented the imposition of franchise taxes measured by gross receipts derived from the business of importing and exporting. The judgments of the Court of Appeals were affirmed. The Attorney General and Mr. Winter represented the State Tax Commission.

## Cases Pending in the Supreme Court of the United States

*Daniel Niemotko vs. State of Maryland.* No. 17, October Term, 1949.

*Neil W. Kelley vs. State of Maryland.* No. 18, October Term, 1949.

*Herman T. Reiling vs. James J. Lacy, State Comptroller.* No. 588, October Term, 1950.

### Case Disposed of in the United States Court of Appeals for the Fourth Circuit

*Benjamin H. Washington vs. J. LeRoy Wright, Warden of the Maryland House of Correction.* No. 6059. This was a petition for a writ of Certiorari, and on March 6th, 1950, was dismissed by the Court.

### Cases Disposed of in the United States District Court for the District of Maryland

*Mae Owens Case vs. State of Maryland, Springfield State Hospital, Bernard Wells, State's Attorney for Baltimore City, and Dr. Manfred Guttmacher.* Civil Action No. 5213. The original proceedings (Civil Action No. 3 in the above Court) was a suit instituted by Mrs. Case against Dr. Guttmacher and Dr. Frank N. Ogden. Those proceedings were tried in 1939 before Judge Coleman and a Jury and resulted in a verdict and judgment in favor of the defendants. The present proceedings constituted an attempt by Mrs. Case to have the judgment in the original proceedings stricken out. In the papers which Mrs. Case filed she attempted to name not only the original defendants, but also the State of Maryland, Springfield State Hospital and Bernard Wells, the State's Attorney for Baltimore City. A motion to dismiss the plaintiff's motion to strike out was filed on behalf of all of the defendants. A preliminary hearing in the matter was held before Judge Chesnut and a final hearing was held before Judge Coleman on December 22nd, at which time all of the plaintiff's motions were dismissed and the defendant's motion to dismiss was granted. Mr. Proctor represented the defendants.

*Herman T. Reiling vs. James J. Lacy, State Comptroller.* No. 4508, Civil. A resident of Maryland who is an em-

ployee of the Federal Government, and receives all of his income by reason of such employment, in the District of Columbia, sought to have the Maryland Income Tax law declared unconstitutional in so far as it qualified him as a resident of this State and required him to pay a tax on all of his income from whatever source derived. A motion to dismiss was filed on behalf of the State, questioning the jurisdiction of the District Court. The motion was heard by a specially convened three Judge Court who, after due deliberation, filed an opinion holding that the Court had no jurisdiction to consider the claim, and holding further that the provisions of the Maryland Income Tax Law which were attacked, were fully constitutional and valid. An appeal was taken to the Supreme Court of the United States by the taxpayer. Mr. Winter represented the Comptroller.

### Case Pending in the United States District Court for the District of Maryland

*F. Vernon Roberts vs. Tasker G. Lowndes, et al. Constituting the State Board of Education of Maryland.* No. 5169, Civil Docket.

### Criminal Cases Tried in the Court of Appeals

*Thomas Alexander Edwards vs. State of Maryland.* No. 75, October Term, 1949. The appellant was separately indicted, in statutory form, for the murders of John H. Mahlan and Mary Kline in Anne Arundel County, Maryland, on the 17th of September, 1948. He pleaded not guilty and elected to be tried by the Court without a jury. The cases were removed to Baltimore City and on the 1st, 2nd, 3rd, 4th, 7th, 8th and 9th of February 1949, he was tried on said charges, and on the latter date was found guilty in both cases of murder in the first degree. The Supreme Bench of Baltimore City overruled a motion for a new trial in both

cases and the appellant was sentenced to death by hanging. From those judgments the appellant appealed, both appeals being contained in one record. The Court overruled all of the questions raised by the appellant except that the confession was not voluntarily made. It was held that the alleged confession should not have been admitted in evidence and the judgments of the lower Court were reversed and the cases remanded for a new trial. Mr. Proctor represented the State.

*John H. MacEwen vs. State of Maryland.* No. 79, October Term, 1949. This was an appeal from the Circuit Court for Talbot County from a judgment entered upon a guilty verdict, found by a jury, under an indictment charging appellant with false pretenses. The count in the indictment was laid under the provisions of the Annotated Code of Maryland, Article 27, Section 150. The appellant was charged by the indictment, as particularized, with obtaining, by false pretenses, from the Maryland Credit Finance Corporation, on May 19th, 1947, the sum of Five Hundred Nineteen Dollars and Fifty Cents ($519.50) ; that the false pretense consisted of the representation by the appellant that a financial statement of appellant, trading as Campbell-Ensor Company, dated May 10th, 1947, was then and there true and correct, when, in fact, appellant knew that said Company was insolvent at the end of the period covered by said statement. After the guilty verdict, a motion for a new trial was filed by appellant and overruled by the trial court. Appellant was sentenced by the Court to a term of three years in the Maryland Penitentiary. From that judgment, appellant appealed. The judgment of the lower Court was reversed and a new trial awarded. Mr. Proctor represented the State.

*Steve Lucich and Joseph Brofa vs. State of Maryland,* No. 81, October Term, 1949. This was an appeal from the Circuit Court of Baltimore County from judgments entered upon guilty verdicts found by a jury under four

criminal informations charging the appellants with the maintenance of a disorderly house and of a bawdy house. Two of said criminal informations charged the appellants with the commission of said crimes on May 31st, 1949. The remaining two charged the appellants with the commission of the same crimes on June 3rd, 1949. After the return of the guilty verdicts, a motion for a new trial was filed by the appellants and was overruled by the trial court. The appellant Lucich was sentenced to confinement in the Baltimore County Jail for the term of six months and to pay a fine of $300.00 and costs, and appellant Brofa was sentenced to confinement in the Baltimore County Jail for the term of sixty days and to pay a fine of $300.00. In the other three cases each appellant was sentenced to confinement in the Baltimore County Jail for the term of six months and to pay a fine of $300.00; said sentences being suspended and appellants being placed on probation for a period of eighteen months beginning at the end of the sentence in the other case. Probation was concurrent in all three cases. From that judgment, the appellants appealed. The judgments in both cases were affirmed. Mr. Proctor represented the State.

*William R. Kapler vs. State of Maryland.* No. 95, October Term, 1949. This was an appeal from the Circuit Court for Baltimore County from judgments entered upon guilty verdicts found by a jury under criminal informations charging violations of the gambling laws. The appellant filed a motion for a new trial and In Arrest of Judgment, which motion was overruled by the trial Court. In one case the appellant was sentenced to confinement in the Baltimore County Jail for the term of six months and a fine of $1,000. In a second case the appellant was sentenced to pay a fine of $1,000 and in five other cases sentences were suspended and appellant was placed on probation for a term of three years beginning at the end of the confinement sentence. This was an appeal from those judgments. The judgments of the lower Court were affirmed. Mr. Proctor represented the State.

*Naomi Hubbard vs. State of Maryland.* No. 132, October Term, 1949. This was an appeal from the Circuit Court for Dorchester County. The appellant was found guilty by the verdict of a jury of the charge that she "unlawfully did keep and suffer to be kept on her premises in her possession, and under her charge and control for the purpose of sale and delivery within this State certain alcoholic beverages, without a license or permit as provided by law." The appellant was sentenced to pay a fine of $500.00 and to serve the term of one year in the Maryland State Reformatory for Females. Sentence was suspended upon payment of the fine and costs. The appellant's counsel duly filed prior to the trial, a Motion to Suppress Evidence seized by the police at the time of her arrest on the ground that such evidence was obtained by an illegal search of her house contrary to the provisions of the Constitution. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

*William Frantom, James Hutton vs. State of Maryland.* No. 143, October Term, 1949. This was an appeal from judgments of the Circuit Court for Anne Arundel County entered upon guilty verdicts in four separate cases in which the appellants were charged with violation of Article 27, Sections 409, 410 and 411 of the Annotated Code of Maryland, (1939 Edition). Prior to the trial of the case, the appellants filed a motion to quash the search and seizure warrant, which had been issued and executed, and to have returned to them all papers, documents, books and other property which had been seized by police officers under said warrant. That motion was overruled by the trial court. The appellants were tried before Hon. Benjamin Michaelson, without a jury. The appellant Frantom was sentenced to pay a fine of $250.00 and costs in each of the two cases against him. The sentences were suspended. The appellant Hutton was sentenced in one case to pay a fine of $750.00 and costs and to serve one year in the House of Correction. The sentence to the House of Correction was suspended pending good behavior and upon payment of fine and costs.

In the other case he was sentenced to pay a fine of $1,000 and costs and to serve one year in the House of Correction. The sentence to the House of Correction was suspended upon payment of fine and costs. This appeal was from those judgments. The judgments of the lower Court were reversed and new trials awarded. Mr. Proctor represented the State.

*Morton M. Freedman vs. State of Maryland.* No. 154, October Term, 1949. Appellant was indicted by the grand jury of St. Mary's County on the charge of unlawfully receiving "notes of United States currency and coins, of the aggregate value of $767.72 the property of James F. Garner and Charles W. Garner, knowing same to have been stolen." The appellant filed a suggestion for removal and, upon order of court, the case was removed to Charles County for trial. The case was tried before Judges Marbury and Digges. Upon the conclusion of the testimony, they found the appellant guilty as charged. Thereupon, the appellant was sentenced to serve a term of five years in the Maryland State Penitentiary. This appeal was from that judgment. The judgment and sentence of the lower Court were affirmed with costs. Mr. Proctor represented the State.

*William H. Turner and Alexander W. Stephens vs. State of Maryland.* No. 155, October Term, 1949. Appellants were indicted by the grand jury for Prince George's County, on two indictments. The first charged that appellants did "unlawfully keep a gaming table for the purpose of gambling." The second charged that they "did unlawfully sell a certain alcoholic beverage, to wit: beer, without first obtaining a license, as provided for by law,***. The cases were tried together before Hon. John B. Gray, Chief Judge of the Seventh Judicial Circuit, sitting as a jury. Appellants were found guilty on both counts. Appellant Stephens was sentenced to pay a fine of $250.00 and costs in the gaming table case and to pay a fine of $300.00 and costs in the other case. Appellant Turner was sentenced to pay a fine of $1.00

and costs in the gaming table case and to pay a fine of $300.00 in the other case. These appeals were from those judgments. The judgments of the lower Court were reversed and new trials awarded. Mr. Proctor represented the State.

*Raleigh E. Walker vs. State of Maryland.* No. 156, October Term, 1949. The appellant was indicted by the grand jury for Prince George's County, on the charge of unlawful possession of lottery tickets. This charge was placed under the provisions of the Code of Public Local Laws of Prince George's County, Section 608. The appellant was tried under said indictment by the Hon. Charles C. Marbury, sitting as a jury, and was found guilty as charged. The appellant was sentenced to confinement in the Maryland House of Correction for a term of three months and to payment of a fine of $200.00 and costs. This appeal was from that judgment. The judgment of the lower Court was reversed and the case remanded for a new trial. Mr. Proctor represented the State.

*Sam Lano vs. State of Maryland.* No. 173, October Term, 1949. The appellant was indicted by the grand jury for Prince George's County under an indictment which contained two counts. The first count charged a violation of the Annotated Code, (1939 Edition), Article 27, Section 585. The appellant was found not guilty under this count. The second count charged a violation of the Code, Section 586 of Article 27. The appellant demurred to the indictment, as amended (the amendment was not involved in the appeal), and to each count thereof, which demurrer was overruled. The appellant was found guilty under the second count and was sentenced to serve a term of one year in the House of Correction. The appeal in this case was from the action of the trial Court in overruling the appellant's demurrer. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

*Sam Lano vs. State of Maryland.* No. 41, October Term, 1950. At the conclusion of the trial in the case above, a motion for re-argument was filed. On re-argument, counsel for the appellant claimed that the admission of prior counsel for the appellant, that the indictment was drawn in the form of the statute was incorrect and that as the indictment failed to allege that the statements charged to appellant were false, the demurrer should have been sustained by the Trial Court. The Court of Appeals agreed with this view and reversed the decision of the trial court. Mr. Proctor represented the State.

*Henry Fischer, Brent L. Atkins, Bradford H. Houck and Earl A. Reich vs. State of Maryland.* No. 183, October Term, 1949. This was an appeal from the Circuit Court for Baltimore County from judgments entered upon guilty verdicts, found by said Court sitting as a jury, under criminal informations charging violation of the gambling laws of Maryland. The judgment of the trial Court was that appellants Fischer and Houck each be confined to the Maryland House of Correction for the term of six months and pay a fine of $1,000 and costs and that appellants Atkins and Reich each be confined to the Maryland House of Correction for the term of six months and pay a fine of $500.00 and costs. This appeal was from those judgments. The judgments of the lower Court were affirmed. Mr. Proctor represented the State.

*Andrew W. Edwards and Gus Nash vs. State of Maryland.* No. 9, October Term, 1950. This was an appeal from the Criminal Court of Baltimore from judgments entered upon guilty verdicts found by that Court, sitting as a jury. The appellants were tried under three indictments, two of which charged them with bets on races and the third with possession of lottery tickets. The appellant Edwards was found guilty under the first count of each of the two bookmaking indictments and was sentenced under the first of said indictments to serve one year in the Maryland House of Correction (sentence suspended and released on proba-

tion for one year in care of the Probation Department) and to pay a fine of $500 and costs and under the second of said indictments to pay a fine of $500 and costs. The appellant Nash was found not guilty under those indictments. Under the lottery indictment, each of the appellants was found guilty, Edwards being sentenced to pay a fine of $500 and costs and Nash being sentenced to serve one year in the Maryland House of Correction (sentence suspended and released on probation for one year in care of the Probation Department) and to pay a fine of $500 and costs. The judgments of the lower Court were affirmed with costs. Mr. Proctor represented the State.

*Joseph Edward Rucker vs. State of Maryland.* No. 21, October Term, 1950. This was an appeal from the Circuit Court for St. Mary's County, by Joseph Edward Rucker, from the judgment entered upon a guilty verdict, found by said Court sitting as a jury, under an indictment which charged the appellant with having certain lottery tickets in his possession on February 21st, 1950. The appellant was sentenced to serve a term of six months in the Maryland House of Correction and to pay a fine of One Hundred Dollars and costs. This appeal was from that judgment and sentence. The judgment of the lower Court was affirmed with costs. Mr. Proctor represented the State.

*Samuel S. Bailey vs. State of Maryland.* No. 22, October Term, 1950. This was an appeal from the Circuit Court for St. Mary's County, by Samuel S. Bailey, from the judgment entered upon a guilty verdict, found by said Court sitting as a Jury, under an indictment which charged the appellant with having certain lottery tickets in his possession on February 21st, 1950. The appellant was sentenced to serve a term of six months in the Maryland House of Correction and to pay a fine of One Hundred Dollars and costs. This appeal was from that judgment and sentence. The judgment of the lower Court was affirmed with costs. Mr. Proctor represented the State.

*State of Maryland vs. William Adams.* No. 27, October Term, 1950. Six indictments were found against the appellee and a number of other defendants. Each of the indictments covered a different day and contained eleven counts charging various violations of the gambling laws. The case against the appellee was tried separately from, and subsequent to, the cases of the other traversers involved. Prior to filing pleas to each of the six indictments, the appellee filed motions to dismiss each of them under the provisions of the Criminal Rules of Practice and Procedure, Rule 3. The appellee entered a plea of not guilty to each of the six indictments and elected to have them tried together before the Court sitting as a Jury. At that point the Court had not yet ruled on the motion to dismiss. However, prior to the taking of testimony the Court stated that the "motion to dismiss is overruled at this time." All testimony introduced by the State was admitted subject to exception. At the conclusion of the testimony and after argument of counsel, Judge Manley ruled that the search and seizure warrant introduced in evidence in the case was illegal in that it was a general warrant. The Court, therefore, granted the appellee's motion to strike out all of the testimony introduced in the case and rendered a verdict of not guilty under each indictment. Judgments were entered in accordance with the verdicts. This appeal was from those judgments. The appeal was dismissed. Mr. Proctor represented the State.

*Gerald S. Day and Russell S. Lewis vs. State of Maryland.* No. 33, October Term, 1950. Appellants were jointly indicted by the Grand Jury of Baltimore City for the murder, on October 5th, 1949, of Orval E. Ericson, the operator of a trackless trolley of the Baltimore Transit Company. The murder allegedly took place at Carey Street and Westwood Avenue in Baltimore City, which is one end of the No. 21 line of the Baltimore Transit Company. Each of the appellants filed a request for severance. The basis of each request was the contention that the State possessed confessions of one traverser, which, if admitted in a joint trial,

would be prejudicial to the rights of the other traverser and would be in violation of his rights guaranteed by the Constitution of the United States. These motions were overruled by the trial court. The case was tried jointly before Judge Smith and a jury upon not guilty pleas. The jury rendered verdicts as to each defendant—guilty of murder in the first degree. Judgment was entered by the trial court as to each defendant that he be sentenced to death by hanging. These appeals were from those judgments. The judgments of the lower Court were reversed with new and separate trials for each of the appellants. Mr. Proctor represented the State.

*William Temple Dean vs. State of Maryland.* No. 50, October Term, 1950. Because of failure to comply with Rule 40, Section 2 of "Rules and Regulations Respecting Appeals to the Court of Appeals," a motion to dismiss the case was filed by the State, and on October 4th, 1950, the motion was granted and the appeal dismissed. Mr. Proctor represented the State.

*Raymond F. Cutsail vs. State of Maryland.* No. 63, October Term, 1950. Because of failure to comply with Rule 40, Section 2 of "Rules and Regulations Respecting Appeals to the Court of Appeals," a motion to dismiss the case was filed by the State, and on November 1st, the motion was granted and the appeal dismissed. Mr. Proctor represented the State.

*Percy K. Lambert vs. State of Maryland.* No. 65, October Term, 1950. This was an appeal from the Circuit Court for Cecil County in a case in which the appellant, tried for the second time, before a jury, was found guilty of violation of Article 27, Section 444A of the Annotated Code of Maryland. The appellant's demurrer to the indictment was overruled by the trial court. A demand was then filed for particulars of the charges which were furnished by the State. These particulars limited the charge to the sign on the front of appellant's building and the fixtures used in con-

nection therewith. The first trial was held on December 16th, 1948; appellant was found guilty and was sentenced to pay a fine of fifty dollars and costs of the suit. He appealed to this Court at the October Term, 1949, and the judgment of the lower Court was reversed. The reason for the reversal was that the Trial Court had improperly admitted testimony of Rev. Walter A. Hearne, Pastor of the Elkton Methodist Church, that the appellant was not a member of an Association of Protestant ministers. As indicated above, the appellant was retried under the same indictment on December 16th, 1949, and was found guilty. On January 6th, 1950, the Trial Court overruled a motion for a new trial and re-imposed the fine of fifty dollars and costs of the suit. An appeal was taken to the Court of Appeals by the traverser and the judgment of the lower court was affirmed. Mr. Proctor represented the State.

*Victor Lambert, John M. Carr, John R. Salfner and Leonard S. Alder vs. State of Maryland.* No. 207, October Term, 1950. This was an appeal from the judgment and sentence in each of two cases against appellants tried jointly before Judge John B. Gontrum sitting as a jury in the Circuit Court for Baltimore County. The criminal informations under which appellants were charged included a number of counts. Appellants were found guilty under the 3rd (making a book on the result of a race), 4th (establishing and keeping a house for the purpose of betting) and 13th (recording and registering bet upon the result of a race), counts of each of said informations. The judgment of the court was that each of the appellants should serve a term of one year in the Maryland House of Correction and pay a fine of $1,000, sentences to run consecutively. Prior to the trial of the case appellants had filed motions to quash the search and seizure warrant issued in the case and to suppress the evidence obtained as a result of the execution of said warrant. These motions were argued before Judge J. Howard Murray and were overruled by him. The Court of Appeals held that the appellants were not shown to have any right to object to the validity of the search warrant.

Three of the appellants were not on the premises at the time charged in one information and their conviction thereunder was reversed. Judgments as to all appellants in one case were affirmed with costs; judgment as to Lambert in another case was affirmed with costs; judgments as to Salfner, Carr and Alder in another case reversed without new trials. On August 18th, 1950, a motion for re-argument and/or stay of proceedings was filed by Carr, Salfner and Alder; motion for re-argument and stay of proceedings was filed by Lambert. On October 4th, 1950, the Court denied the Motions for Re-argument in all of the cases. Mr. Proctor represented the State.

## Civil Cases Tried in the Court of Appeals

*Daniel Niemotko vs. State of Maryland—Neil W. Kelley vs. State of Maryland.* No 1, October Term, 1949. These were petitions for writs of certiorari to review convictions and judgments of the Circuit Court for Harford County in two cases appealed from trial magistrates' decisions, convicting each of disorderly conduct and fining each $50.00 and costs. The Court dismissed both petitions. Mr. Proctor represented the State.

*Pierce & Hebner, Inc., vs. State Tax Commission of Maryland.* No. 60, October Term, 1949. This was an appeal from a decree of the Circuit Court No. 2 of Baltimore City affirming a decision of the State Tax Commission of Maryland. Under that decision, said Commission refused to exclude from the assessment of appellant's stock in business the Federal Excise Tax on distilled spirits which had been paid on said property. The decree was entered in a proceeding instituted under the Annotated Code of Maryland (1947 Supplement), Article 81, Section 194(b). That proceeding was an appeal from the final action of the State Tax Commission in the exercise of its original jurisdiction. The decree of the lower Court was affirmed. Mr. Proctor represented the State Tax Commission.

*Western Maryland Railway Company vs. State Tax Commission.* No. 75, October Term, 1949.

*Canton Railroad Company vs. State Tax Commission of Maryland.* No. 76, October Term, 1949. These appeals were taken by the Western Maryland Railway Company and the Canton Railroad Company from a decree of the Circuit Court No. 2 of Baltimore City, sustaining a final assessment against the appellants for gross receipts taxes imposed by Section 95 of Article 81 of the Code of Maryland (1943 Supp.). With respect to the appellant Western Maryland the taxes are for the years 1946 and 1947 computed upon the gross receipts of the appellant Western Maryland for the preceding calendar years 1945 and 1946, respectively. With respect to the appellant Canton, the taxes are for the year 1947 and are computed upon the gross receipts of the appellant Canton for the calendar year 1946. In both cases, the appellants contest the inclusion, within the total amount of gross receipts subject to the tax, of certain portions alleged to have been derived from the "process" of importing and exporting. Their attack is based on the proposition that Article 1, Section 10, Clause 2 of the United States Constitution (known as the Import-Export Clause) grants immunity to that portion of the gross receipts in question. The decrees of the lower Court were affirmed with costs. The Attorney General and Mr. Winter represented the State Tax Commission.

*Morning Cheer, Inc., vs. Board of County Commissioners of Cecil County.* No. 77, October Term, 1949. This was an appeal from an order of the Circuit Court for Cecil County, affirming the order of the State Tax Commission which allowed Morning Cheer, Inc., an exemption from the property tax levied on its property used exclusively for public worship and the parsonage. The decision of the Commission was rendered without opinion, contrary to the statement of the appellant, and was a reversal in part of the denial by the County Commissioners of Cecil County of any exemption. These decisions denied Morning Cheer,

Inc., the classification of a charitable or benevolent institution. This Court held that the appellant was a religious organization and was entitled to exemption. Mr. Murphy represented the State Tax Commission.

*Hall Hammond, Attorney General of the State of Maryland, et al. vs. H. Carrington Lancaster, et al.* No. 107, October Term, 1949. This was an appeal from a decree passed by the Circuit Court No. 2 of Baltimore City overruling the appellant's demurrer to the bill of complaint which challenged the constitutionality of Chapters 86 and 310 of the Acts of 1949 of the General Assembly of Maryland. The former Chapter enacted the Subversive Activities Act of 1949, generally known as the "Ober Law," while Chapter 310 was the emergency law which was designed to make the Subversive Activities Act become effective on April 22nd, 1949, rather than on June 1st, 1949. The lower Court held that both Acts were unconstitutional and consequently a decree was passed overruling the demurrer. The decree of the lower Court was reversed by the Court of Appeals. The Attorney General and Mr. Harvey represented the State.

*The Woman's Club of Chevy Chase, Maryland, Inc., vs. the State Tax Commission.* No. 108, October Term, 1949. This was an appeal from a decision of the Circuit Court for Montgomery County affirming the action of the State Tax Commission which denied the petition of the appellant for continuation of tax exemption under Article 81, Section 7, subsections (7) and (8) of the Annotated Code of Maryland, as a charitable, benevolent, educational and literary institution, and affirmed the action of the Board of County Commissioners taken on July 27th, 1948, denying the application of the appellant for continuation of tax exemption. The order of the lower Court was reversed with costs and case remanded for passage of an order abating the assessment in question. Mr. Coe represented the State Tax Commission.

*Walter Novak, et al. Petition of Anastacia Maddock vs. State of Maryland.* No. 115, October Term, 1949. Under the authority of a search warrant issued by a Judge of the Circuit Court for Howard County, the State police raided a place commonly known as "Rocway Towers," in Howard County, and seized a large quantity of paraphernalia, and $32,123 in currency. Twenty-one men were arrested, indicted and tried for certain violations of the gambling laws. Nineteen of the defendants were convicted and sentenced to imprisonment in the House of Correction. During the course of these trials, the $32,123 was produced and offered in evidence. Of this total sum, $12,025 is the subject matter of this proceeding. This smaller sum was found in a suitcase, together with gambling paraphernalia, in a locked closet within a larger locked closet on the second floor of the premises. When the total sum of money was offered in evidence, a question as to its future custody was raised and the Court directed the Clerk to take charge of it and place it in a safe deposit box until the further order of the Court. Exactly one year, less one day, from the date on which the money was seized by the State police under the authority of the search warrant, the appellant, Anastacia Maddock, filed a petition claiming that the sum of $12,025 represented her life savings and should be returned to her. Prior to that time, the other monies which had been seized were claimed by one of the defendants in the main criminal proceeding and, after a hearing at which his claim of ownership was demonstrated, the money was returned to him. The order of the lower Court was reversed and the case remanded. On May 8th, a Motion for Modification of Opinion and Judgment was filed, but on May 17th, the Motion was denied. Mr. Winter represented the State.

*Clarence A. Christy, et. al. etc. vs. John E. Clark et al. etc.* No. 122, October Term, 1949. This was an appeal from a decree sustaining a Demurrer and dismissing a Bill of Complaint which sought an injunction to restrain the appellees from enforcing the oyster cull law, because of its alleged unconstitutionality. The Court held that regu-

lation of the oyster industry as applied to oysters brought into the State was not in violation of the Commerce Clause of the Federal Constitution and thereby affirmed the decree of the lower Court. Mr. Harvey and Mr. Russell represented the Commission.

*In re Estate of John Henry Snyder; Rosewood State Training School, et al. vs. Safe Deposit & Trust Company of Baltimore, Trustee, et al.* No. 127, October Term, 1949. This was an appeal by the Rosewood State Training School from the decree of the Circuit Court of Baltimore City, assuming jurisdiction over the administration of the trust created by the Last Will and Testament of John Henry Snyder and holding the gifts of remainder interest to the great grandchildren of John Henry Snyder valid. The decree of the lower Court was affirmed. Mr. Murphy represented the State Training School.

*Hall Hammond, et al. vs. Philip Frankfeld, et al.* No. 136, October Term, 1949. This was an appeal from a decree of the Circuit Court No. 2 of Baltimore City, overruling the appellants' demurrer to the Bill of Complaint, which challenged the constitutionality of Chapters 86 and 310 of the Acts of 1949, General Assembly of Maryland. These Acts, known as the "Subversive Activities Act of 1949," were set forth in the Brief and Appendix in *Hammond, et al. vs. Lancaster, et al.* No. 107, October Term, 1949. The two cases were argued together and the opinion of the lower Court was filed in the Lancaster proceeding. The facts and questions involved are identical with those raised in the Lancaster case. The decree of the lower Court was reversed and the bill dismissed. The Attorney General and Mr. Harvey represented the State.

*R. R. Raymond, Superintendent Maryland State Reformatory for Males, vs. State of Maryland, ex rel Martin Younkins.* No. 137, October Term, 1949. This was an application for leave to prosecute an appeal from an Order of Honorable Herman M. Moser, one of the Judges of the

Supreme Bench of Baltimore City, by which the appellee was released and discharged from the custody of the appellant. That order was passed on October 6th, 1949. This application was filed pursuant to the provisions of the Annotated Code of Maryland (1947 Supplement), Article 42, Sec. 3C. The petition for appeal in this case was granted by the Court of Appeals and the case was duly heard. The Order of October 6th was reversed and the appellee remanded to the custody of the appellant. Mr. Proctor represented the Superintendent.

*Esther McCready, minor by Elizabeth McCready vs. Harry C. Byrd, President of the University of Maryland, etc.* No. 139, October Term, 1949. This was an appeal from an Order of the Baltimore City Court dated October 10th, 1949, dismissing a Petition for Mandamus filed by Esther McCready on behalf of her minor child, Elizabeth McCready, against Harry C. Byrd, President of the University of Maryland, and others, to compel them to consider and act upon the appellant's application for admission to the School of Nursing of the University of Maryland and to certify her for entrance to said School without regard to her race or color. The decree of the lower Court was reversed. Mr. Proctor represented the University of Maryland.

*Joseph H. A. Rogan, et al. State Tax Commission of Maryland vs. County Commissioners of Calvert County, a body corporate and politic.* No. 140, October Term, 1949. This was an appeal from an order of the Circuit Court for Calvert County denying a petition of the State Tax Commission of Maryland for a writ of mandamus to compel the County Commissioners of Calvert County to review and reassess for the year 1950, the taxable real property in the First Assessment District of Calvert County in accordance with the instructions of the State Tax Commission as to the plan and method of assessment. The judgment of the lower Court was reversed and the case remanded. The Attorney General and Mr. Coe represented the Commission.

*Frank M. Duvall, et al. vs. James J. Lacy, Comptroller of the Treasury of the State of Maryland.* No. 141, October Term, 1949. This was an appeal from an order sustaining a demurrer to a petition for a writ of mandamus and dismissing the petition, which sought to require the appellee to keep in Annapolis "the Income Tax Division of his office, and all other divisions of his office that are now located at the seat of government * * *." The lower Court held that Section 1 of Article VI of the Constitution providing that the Comptroller and Treasurer "shall keep their offices at the seat of government" did not prohibit the appellee from maintaining a branch office at Baltimore and other places throughout the State for the convenience of those transacting business with his office. The order of the lower Court was affirmed. Mr. Harvey represented the State Comptroller.

*State of Maryland, for the use of William Preston Lane, Jr., Governor, et al. Board of Public Works vs. J. Roland Dashiell.* No. 190, October Term, 1949. This case arose on a joint petition for a declaratory decree to determine the rights and obligations of the appellants under a certain contract dated May 15th, 1946, under which the appellee undertook to construct for the appellants a Chronic Disease Hospital, located at Salisbury, Maryland, known as "Deer's Head State Hospital." The declaratory decree was sought to determine (1) whether or not the appellants had a duty under the contract to obtain a Civilian Production Administration permit for the construction of Deer's Head State Hospital at Salisbury, Maryland; and (2) was there a breach of that duty by reason of the appellants' failure to obtain such a permit in due time to prevent an interruption to the construction of that project? and (3) in the event that there was a breach of such duty on the part of the appellants, were they excused from payment of damages flowing from such breach? From a decree determining that the appellants were under the obligation and duty to obtain a permit from the Civilian Production Administrator, and that failure to obtain such a permit in due time to

prevent an interruption of the construction project constituted a breach of contract, and the further determination that the appellants were not legally excused from the payment of damages by reason of certain Federal statutes and regulations set forth in the joint petition, this appeal was taken. The Court held that it was the duty of the State to obtain the permit and the State was liable for the damages caused to the contractor by the delay, thereby affirming the order of the lower Court. Mr. Winter represented the State.

*American Bank Stationery Company vs. State of Maryland.* No. 199, October Term, 1949. The State of Maryland, appellee herein, sued American Bank Stationery Company, appellant, for the amount of $4,540.35, by reason of assessments for additional income taxes and interest for the fiscal years 1941 to 1947, inclusive. By its pleas, the appellant admitted liability for additional income taxes and interest for the fiscal years 1945 to 1947, inclusive, in the amount of $1,472.40 and duly paid this amount. The appellant filed pleas contesting liability as to the balance $3,067.95, on the ground that the assessments were not made within the time prescribed by statute and hence were illegal, void and unenforceable. Demurrers were filed to the special pleas and general issue plea as particularized, which asserted this defense. The demurrers were sustained after a hearing by the lower Court. Thereafter the appellee filed a motion for summary judgment, supported by an affidavit setting forth all of the matters contained in the pleadings and summary judgment was granted for $3,067.95. From that judgment, this appeal was taken. This Court affirmed the judgment of the lower Court. On August 15th, 1950, a motion for re-argument and/or modification of opinion was filed, and on November 1st, 1950, the motion was denied by the Court. Mr. Winter represented the State.

*Joseph Zack vs. Captain Henry J. Kriss, Baltimore City Police Department.* No. 5, October Term, 1950. This case was advanced and tried at the 1949 Term of Court,

and was an appeal from an order of the Honorable Robert France, Associate Judge of the Supreme Bench of Baltimore City, sitting in the Baltimore City Court, passed on March 8th, 1950. The appellant was remanded to the custody of the appellee and the petition for a writ of habeas corpus was dismissed. The petition had been filed after Honorable William Preston Lane, Jr., Governor of Maryland, issued his rendition warrant upon the request of the Governor of Pennsylvania ordering the arrest of the appellant and his return to the Commonwealth of Pennsylvania. The order of the lower Court was affirmed. Mr. Proctor represented Captain Kriss.

*Mary Anna Adams vs. State of Maryland.* No. 7, October Term, 1950. This was an appeal from an order of the Hon. W. Laird Henry, Jr., Chief Judge, sitting in the Circuit Court for Dorchester County, passed on November 29th, 1949. The appellant, on whose behalf the petition below had been filed, was remanded to the Eastern Shore State Hospital in accordance with the terms of her commitment. This appeal was from that order. This Court affirmed the order of the lower Court without prejudice. Mr. Proctor represented the State.

*James T. Murray, alias William N. Cyphert, vs. Warden, Maryland Penitentiary.* No. 8, October Term, 1950. The appellant, released on conditional parole from life imprisonment, was brought back into the State upon telephone complaint of his sister. Without opportunity for a hearing, the Governor revoked the pardon. This Court held that the prisoner was entitled to an opportunity to be heard by the Governor before the pardon was revoked. Mr. Proctor represented the Warden.

*Kenneth C. Hitchcock vs. E. H. Kloman, et al. constituting the Board of Medical Examiners, et al.* No. 29, October Term, 1950. This was an appeal from the Circuit Court of Baltimore City. The Court sustained the demurrer without leave to amend and dismissed the Amended Bill of

Complaint, the purpose of which was to have the Court declare that the practice of naturapathy was beyond the scope of the Medical Practice Act. In the first appeal to this Court, the case was disposed of without reaching the question here presented. On the former appeal, it was held that the appellant could not maintain its suit and that there was a non-joinder of necessary defendants. The decree of the lower Court was affirmed with costs. Mr. Harvey represented the Medical Examiners.

*David H. Wallace, et al. constituting the Department of Tidewater Fisheries of Maryland, vs. Elmer H. Catlin, et al.* No. 45, October Term, 1950. This was an appeal under Section 12(j) of Article 72 of the Annotated Code of Public General Laws of Maryland (1947 Supp.) from a judgment declaring a certain submerged area in Tangier Sound to be "a natural oyster bar," and in favor of the appellee for costs. The case arose under the provisions of Section 12 upon protest by the appellees to the granting of a lease of said area to one Norman Bradshaw, a resident of Smith Island, Somerset County, by the Tidewater Fisheries Commission. The application for lease filed by Bradshaw with the Commission was duly advertised by the appellants pursuant to Section 12(I); and the protest was answered by the appellants. The case was tried before a jury upon agreed issues of fact. The only one of said issues involved in this appeal is the following: Is the area described in the advertisement in this case a natural oyster bar as defined in Article 72? The judgment of the lower Court was reversed and judgment entered that the area in question in this case was not a natural oyster bar. Mr. Coe represented the Department of Tidewater Fisheries.

*Louis Shub, Marshall Jones, Thelma Gerende and Sam Fox vs. Vivian V. Simpson, etc., Secretary of State.* No. 105, October Term, 1950. This was an appeal from an order of the Circuit Court for Anne Arundel County sustaining the Demurrer to the Appellant's petition for a writ of mandamus and dismissing the petition. The purpose of

the proceeding was to compel the Secretary of State to accept the certificates of nomination of candidates of the Progressive Party. Two of the candidates declined to file the affidavit required by Section 15 of Article 85A of the Code (Ober Law). The lower Court sustained the demurrer filed in behalf of the Secretary of State and dismissed the petition. The appeal was dismissed as to Jones and Fox, who had actually filed the affidavit required by law. The order was affirmed as to Shub, a candidate for State office, and reversed as to Gerende, a candidate for the House of Representatives of the United States. The Attorney General and Mr. Harvey represented the Secretary of State.

## Cases Pending in the Court of Appeals

*Theodore J. Phillips vs. Colonel Beverly Ober, Police Commissioner for Baltimore City.* No. 78, October Term, 1950.

*State of Maryland, ex rel Roy M. Audler vs. Captain Henry Kriss.* No. 103, October Term, 1950.

*Allen Fisher vs. State of Maryland.* No. 109, October Term, 1950.

*The Dundalk Liquor Company, a body corporate, vs. Millard Tawes, Comptroller.* No. 117, October Term, 1950.

*Levi Acion, alias Lee White Crips, and John Plummer Thorne vs. State of Maryland.* No. 118, October Term, 1950.

## Cases Finally Disposed Of In Lower Courts

*Kenneth C. Hitchcock vs. E. H. Kloman, et al. and Hamilton R. Atkinson, Beverly Ober, J. Bernard Wells, etc.* In the Circuit Court of Baltimore City. The bill of complaint in this case involved the question whether the practice of naturapathy is forbidden by the Medical Practices Act.

The demurrer to the original bill of complaint was sustained with leave to amend, and subsequently an amended bill of complaint was filed to which another demurrer was interposed. The demurrer to the amended bill was sustained and the bill dismissed without leave to amend. Mr. Harvey represented the defendants.

*Louis Shub, et al. vs. Vivian V. Simpson, etc.* In the Circuit Court for Anne Arundel County. See this case under heading CIVIL CASES TRIED IN COURT OF APPEALS, No. 105.

*James Smith vs. Boulevard Building and Loan Association and Joseph Deegan.* In the Circuit Court No. 2 of Baltimore City. This suit resulted from a dispute about real estate purchased by the plaintiff. The sheriff was joined as a party defendant because a writ had been issued and placed in his hands requiring him to evict the plaintiff. On the Sheriff's behalf an answer was filed stating that that official had no interest in the proceeding and that he would abide by any order which may be passed in the premises. Mr. Harvey represented the Sheriff.

*National Operating Company vs. George C. George and Helene George, his wife.* In the Superior Court of Baltimore City. The defendants filed a motion to strike out a judgment entered against them and for an order to restrain the Sheriff of Baltimore City from proceeding with the sale of leasehold property mentioned in the petition. As the Sheriff had no interest in the proceeding, an answer was filed consenting to abide by such order as may be passed by the Court. Mr. Harvey represented the Sheriff.

*Walter H. Hick, Inc., vs. Universal Finance Company, Maryland Casualty Company and Joseph C. Deegan, Sheriff of Baltimore City.* In the Baltimore City Court. This was a suit against the Sheriff, and others, and resulted from alleged sale of property by the Sheriff under a writ of fi. fa. in which property the plaintiff claimed to have

an interest. Before proceeding under the writ the Sheriff had required a bond to be given for his protection and the Surety Company was notified of the pending suit and requested to defend it under its bond. Mr. Harvey represented the Sheriff in the matter.

*Feldman's Inc. vs. Edgar Crockett, et al.* In the Superior Court of Baltimore City. This was a petition for an order to compel the Sheriff of Baltimore City to pay the surplus proceeds of an execution sale in a certain manner. An answer was filed on behalf of the Sheriff consenting to abide by such order as may be passed in the premises. Mr. Harvey represented the Sheriff.

*Harry Davidson vs. George C. George and Helene George, his wife.* In the Superior Court of Baltimore City. See NATIONAL OPERATING COMPANY CASE ABOVE. Mr. Harvey represented the Sheriff in the proceeding.

*Otto Yerell, et al. vs. Leo M. Welsh, President, et al. Board of Supervisors of Elections.* In the Baltimore City Court. This was a petition for a writ of mandamus to compel the Supervisors of Elections of Baltimore City to accept certificates of candidacy which were filed without the affidavit required by the Subversive Activities Act. The demurrer to the petition was sustained without leave to amend. Mr. Harvey represented the Supervisors.

*Theodore J. Phillips vs. Colonel Beverly Ober, Police Commissioner of Baltimore City.* In the Circuit Court of Baltimore City. The purpose of this suit was to restrain the Police Commissioner from merging the Western Police District of the City into three adjacent Districts. The demurrer to the amended bill of complaint was sustained without leave to amend and the petition dismissed. Mr. Harvey represented the Commissioner.

*Alexander Goodman vs. Leo Welsh, et al.* In the Superior Court of Baltimore City. This was a petition for a writ of

mandamus to restrain the Supervisors of Elections of Baltimore City and the Clerk of the Superior Court from certifying the nomination of certain persons as candidates for the House of Delegates from the Fourth Legislative District of Baltimore City, to reject all the votes cast in one of the precincts of said District and for other relief. All of the defendants demurred and the demurrers were sustained without leave to amend. Mr. Harvey represented the defendants.

*Frank J. Flynn vs. Leo W. Welsh, Chairman, et al. Board of Supervisors of Elections of Baltimore City.* In the Court of Common Pleas. This was a petition for a writ of mandamus to compel the Board of Supervisors of Elections of Baltimore City to omit the name of LeRoy C. Shaughnessy from the voting machines at the election of November 1950. An answer was filed in behalf of the Supervisors of Elections, and thereafter Shaughnessy intervened as a party defendant. The demurrer filed in his behalf was overruled after which he filed an answer. Following a full hearing of the case the petition was dismissed. Mr. Harvey represented the Supervisors.

*Clara Govans vs. Julius A. Romano, Justice of the Peace of the Western Police Station.* In the Court of Common Pleas of Baltimore City. This was a petition for a writ of certiorari in which a proceeding before the defendant was challenged on the ground that the petitioner did not freely and voluntarily waive her right to a jury trial. A motion to quash the writ was filed in behalf of the Magistrate and after the taking of testimony the motion was granted. Mr. Harvey represented the Magistrate.

*Richard A. Clayton vs. James R. Cadden, Justice of the Peace of the Central Police Station.* In the Court of Common Pleas of Baltimore City. This was a petition for a writ of certiorari to review a proceeding before the Justice of the Peace of the Central Police Station. The contention was that the Magistrate had no jurisdiction because he failed

to inform the traverser of his right to a Jury Trial and that the traverser did not therefore voluntarily waive that right. A motion to quash filed in behalf of the Magistrate was overruled and after the conclusion of testimony the proceedings below were quashed and the case remanded to the Magistrate. Mr. Harvey represented the Magistrate.

*Ralph Fino vs. Edwin T. Swenson, Warden, Maryland Penitentiary.* In the Superior Court of Baltimore City. The plaintiff filed a declaration for a declaratory judgment in order to have a Court determine the meaning and application of the law applicable to the term of imprisonment which he must serve in the Maryland Penitentiary. To that declaration a demurrer was filed. After argument it was sustained with leave to amend and thereafter an amended declaration was filed. A demurrer to that declaration was sustained with leave to amend and subsequently a second amended declaration was filed. The demurrer to the second amended declaration was sustained without leave to amend. Mr. Harvey represented the Warden.

*Charles M. Jones vs. The Unknown Heirs or Devisees of Annie Morris Anthony, et al. and the State of Maryland.* In the Circuit Court for Howard County.

*Harry W. Meehan vs. David Grason, etc. and the State of Maryland.* In the Circuit Court for Howard County.

*Douglas Duck and Mary Louise Duck, his wife vs. Mary F. Nichols etc. and the State of Maryland.* In the Circuit Court for Howard County.

*Malcolm Disney, et al. vs. Edgar B. Hilleary, etc. and the State of Maryland.* In the Circuit Court for Howard County.

*Henry D. Smith vs. Christian Schoolman, et al. and the State of Maryland.* In the Circuit Court for Howard County.

In each of the above cases a bill of complaint was filed to procure a decree foreclosing all rights of redemption in property held for non-payment of State and County taxes. The State of Maryland was made a party as the law provides, and an answer in its behalf was filed in each case, neither admitting nor denying the allegations of the bill of complaint. Mr. Harvey represented the State.

*Helen C. Kennedy vs. Emanuel Gorfine, Chairman of the State Industrial Accident Commission.* In the Court of Common Pleas. This was a petition for a writ of mandamus to compel the defendant to restore Miss Kennedy to a position she formerly occupied and to compel the payment of salary for the period for which she was dropped from the payroll of the Commission. After a full hearing the Court denied the writ and dismissed the petition. Mr. Harvey represented the Commission.

*James F. Aler vs. Motor Vehicle Commissioner.* In the Circuit Court of Baltimore City. The plaintiff filed a bill of complaint for an injunction to restrain the Commissioner of Motor Vehicles from suspending his license following an accident in which the plaintiff was involved. He contended that his insurance policy relieved him from the provisions of Chapter 456 of the Acts of 1945. However, the insurance carrier informed the Commissioner of Motor Vehicles that the policy was not applicable to the case and that it assumed no liability for the damages resulting. A demurrer was filed to the bill of complaint and subsequently the plaintiff dismissed the case voluntarily. Mr. Harvey represented the Commissioner.

*American Home Fire Assurance Company vs. Arthur H. Brice, Commissioner of Motor Vehicles.* In the Court of Common Pleas. The plaintiff filed an action of replevin to recover possession of a motor vehicle alleged to be in the possession of the defendant. Pleas were filed in which it was alleged among other things that the ownership of the vehicle was vested in a third party. The defendant did not

claim ownership of the vehicle or any interest therein, and it was merely because the vehicle was in his custody that he was made a party to the case. Before the matter was brought on for trial an agreement was reached between all the parties in interest and the case was dismissed. Mr. Harvey represented the Commissioner.

*Edward A. Coleman vs. Motor Vehicle Commissioner.* In the Superior Court of Baltimore City. A petition for a writ of mandamus was filed to require the Commissioner of Motor Vehicles to return to the petitioner an operator's license which had been revoked. A demurrer was filed to the petition and it was sustained and the petition dismissed. Mr. Harvey represented the Commissioner.

*Corinne Amanda Snyder vs. Henry Marvin and Arthur H. Brice, Commissioner of Motor Vehicles.* In the Circuit Court for Baltimore County. This was a suit by a wife against her husband and others, including the Commissioner of Motor Vehicles, against whom the relief sought was that that official be restrained from transferring the title to a certain automobile. An answer was filed in behalf of the Commissioner denying all the material allegations of the bill of complaint and denying further that he was either a necessary or proper party to the proceeding. As the Commissioner had no interest in the case it may be considered closed. Mr. Harvey represented the Commissioner.

*Harry M. Jackson, Sr. et al. vs. Harry M. Jackson, Jr., et al. and Joseph C. Daniels, et al.* In the Baltimore City Court. The Sheriff of Baltimore City sold a motor vehicle pursuant to a writ of fi. fa. and the State Finance Company filed a petition asking the Court to allow its claim as a priority. An answer was filed in behalf of the Sheriff that inasmuch as he had no interest in the matter, other than that of making a proper disposition of the proceeds of sale, the proper division of the fund was left to the contending parties. Mr. Harvey represented the Sheriff.

*George Edward Ash vs. Motor Vehicle Commissioner.* In the Circuit Court for Cecil County.

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

*William Chester Harvey vs. Motor Vehicle Commissioner.* In the Circuit Court for Cecil County.

*James Herbert Jacobs vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*Cubit Lee vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*Russell J. Lewis vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*Ernest R. Nasher vs. Motor Vehicle Commissioner.* In the Circuit Court for Frederick County.

*Leon Pelligrini vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*Raymond William Reid vs. Motor Vehicle Commissioner.* In the Circuit Court for Montgomery County.

*Earl Ellsworth Roloff, Jr. vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*J. F. R. Scott vs. Motor Vehicle Commissioner.* In the Circuit Court for Baltimore County.

*Bernard Mathias Simmons vs. Motor Vehicle Commissioner.* In the Circuit Court for Frederick County.

*Edward Lee Simmons vs. Motor Vehicle Commissioner.* In the Baltimore City Court.

*Samuel Arthur Spence, Jr. vs. Motor Vehicle Commissioner.* In the Circuit Court for Talbot County.

*Clifford Lee Wilson vs. Motor Vehicle Commissioner.* In the Circuit Court for Talbot 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.

*Elmer R. Catlin, et al. vs. David H. Wallace, et al. Department of Tidewater Fisheries of Maryland.* In the Circuit Court for Somerset County. Some thirty-nine applications for oyster leases filed with the Department of Tidewater Fisheries by residents of Smith Island, involved areas in Tangier Sound and the Chesapeake Bay. All of the applications were protested and the cases were marked for trial before a jury in the Circuit Court for Somerset County. Upon the first case tried, the jury rendered a verdict for the protestants and a judgment was entered declaring the area applied for to be a natural oyster bar. This case was appealed to the Court of Appeals by the Department of Tidewater Fisheries, and counsel filed a stipulation that the remaining cases be continued and that final judgments in them be entered in accordance with the result of the case on appeal. The Court of Appeals reversed the judgment and directed the entry of a judgment that the area in question is not a natural oyster bar. The same judgment pursuant to the stipulation was entered in the remaining cases. Mr. Coe represented the Department of Tidewater Fisheries.

*State of Maryland for the use of Claude A. Hanley, Insurance Commissioner vs. The Baltimore Fire Insurance Company, Inc.* In the Circuit Court No. 2 of Baltimore City. This was a suit instituted by the Insurance Commissioner on behalf of the State to obtain a Receiver for the Baltimore Fire Insurance Company, Inc., on the ground that it

had failed to comply with the laws of this State with respect to adequate reserves for the protection of policyholders. A show cause order was entered by Judge Niles and thereafter the officers of the Baltimore Fire Insurance Company were successful in arranging re-insurance of all claims in a company acceptable to the Insurance Commissioner and depositing money into the Baltimore Fire Insurance Company in an amount sufficient to pay all claims and to reimburse all policyholders not consenting to reinsurance. Thereafter, after all policyholders not consenting to reinsurance had been fully reimbursed and reinsurance contracts for all remaining policyholders put into effect, the Baltimore Fire Insurance Company, Inc., filed articles of dissolution with the State Tax Commission and the Insurance Commissioner dismissed the suit. Mr. Winter represented the Insurance Commissioner.

*Richard F. Schneider, et al. vs. Thomas G. Pullen, Jr., State Superintendent of Education, et al. and State Board of Education.* In the Circuit Court of Baltimore City. The complainant, the operator of a barber school, sought to contest the constitutionality of the statute which gives to the State Department of Education of Maryland the power to license and approve private schools, including technical or trade schools. A demurrer to an amended bill of complaint was sustained by Judge Moser without opinion. The complainant took an appeal to the Court of Appeals, Mr. Winter represented the State Board of Education.

*Paul A. Brothers vs. Claude A. Hanley, Insurance Commissioner of the State of Maryland.* In the Superior Court of Baltimore City. The Insurance Commissioner, on the basis of charges filed against him, revoked the license theretofore granted to Paul A. Brothers to carry on an insurance adjusting business. Pursuant to statute, an appeal was taken to the Superior Court of Baltimore City. The Court, after hearing testimony and argument in the case, concluded to remand the case to the Insurance Commissioner for further hearing. Mr. Winter represented the Commissioner.

*The Crofton Company vs. The Comptroller of the State of Maryland.* In the Baltimore City Court. This was an appeal from an assessment made by the Comptroller for nonpayment of sales and use taxes. The case was fully argued before His Honor Judge Tucker who filed an opinion sustaining the Comptroller's assessment in part and reversing it in part. An appeal was taken to the Court of Appeals from that part of Judge Tucker's order which reversed the Comptroller's assessment. Mr. Winter represented the Comptroller.

*State of Maryland for the use of the Department of State Police vs. John Gordon Davis.* In the Superior Court of Baltimore City. This was a suit for property damage to a motor vehicle owned by the Department of Maryland State Police, and driven by an employee of that Department. After suit was filed and pleas entered, the case was settled by and with the permission of the Board of Public Works. Mr. Winter represented the State Police.

*The Mullan Contracting Company, et al. vs. John B. Funk, et al. Members of the Commission on Prevailing Wages for the State of Maryland.* In the Circuit Court No. 2 of Baltimore City. Suit was filed by the Mullan Contracting Company to test the constitutionality of Chapter 30 of the Acts of 1950, which created a Commission on Prevailing Wages and provided that no contractor might undertake any building or road or bridge construction without paying the minimum wages prescribed by the Commission on Prevailing Wages. The attack on the constitutionality was made on a number of grounds. Judge Niles overruled a demurrer filed on behalf of the defendants and required the filing of an answer. Thereafter, after trial, Judge Niles filed an opinion holding that Chapter 30 of the Acts of 1950 was unconstitutional as not being "legislation in the general public welfare," within the meaning of Section 15 of Article 3 of the Maryland Constitution which prescribes the appropriate subjects for legislative enactment by a short or thirty day Session of the General Assembly. An

appeal was taken to the Court of Appeals because of the effect of the ruling of Judge Niles on the placing of contracts for State construction and the doubt cast on the validity of other Acts enacted during the 1950 Session of the General Assembly. Mr. Winter represented the Commission.

*The Dundalk Liquor Company vs. James J. Lacy, et al.* In the Circuit Court of Baltimore City. Suit was filed to test the constitutionality of certain regulations of the Comptroller relating to the sale of alcoholic beverages by wholesalers, manufacturers and distributors. A demurrer was filed on behalf of the Comptroller to an amended bill of complaint and the demurrer was sustained by Judge Moser without leave to amend. The complainant took an appeal to the Court of Appeals. Mr. Winter represented the Comptroller.

*David B. Cohen, t/d Venetian Blind Laundry Company vs. State Tax Commission.* In the Baltimore City Court. This was an appeal from an assessment made by the State Tax Commission on certain personal property of the petitioner. After a hearing the ruling of the Commission was affirmed. Mr. Coe represented the Commission.

*Frederick J. Adler vs. State Aviation Commission.* In the Circuit Court for Prince George's County. This was an appeal from a decision of the State Aviation Commission which licensed a seaplane base on Broad Creek, a tributary of the Potomac River. The protestants claimed that the establishment of a seaplane base in this locality could materially damage property values and injure riparian rights. After hearing testimony the Commission was in principle affirmed upon certain conditions to be performed by the licensee. Mr. Coe represented the Commission.

*George P. Ambush vs. James J. Lacy, Comptroller of the Treasury, and Ellis C. Wachter, etc.* In the Circuit Court for Frederick County. This was a suit for a declaratory de-

cree to determine whether or not the plaintiff was required to have a hawker's and peddler's license. The Court rendered an opinion and decree in favor of the plaintiff. Mr. Coe represented the Comptroller.

*Justin G. Buch vs. Board of County Commissioners of Anne Arundel County and the State Tax Commission of Maryland.* In the Baltimore City Court. These were five cases resulting from a judgment for a hearing as to assessments of forty-seven property owners before the County Commissioners of Anne Arundel County. By agreement before the County Commissioners, five of the properties were selected as test cases and the other forty-two were continued pending final determination of the five. The County Commissioners affirmed the existing assessments in the five cases which they heard and the demandant appealed to the State Tax Commission. The assessments were there again affirmed and further appeals were taken to the Baltimore City Court. Judge Tucker, sitting in that Court affirmed one of the assessments and remanded the other four to the State Tax Commission for further proceedings. Appeals were taken by the State Tax Commission to the Court of Appeals from the orders of Judge Tucker remanding four of the cases. By agreement with the attorney for the demandant however, the State Tax Commission again affirmed the assessments in the four remanded cases and the demand for a hearing before the County Commissioners of Anne Arundel County as to the other forty-two assessments was withdrawn. The appeals to the Court of Appeals consequently became moot and were voluntarily dismissed. Mr. Coe represented the State Tax Commission.

*Dryden Brothers Seafood Company, Inc. vs. John E. Clark, Tidewater Fisheries.* In the Circuit Court for Somerset County. This was a petition for an injunction to restrain the Department of Tidewater Fisheries from enforcing the oyster cull law in so far as it applies to percentage of shells from oysters brought into Maryland from out of the State. The case was submitted on demurrer and

the Court passed a decree sustaining the demurrer and dismissing the bill on the authority of *Christy vs. Clark,* decided by the Court of Appeals of Maryland, and reported in 72 Md. A(2d) 718. Mr. Coe represented the Commission.

*Ernest Forrest, et al. vs. Edwin Warfield, et al. Conservation Commission.* In the Circuit Court for St. Mary's County. This was a protest of a renewal of an oyster lease in St. Mary's County. The protest was dismissed upon motion for summary judgment made by the defendants. Mr. Coe represented the Commission.

*Thomas F. Gardner, et al. vs. Department of Tidewater Fisheries.* (3 cases) In the Circuit Court for Queen Anne's County. These were three cases involving protests against the granting of oyster leases in Queen Anne's County. In all three cases the protests were filed after the expiration of the statutory time for filing protests and the protestant's attorney was induced to voluntarily dismiss the protests in open Court. Mr. Coe represented the Commission.

*Charles E. Hutson, et al. vs. Department of Tidewater Fisheries, etc.* In the Circuit Court for Talbot County. No. 378 Law. This was a protest filed against the Commission to the granting of an oyster lease. After the protest the applicant withdrew his application for a lease. The case was, therefore, dismissed without prejudice by stipulation between counsel for the protestants and the Attorney General's Office. Mr. Coe represented the Commission.

*In the Matter of The Deed of Trust to Morris D. Hyman from the Skillet, Inc.* In the Circuit Court of Baltimore City. This case involved competing claims in an insolvency proceeding between the Federal Government for income taxes and the State of Maryland for sales taxes. Judge Moser passed a decree giving the Federal claims priority. Mr. Coe represented the State.

*Frank Muller, Jr., etc., vs. John Mays Little, et al.* In the Circuit Court for Baltimore County. This was a suit

in equity for construction of a will and to determine the inheritance taxes. All inheritance tax questions were resolved by agreement of the parties and a decree consented to by all parties was passed by the Court, determining among other things the amount of the inheritance taxes due. Mr. Coe represented the State in the matter.

*Allan Parker, et al. vs. David H. Wallace, et al. Tidewater Fisheries.* In the Circuit Court for Dorchester County. Nos. 87, 88. These were two cases involving protests against the granting of oyster leases and were consolidated for trial. The Jury entered a verdict in favor of the protestants and an appeal was not advised. Mr. Coe represented the Commission.

*State of Maryland vs. Albert Edward Ellerman.* In the People's Court of Baltimore City. This was a claim for damages arising out of a collision between a motor vehicle driven by the defendant and a motor vehicle owned by the State and assigned to the Income Tax Division of the State Comptroller's Office. A suit was filed but before being tried a satisfactory settlement was made. Mr. Russell represented the State.

*Marine Electronics, Inc., vs. Joseph H. A. Rogan, et al. State Tax Commission.* In the Circuit Court of Baltimore City. This was an appeal from an assessment made by the Commission on certain tangible personal property for the year 1950. Before the case was set for trial the appeal was dismissed. Mr. Coe represented the Commission.

*Baltimore National Bank, sub. trustee, et al. vs. Horace S. Whitman, et al.* In the Circuit Court of Baltimore City. This proceeding was instituted by the Baltimore National Bank, substituted Trustee under the will of Samuel S. Clayton, seeking a construction of the will and a determination of the powers of the Trustee. The Register of Wills of Baltimore City was made a party to the proceedings and the Court was asked to determine the inheritance taxes

due the State of Maryland on the Trustee Estate. The tax was arrived at by agreement between this office and the attorney for the Trustee. The Auditor's account was passed and ratified. Mr. Coe represented the Register of Wills.

*Russell Morris, et al. vs. Roy S. Melvin, Clerk of the Circuit Court, and Orville Parks, et al.* In the Circuit Court for Dorchester County. See Volume 33, page 43, Attorney General's Report. Before the case came to trial the plaintiff voluntarily dismissed the case. Mr. Buscher represented the State.

*Association of Independent Taxi Operators, Inc., et al. vs. the Yellow Cab Company, et al. and Colonel Beverly Ober, Commissioner of Police.* In the Circuit Court No. 2 of Baltimore City. This proceeding was instituted for the purpose of determining the status of Pennsylvania Railroad Drive which runs in front of the Pennsylvania Station between St. Paul and Charles Streets. It was claimed by the complainants that the Drive was a public thoroughfare and that therefore the exclusive franchise of the Yellow Cab Company was illegal. Pre-trial conferences were held and several depositions taken. The case was tried in November, 1950, before Judge Niles. At the conclusion of the case a decree was signed dismissing the bill of complaint, determining that Pennsylvania Railroad Drive was not a public street or highway. Mr. Proctor represented the Commissioner of Police.

*Richard L. Hanna vs. H. Courtenay Jenifer, et al. Maryland Racing Commission.* In the Baltimore City Court. This was a petition for a writ of mandamus to compel the Racing Commission to reissue a license to Richard L. Hanna, whose license had been revoked for violation of orders ruling him off the race tracks of Maryland. After a hearing the petition was dismissed. Mr. Proctor represented the Commission.

*Owen J. Kelly vs. University Hospital.* In the Superior Court of Baltimore City. This was a suit at law for recovery of damages due allegedly to negligence of employees of the University Hospital. A demurrer was filed, and on November 17th, 1950, was sustained by Judge Warnken, with leave to amend. The declaration was never amended and the suit was abandoned by the plaintiff. Mr. Proctor represented the University Hospital.

*Mayor and City Council of Baltimore, et al. vs. Beverly Ober, Police Commissioner of Baltimore City, Garnishee of Fannie E. Webb.* In the Superior Court of Baltimore City. The City claimed that Fannie E. Webb had improperly obtained moneys from the Department of Public Welfare. At the time of her death Police found approximately $5,000 in cash on the premises in which she lived. These attachment proceedings were instituted by the City in an attempt to recover these monies. Several hearings were had before Judge Tucker, all of which finally resulted in the award of the money to the City. Mr. Proctor represented the Police Commissioner.

*Parren J. Mitchell vs. Harry C. Byrd, President, et al. University of Maryland.* In the Baltimore City Court. The petitioner had applied for admission to the graduate school of the University of Maryland at College Park for study leading to the degree of Master of Arts in Sociology. He was admitted to the University in the Graduate School in Baltimore City. He filed a petition for a mandamus on the theory that the quality of education sought by him and furnished in the Baltimore Schools of the University was not equal to the quality of such education as furnished by the College Park Graduate School. After trial before Judge Tucker the decision was that the quality of education in Sociology offered at the Baltimore Graduate School was not equal to the quality of such education provided in the Graduate School at College Park, and that the petitioner be admitted to the College Park School. Mr. Proctor represented the University of Maryland.

*John F. Sperber vs. Beverly Ober, Garnishee of Donald L. Kaley.* In the Baltimore City Court. These proceedings were instituted for the recovery of a 1941 Chrysler Sedan which had been stolen by Kaley. The Police Commissioner had no interest in the automobile and filed a plea stating that at the time of the laying of the attachment the automobile was in his possession. Mr. Proctor represented the Commissioner.

*Malcolm J. Tazzioli vs. Wm. F. Monoghan, Supervisor, Taxicab Bureau.* In the Baltimore City Court. This was an appeal from the decision of the Supervisor of the Taxicab Bureau in which he refused the appellant a taxicab operator's license. The appeal was heard by Judge Tucker and resulted in affirming Mr. Monoghan's decision. Mr. Proctor represented the Bureau.

*Water Pollution Control Commission vs. L. C. Bulow Canning Company.* Before Magistrate Stewart Wright. Two warrants were issued against Leon C. Bulow, proprietor of the above named defendant, charging him with pollution of the waters of Gravel Run in Caroline County. The case was tried and resulted in a verdict of guilty, and fines imposed in each case. Mr. Proctor represented the Commission.

*Water Pollution Commission vs. Henry Siejack and Frank Cebula.* Before Magistrate Edward H. Bustard, Edgemere, Md. Warrants were sworn out charging the above named defendants with pollution of Herring Run and Moore's Run, both waters of the State of Maryland located in Baltimore County. The cases were tried and resulted in both defendants being found guilty and being fined. Mr. Proctor represented the Commission.

*State of Maryland, ex rel. Joseph H. McLain, Chairman, et al. constituting the Maryland Water Pollution Commission vs. A. H. Smith Sand and Gravel Company.* In the Circuit Court for Prince George's County. This was a bill for an injunction under which the State sought to enjoin

the defendant from polluting the waters of Indian Creek. A demurrer was filed, was overruled and an answer filed by the defendant. After several pre-trial conferences between Judge John B. Gray and counsel for the parties, the case was tried before Judge Gray and resulted in a decree in favor of the State. The decree required the defendants to take one of three alternative steps to eliminate the pollution of Indian Creek which was caused by the operation of the sand and gravel plant of the defendant. Since passage of the decree the defendant put into effect temporary measures to eliminate such pollution, preparatory to making them permanent. Mr. Proctor represented the Commission.

*Reginald Pyles, Deceased vs. Rosewood State Training School.* Before the State Industrial Accident Commission. Pyles was a hospital attendant and was accidently knocked down by a patient. Pyles suffered a leg fracture and died several weeks later. Claim was brought by the widow for benefits under the Workmen's Compensation Law and she was awarded benefits as a partial dependent in the amount of $3,000.00 Mr. McCusker represented the State.

*Osborne T. Biddle, et al. etc. vs. University of Maryland.* In the Circuit Court of Baltimore City. Suit was instituted by the Executors for a construction of the last will and testament of Dr. A. Lee Ellis, and a cross suit was filed by the Trustee named in the will for further construction. The University of Maryland, as a residuary legatee, was joined as a party as well as Morgan State College. A hearing was held in the matter and some testimony taken, and all parties entered into a stipulation authorizing a decree interpreting the will. Pursuant to the decree the University of Maryland, after the payment of annual sums to certain individuals for their lives, will receive for each year beginning September 1st, 1948, an amount sufficient to pay the tuition into the Medical School of one student. Such payments will continue until the twentieth anniversary of the death of the last survivor of the aforesaid individuals who receive

annual sums, and upon said date the University of Maryland will receive one quarter of the corpus of the Trust. Mr. Winter represented the University of Maryland.

*Ruth and Ben Wilkins, t/a Wilkins Credit Store vs. Beverly Ober, Commissioner of Police of Baltimore City, et al.* In the Baltimore City Court. This was an action of replevin against the Police Commissioner to recover some clothing which came into the possession of the Police Department. Pleas were filed on behalf of the Commissioner. The plaintiff later filed an order of satisfaction as to the Police Commissioner and Captain Kriss, another defendant. Mr. Proctor represented the Police Department.

*State of Maryland vs. William H. Keehner, et al. td. as Keehner's Tavern.* In the Superior Court of Baltimore City. This was an attachment suit for taxes due and owing the State of Maryland and was settled before coming to trial. Mr. Coe represented the Comptroller.

*Canton Railroad Company vs. Joseph H. A. Rogan, et al. State Tax Commission.* In the Circuit Court No. 2 of Baltimore City. SEE CASE UNDER HEADING OF SUPREME COURT CASES DISPOSED OF DURING 1950.

## REPORT OF JOSEPH D. BUSCHER
## SPECIAL ASSISTANT ATTORNEY GENERAL FOR THE STATE ROADS COMMISSION

The activities of this office during the current year were under the supervision of the Special Assistant Attorney General, along with three Special Attorneys.

The work of the legal department of the Commission for the year 1950 continued to be heavy and involved many and varied problems and cases. The work of the Special Assistant consisted primarily in acting as general legal advisor and counsel to the Chairman and Members of the Commission and its employees. This included giving legal advice and opinions, oral and written, on the validity and application of State and local laws, conferring on land and title matters, drainage complaints, and the many other and varied legal problems which arise in an active governmental agency doing business with the general public.

This Department also approved all contracts for road construction and all agreements to which the State Roads Commission is a party.

The increase in road contracts required an increase in the number of title examinations necessary in the acquisition of rights of ways. During the year, two thousand six hundred and six title examinations were made, at a cost by local attorneys in the twenty-three counties of $99,383.00. These title examinations were all checked by this office. There were also five hundred and forty (540) closings, involving a total expenditure of $13,168.50.

Construction contracts increased to such an extent that it became necessary to require more rights of way than in previous years. It was also necessary to file more condemnation cases as a result of the increased construction. During the year one hundred and sixteen condemnation cases were

prepared and filed in the various counties. During the year many cases were tried which had been filed in previous years, as well as a number of cases filed in 1949. In 1950, seventy condemnation cases were tried or otherwise disposed of. This made it necessary for the Special Assistant and the three Special Attorneys to spend two or three days in Court in the prosecution of each case tried.

In addition to the above matters, this office attended many meetings and conferences of the Advisory Council of the State Roads Commission, the Commission itself, and of other groups and individuals, and furnished legal advice thereto.

Because of the large increase of work in this Department, it became necessary to employ the services of an additional attorney, and on May 1st, 1950, Mr. John B. Russell was appointed as a special attorney. On September 30th, 1950, Mr. Clarke Murphy, Jr., resigned as Special Attorney, and his successor, Andrew W. Starratt, Jr., was appointed. It was also necessary to employ an additional stenographer to help with the increased volume of business.

The following is a list of condemnation cases prepared and filed by this office which have been tried and determined by the verdict of a jury, were settled out of Court, or pending, as noted:

*Allegany County:*

Stanley A. Donohue and wife,
Verdict.

Cumberland Real Estate Company, Gregory Dendrenos,
Settled.

James J. Winebrenner and wife,
Settled.

Estate of Archibald Longerbeam,
Pending.

Maryland Coal and Realty Company,
Pending.

Walter M. White,
Pending.

Pile Brothers,
Pending.

Della Estella Smith and husband,
Pending.

*Anne Arundel County:*

Sarah M. Gransee,
Settled.

Lola E. Benson, Mary Virginia Benson, Margaret Benson Beck and husband,
Settled.

Charles F. Rechner, et al. Trustees for heirs of Elizabeth A. Hopkins,
Pending.

Edward J. Sachs, Sr., and wife,
Verdict.

Edward J. Sachs, Jr. and Melvin G. Sachs, Sr. t/d Linthicum Used Car Co., et al,
Verdict.

Melvin G. Sachs and wife,
Pending.

Seth H. Linthicum and wife, et al,
Pending.

Emilie Beck, widow, et al,
Pending.

Raymond B. Chaney and wife,
Settled.

Joseph D. Bowen,
Pending.

Martin Preston and wife, Stanley I. Goddard and wife, William Burns and wife,
Settled.

Charles F. Meyer and wife, et al,
Pending.

J. Everett Hall and wife,
Settled.

Elsie B. Barber,
Settled.

Louis H. Hall and wife,
Verdict.

Theresa Wagner,
Pending.

Samuel S. Levin and wife, et al,
Pending.

John H. Matthews and wife,
Pending.

James E. Steuart,
Pending.

Edward H. Wiesner Estate,
Pending.

Joseph J. Sass and wife, et al,
Pending.

Gordon B. Clark and wife,
Pending.

Frank A. White,
Pending.

*Baltimore County:*

Merchantile Trust & Deposit Company and Louis McLane Fisher, Co-Trustees for Emily McLane Merryman,
Settled.

Louis McLane Merryman and Josephine Merryman, his wife,
Settled.

William G. Boyle and wife, et al. Heirs of Bessie M. Boyle,
Pending.

Nolley E. Fisher and wife,
Pending.

Elizabeth S. Norris,
Pending.

Grace C. Duncan, et al. Surviving Trustee under the Will of Charles H. Duncan,
Pending.

*Caroline County:*

Ella B. Ward, Trustee for Laing Waddell,
Settled.

Lawrence Realty Company,
Pending.

Theodore E. Fletcher and wife,
Pending.

Edgar W. Wrightson and wife,
Pending.

Eileen G. Paris, et al,
Pending.

Preston Trucking Company,
Pending.

*Carroll County:*

Raymond E. Zepp and wife, et al,
Settled.

Carl C. Lassiter and wife,
Verdict.

Charles C. Hann, et al,
Settled.

Charles H. Armacost and wife,
Settled.

Claude E. Armacost and wife,
Settled.

Dorothy Elmo,
Settled.

Sarah A. Leister,
Verdict.

Charles E. Drechsler, Jr. and wife,
Pending.

Charles E. Drechsler and wife,
Pending.

George W. Drechsler and wife,
Pending.

*Cecil County:*

John Kutz and wife,
Pending.

Stanley S. Stevens and wife,
Pending.

Winifred Schaefer Estate,
Pending.

Union Memorial Hospital, a body corporate, residuary devisee of Charles B. Bayard, deceased,
Pending.

Wilmer H. S. Bouchell,
Pending.

*Charles County:*

Melville F. Peters and wife,
Pending.

Peter L. Grinder and wife,
Pending.

*Dorchester County:*

Ralph H. Carroll, et al,
Verdict.

Louis M. Wright and wife,
Verdict.

*Frederick County:*

Sarah A. Grumbine and husband,
Pending.

George R. Dennis, Jr.,
Settled.

Abou A. Pollack and wife,
Pending.

*Garrett County:*

Andrew Balch and wife,
Verdict.

James P. Treacey and wife,
Settled

Cheston H. Browning and wife,
Settled.

Garrett County Co-Operative Inc.,
Pending.

Cobey Engle and wife,
Pending.

Jack N. Savage and wife,
Pending.

*Harford County:*

Olivia A. Browning,
Verdict.

John J. Ayres, Jr.,
Pending.

Charles Carroll Creaghan,
Pending.

Bessie W. Keithley,
Verdict.

Mamie E. Marll,
Pending.

John Greene Peery,
Pending.

N. Webster Grafton and wife,
Pending.

Carl Nelson and wife,
Pending.

Harold J. Dunnigan,
Settled.

J. Frank Norman and wife,
Pending.

W. Parker Hawkins and wife,
Pending.

Woodrow B. Moats and wife,
Settled.

George E. Proctor and wife,
Pending.

Martin R. Wagner and wife,
Pending.

Prospect Mills,
Pending.

Charles H. McComas and wife,
Pending.

Leonard E. McGrady and wife,
Pending.

Stephen M. Kahoe and wife,
Pending.

Milton P. Kirk and wife,
Pending.

Glenn E. Tilley and wife,
Pending.

Sabret A. Richardson and wife,
Pending.

Samuel C. Guerico and wife,
Pending.

Philip O. Bordner and wife,
Pending.

Dewey F. Bowman and wife,
Pending.

Tyler M. Fulton and wife,
Pending.

*Howard County:*

Thomas H. Jarvis and wife,
Verdict.

Henry W. Rauck and wife,
Settled.

Willis T. Thompson and wife,
Settled.

Gerald J. Benkert and wife,
Pending.

George W. Nowman and wife,
Pending.

John H. Cross Heirs,
Settled.

Harry S. Engel and wife,
Pending.

Perry Harless and wife,
Pending.

Emma Regina Knill,
Verdict.

B. Frank Hernandez and wife,
Pending.

Beatrice S. Pfefferkorn and husband,
Pending.

Augustus Riggs and wife,
Pending.

Emma Shipley,
Pending.

Howard F. Streaker and wife,
Pending.

Andrew Thomas and wife,
Pending.

Albert Kermisch and wife,
Settled.

Sadie E. Hobbs,
Settled.

Frederick A. Kaiser and wife,
Verdict.

Timothy W. Gales and wife,
Verdict.

*Montgomery County:*

Edith M. Ludt and husband,
Settled.

Daniel P. Shaw and wife,
Verdict.

Munsey Trust Company, Trustee, Charles B. Hawley, et al. Beneficiaries,
Verdict.

Charles B. Hawley and wife,
Settled.

Irene Pumphrey,
Pending.

Bank of Silver Spring,
Pending.

Mary K. James, et al.,
Pending.

Mary A. Harmon Estate,
Pending.

John O. Harmon Estate,
Pending.

Edith Sumner,
Settled.

Morris Marlow and wife,
Pending.

Irving C. Miller and wife,
Settled.

Colebrook Development Company,
Settled.

Theodore A. Meyer and wife,
Verdict.

W. Eugene Pyles and wife,
Settled.

Square Realty Company,
Settled.

James A. Hogue and wife,
Pending.

Adele Almo and husband,
Pending,

Southern Maryland Oil Company,
Pending.

Morris W. Suit and wife,
Pending.

*Prince George's County:*

Harley W. Leizear and wife,
Pending.

Lucile VanNess Duvall Shreeve and husband,
Verdict.

Peter W. Duvall and wife,
Verdict.

Warren F. Adams and wife,
Settled.

Walter F. Brantley and wife,
Settled.

Anthony A. Carozza and wife,
Settled (1).

Anthony A. Carozza and wife,
Settled (2).

Charles E. Ford, Executor of Estate of James A. LaFontaine,
Pending.

Annie LaFontaine (widow),
Pending.

*Queen Anne's County:*

The Board of Education of Queen Anne's County, a body politic and corporate,
Settled.

Charles E. Snyder and wife,
Pending.

George R. Benton and wife,
Pending.

Harry P. Breeding and wife,
Pending.

Walter L. Price,
Pending.

Elizabeth Lane Potts,
Settled.

Theodore Cooke, Jr. (Compromise),
Verdict.

Tilghman Eaton and wife,
Pending.

Hiram G. Dudley, et al.,
Settled.

Ellsworth Ford and wife,
Pending.

Thorpe Nesbit and wife,
Pending.

J. Rodney King and wife,
Pending.

Guarantee Realty Company,
Pending.

C. Perry Saddler and wife,
Pending.

Thomas J. Keating, Trustee,
Pending.

H. H. Evans, et al.,
Pending.

*St. Mary's County:*

James Edward Russell, Sr., and wife, et al.,
Settled.

Dr. L. B. Johnson and wife,
Settled.

Benedict B. Love, Sr.,
Settled.

Robert L. Anderson and wife,
Settled.

Edward C. Tennison and wife,
Settled.

Philip D. Hayden and wife,
Pending.

*Somerset County:*

Lloyd C. Chambers and wife,
Settled.

*Talbot County:*

The Isla Corporation of Easton, a corporation of the State of Maryland,
Pending.

*Washington County:*

William O. Daub, Edna I. Groh and husband,
Pending.

Marshall Grove and wife,
Settled.

John D. Griffin,
Pending.

R. J. Witmer,
Pending.

*Wicomico County:*

Rosa J. Bethard and husband,
Pending.

Harry C. Rayne and wife,
Pending.

J. A. Watson and wife,
Pending.

Elizabeth W. Spicer and husband,
Pending.

Cozy Cabins, Inc.,
Pending.

Harry Oliphant and wife,
Verdict.

Samuel Feldman and wife, et al.,
Pending.

Samuel Feldman and wife,
Pending.

James J. Jones and wife,
Pending.

William Parks Young,
Pending.

*Worcester County:*

Anna A. Burbage (widow),
Pending.

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

During the calendar year 1950 the membership of the Commissioners of the State Accident Fund remained the same as during the preceding year.

The cases in which this Assistant represented the State Accident Fund at hearings before the State Industrial Accident Commission concerning Workmen's Compensation claims against the Fund are enumerated as follows:

| | | | |
|---|---|---|---|
| Baltimore City | 132 | Bel Air | 10 |
| Cambridge | 12 | Centreville | 1 |
| Cumberland | 22 | Denton | 1 |
| Easton | 10 | Elkton | 6 |
| Frederick | 11 | Hagerstown | 15 |
| Hyattsville | 4 | Oakland | 9 |
| Rockville | 1 | Salisbury | 15 |
| Westminster | 3 | | |

making a total of 252 hearings on accidental injury claims.

Hearings before the Medical Board for Occupational Diseases of the State Industrial Accident Commission were as follows:

| | | | |
|---|---|---|---|
| Baltimore City | 10 | Cumberland | 8 |
| Hyattsville | 1 | | |

making a total of 19 such hearings.

Cases disposed of by Final Compromise Settlement Agreements numbered 22.

Eight (8) appeals to the nisi prius courts throughout the State were disposed of by trial.

This Assistant attended all meetings of the Commissioners of the State Accident Fund which his duties for the Fund permitted.

Collections of premiums on accounts certified to the State Law Department under Section 75, Article 101 of the Annotated Code, amounted to $5,278.74.

This Assistant also represented various Departments of the State in compensation claims by State employees against the Self-Insured and Non-Insured Departments.

## Report of Aaron A. Baer

## Special Assistant Attorney General for the Maryland Employment Security Board

During the year 1950, this Assistant obtained eight hundred and ninety-one judgments amounting to $126,400.88. As of December 31st, 1950, there were on hand one thousand two hundred and twenty-one uncollected judgments amounting to $376,075.00. Six hundred and fifteen judgments were collected during the year totaling $99,236.02, and one hundred and three judgments totaling $27,609.58 were marked off as uncollectible. During the year fifty liens totaling $9,166.18 were prepared for recordation, but payment of same was enforced prior to recording.

In enforcing collection of the judgments mentioned, this Assistant was required to issue executions in seven hundred cases and attachments in eight cases. Claims were filed in fifty-three bankruptcy cases, eight Orphans' Court cases, forty-nine receivership cases, twenty-two deed of trust cases, one foreclosure case, and four in Re-Organization cases under Chapter X of the Bankruptcy Act, involving a total of $43,648.96. Forty-one of the aforesaid cases were brought to a close and resulted in the collection of $9,179.97.

Subpoenas were issued for the appearance of nine hundred and ten employers who failed to file reports and/or pay contributions. We received one hundred and sixty-seven cases involving payment of benefits to representatives of deceased claimants and closed one hundred and sixty-five of them.

We learned of two hundred and six 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-four complaints involving forged checks, of which twenty-three have been closed.

During the year we filed in the courts thirty petitions and nisi orders to enjoin employers from operating their businesses for wilful failure to pay contributions incurred under our Act and ten petitions and nisi orders to enjoin employers from operating their businesses for wilful failure to file contribution reports required for the effective administration of the law. Twenty of these employers were actually enjoined from conducting their businesses, final orders having been entered.

We also filed in the courts forty-five petitions and nisi orders requiring employers to appear before the Employment Security Board to offer testimony regarding past due contributions incurred under the Unemployment Compensation Law, and thirty-two petitions and nisi orders requiring employers to appear before the Employment Security Board of Maryland to produce the necessary records for the filing of contribution reports which were delinquent. Ten petitions and nisi orders to have employers held in contempt of court for failure to obey a previous petition and order were also filed during the year 1950. Many of these petitions resulted in the employers paying past due contributions or filing delinquent contribution returns.

Two actions in assumpsit were also filed in the People's Court of Baltimore City against claimants who were overpaid unemployment compensation benefits in an effort to recover the overpayments. Only one of these was served, and a judgment in the amount of the overpayment was entered against this defendant.

One case was handled before the Referee in the United States District Court with the following result:

*In the Matter of Baugh Machine & Tool Co., a Bankrupt.* This was a bankruptcy proceeding in which the United States filed objections to the accounting and attempted to change the status of their claim to a secured claim. The United States Attorney agreed to withdraw the objections,

with the result that the Unemployment Compensation Fund was on a parity with the United States Government tax claims.

We instituted one case for the appointment of a receiver in an effort to collect unemployment compensation contributions.

*Albert Louis Thomas, Jr., vs. J. Rodney King and Eleanor W. King.* In the Circuit Court for Baltimore County. This was an action between two persons, the plaintiff alleging a partnership and asking for an accounting, the defendant denying the jurisdiction of the Court. The defendant was an employer within the meaning of the Maryland Law and was indebted to this Agency in the amount of $1,800.00 but had not been subject to service prior to this time. Petitions for intervention in the partnership case and for the appointment of a receiver were filed. At the same time, attachments were issued against property belonging to the defendant located in the State of Maryland. The defendant paid the full amount of his indebtedness in order to procure the withdrawal of this Agency from the proceeding.

Six cases were appealed from the various lower courts in the State to the Court of Appeals during 1950. Five of these cases were appealed by the Board and one by a claimant. In four of the cases the Board was affirmed; in one the plaintiff's attorney filed an order of dismissal, and in one the Court of Appeals remanded the case with instructions to dismiss the appeal.

*Oscar R. Beery vs. Maryland Employment Security Board.* In the Circuit Court for Allegany County. The decision of the Board reversed; on appeal to the Court of Appeals the order of the Circuit Court was reversed.

*Jacob R. Feaster vs. Maryland Employment Security Board.* Appeal from the Circuit Court for Allegany

County. The decision of the lower Court reversed on appeal to Court of Appeals.

*Joan H. Merbaugh vs. Employment Security Board.* Appeal from the Circuit Court for Allegany County. The decision of the lower Court reversed on appeal to Court of Appeals.

*Harper O. Peer vs. Department of Employment Security.* In the Circuit Court for Allegany County. Plaintiff appealed to Court of Appeals from decision of the lower Court but later filed an Order of Dismissal in the Court of Appeals.

*Grace K. Poorbaugh vs. Maryland Employment Security Board.* In the Circuit Court for Allegany County. On appeal by the Board the Court of Appeals reversed the order of the lower Court.

*Harry L. Spiker vs. Employment Security Board.* In the Circuit Court for Allegany County. The Board filed an appeal from the decision of the lower Court. The Court of Appeals remanded the case to the lower Court with instructions to dismiss the plaintiff's appeal.

During the year 1950, forty appeals were entered in the Courts from decisions of the Board. There were pending in the Courts seventy-one appeals taken prior to 1950. We disposed of sixty cases, which included forty-seven cases instituted prior to 1950, and thirteen cases instituted in 1950. There are now pending in the courts fifty-one appeals, which include twenty-four cases instituted prior to 1950, and twenty-seven cases instituted in 1950.

In connection with the fifty-one cases open and pending in the Courts as of December 31st, 1950, eighteen relate to leaving work voluntarily, without good cause, thirteen involve the misconduct of an employee in connection with his work, six relate to the question of whether claimants

are able to work, available for work and actively seeking work, five involve claimants' failure to apply for available, suitable work, three are concerned with the question of denial of benefits to claimants because their unemployment was due to a stoppage of work or a labor dispute, two are concerned with the question of whether claimants are eligible to establish benefit rights under the provisions of the Maryland Unemployment Compensation Law, one involves the question of whether a claimant knowingly failed to disclose a material fact in order to obtain or increase benefits under the Maryland Unemployment Compensation Law, one involved the question of whether a claimant had removed the disqualification imposed on a certain date by earning ten times his weekly benefit amount since that date, one involved the question of whether or not the holiday pay received by a claimant for a certain period constituted wages for that period, and one involved the question of whether or not the experience rating assigned by the Board to an employer was a proper one.

Of the said fifty-one open cases, thirty are pending in the Superior Court of Baltimore City, fourteen in the Circuit Court for Allegany County, three in the Circuit Court for Baltimore County, one in the Circuit Court for Caroline County, one in the Circuit Court for Garrett County, one in the Circuit Court for Washington County, and one in the Circuit Court for Wicomico County.

## Cases Pending in Lower Courts

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

*William J. Fair vs. Motor Vehicle Commissioner.* In the Circuit Court for Allegany County.

*Marvin Hartrek Gowans vs. Motor Vehicle Commissioner.* In the Circuit Court for Allegany County.

*Boyd L. Harper vs. Walter R. Rudy, etc.* In the Circuit Court for Allegany County.

*Clarence R. Hemmis vs. Motor Vehicle Commissioner.* In the Circuit Court for Allegany County.

*Janie Hooper vs. Motor Vehicle Commissioner.* In the Circuit Court for Dorchester County.

*Julian Howard vs. Motor Vehicle Commissioner.* In the Circuit Court for Dorchester County.

*Harley M. Langrall vs. Motor Vehicle Commissioner.* In the Circuit Court for Dorchester County.

*Harry Carroll Minor vs. Commissioner of Motor Vehicles.* In the Circuit Court for Baltimore County.

*Dewey Clarence Shoemaker vs. Motor Vehicle Commissioner.* In the Circuit Court for Allegany County.

*Eldon Sponaugle vs. Motor Vehicle Commissioner.* In the Circuit Court for Allegany County.

*Theresa Stanley vs. Motor Vehicle Commissioner.* In the Circuit Court for Dorchester County.

*Oscar Travers vs. Motor Vehicle Commissioner.* In the Circuit Court for Dorchester County.

*P. Leo Flynn vs. Raymond C. Beck, et al. Board of Electrical Examiners.* In the Court of Common Pleas.

*Frostburg Lodge No. 99, Ancient Free and Accepted Masons, etc., vs. State Tax Commission.* In the Circuit Court for Allegany County.

*William G. Beier, et al. vs. State Tax Commission.* In the Circuit Court for Allegany County.

*The Masonic Temple Association of Cumberland vs. State Tax Commission.* In the Circuit Court for Allegany County.

*Walter Finch vs. A. G. Christie, et al. Board of Professional Engineers.* In the Baltimore City Court.

*Clifton B. Mathay vs. David H. Wallace, et al. Department of Tidewater Fisheries and Board of Public Works.* In the Superior Court of Baltimore City.

*Provident Savings Bank of Baltimore vs. Joseph P. Healy, State Bank Commissioner.* In the Circuit Court No. 2 of Baltimore City.

*Baltimore & Ohio Railroad Company vs. State Tax Commission.* In the Circuit Court of Baltimore City.

*Baltimore Transit Company vs. James J. Lacy, State Comptroller.* In the Baltimore City Court.

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

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

*The County Commissioners of Washington County, etc., and the Brandt Cabinet Works, Inc., vs. Joseph H. A. Rogan, et al. State Tax Commission.* In the Circuit Court for Washington County.

*The Alex J. Mandl Company vs. State Tax Commission.* In the Circuit Court No. 2 of Baltimore City.

*The Rudow Tailoring Company vs. State Tax Commission.* In the Circuit Court No. 2 of Baltimore City.

*Laura May Hitchens vs. Herbert Henry Hitchens, etc., and Sheriff of Baltimore City.* In the Superior Court of Baltimore City.

*Richard W. Carter vs. Francis T. Peach, etc., and Hall Hammond, Attorney General.* In the Circuit Court for Baltimore County.

*Joseph Hobbs, Jr., vs. Harold E. Donnell, Superintendent of Prisons.* In the Circuit Court of Baltimore City.

*Chesapeake Marine Railway Company and Wills Spedden Shipyard vs. James J. Lacy, State Comptroller.* In the Baltimore City Court.

*Union Trust Company, Trustee under the Will of Oscar Strauss, vs. Springfield State Hospital, et al.* In the Circuit Court No. 2 of Baltimore City.

*Charles S. Jacquette vs. James J. Lacy, Comptroller, et al., etc., Estate of Percival C. Smith, Deceased.* In the Circuit Court for Kent County.

*Frederick H. Hennighausen, etc., vs. Linguistic Society of America.* In the Circuit Court of Baltimore City.

*The Equitable Trust Company, Trustee, etc., et al. vs. Happy Hills Convalescent Home for Children, Inc., et al.* In the Circuit Court No. 2 of Baltimore City.

*William F. Prettyman and Robert Peter, Jr., etc., Estate of William A. Jones vs. Walter C. Clarke, Register of Wills for Montgomery County, etc.* In the Circuit Court for Montgomery County.

*Thomas Pressley and Colonial Credit Corporation vs. Colonel Beverly Ober, Police Commissioner.* In the Superior Court of Baltimore City.

*Washington Shopping News Corporation, etc., vs. J. Millard Tawes, Comptroller of the State of Maryland.* In the Baltimore City Court.

*Louis A. Montague vs. the Windsor Company and State Tax Commission.* In the Superior Court of Baltimore City.

*State of Maryland vs. Charles H. Clarke, et al. td. Mt. Jerry's Place, Thurmont, Md.* In the Circuit Court for Frederick County.

*In the Matter of the Trust Estates of Claribel Cone, Deceased.* In the Circuit Court No. 2 of Baltimore City.

*Mayo Watermen's League, Inc., et al vs. Commission of Tidewater Fisheries, et al.* In the Circuit Court for Anne Arundel County.

*John W. Abbott, et al. vs. David H. Wallace, et al.* In the Circuit Court for Somerset County.

*John Francis Bailey, et al. vs. W. Mason Shehan, et al.* In the Circuit Court for St. Mary's County.

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

*Hayden B. Bond, et al., vs. David H. Wallace, et al.* In the Circuit Court for St. Mary's County.

*Luther Daugherty, et al., vs. John E. Clark, et al., Tidewater Fisheries Commission.* In the Circuit Court for Somerset County.

*Ray Daugherty, et al., vs. Delmas Price and John Clark, et al., Department of Tidewater Fisheries.* In the Circuit Court for St. Mary's County.

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

*Stanford R. Harrison, et al., vs. David H. Wallace, et al.* In the Circuit Court for Somerset County.

*Richard S. Lewis, Jr., et al., vs. David H. Wallace, Department of Tidewater Fisheries.* In the Circuit Court for Dorchester County.

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

*Andrew P. Scheibee, et al., vs. David Wallace, et al., Department of Tidewater Fisheries.* In the Circuit Court for St. Mary's County.

*Maurice Sneade, et al., vs. John Clark, et al., Tidewater Fisheries of Maryland.* In the Circuit Court for Somerset County.

*Latelle Thompson, et al., vs. David H. Wallace, et al., Department of Tidewater Fisheries.* In the Circuit Court for St. Mary's County.

*Leroy Thompson, et al., vs. David H. Wallace, et al., Department of Tidewater Fisheries.* In the Circuit Court for St. Mary's county.

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

*T. Spencer Wilkinson, et al., vs. David H. Wallace, et al., Tidewater Fisheries.* In the Circuit Court for St. Mary's County. (5 cases)

*James C. Simpkins, et al., vs. David H. Wallace, et al., Tidewater Fisheries.* In the Circuit Court for St. Mary's County.

*George Woodall, et al., vs. Department of Tidewater Fisheries.* In the Circuit Court for St. Mary's County.

*Martin B. Booth, vs. Harry C. Byrd, President, et al., University of Maryland.* In the Baltimore City Court.

*Salvatore J. Cicero vs. H. Courtenay Jenifer, et al., Maryland Racing Commission.* In the Superior Court of Baltimore City.

*Dr. Wm. O. Negherbon vs. Dr. H. C. Byrd, President, et al. and the University of Maryland.* In the Superior Court of Baltimore City.

*State of Maryland vs. William Bishop and Henry Shipman.* In the Criminal Court of Baltimore City.

*Richard Tyson, etc., Richard Williams, Donald W. Stewart, etc., Hiram T. Whittle, etc., Lucille Williams vs. Harry C. Byrd, President, et al., Board of Regents of the University of Maryland.* In the Baltimore City Court.

*Wesley Grant Handy vs. John J. Harbaugh and Nobel K. Collison.* In the Circuit Court for Anne Arundel County

*Olga E. Deal vs. Edward S. Deal and the Police Beneficial Association of Baltimore.* In the Circuit Court of Baltimore City.

*State of Maryland, Ex rel., Malichi Holiday vs. E. T. Swenson, Warden, Maryland State Penitentiary.* In the Circuit Court of Baltimore City.

*State of Maryland, Department of Correction vs. James Harris, Philadelphia, Pa.* In the Superior Court of Baltimore City.

*Joseph Hobbs, Jr. vs. Harold E. Donnell, Superintendent of Prisons.* In the Circuit Court of Baltimore City.

*State of Maryland vs. Marie J. Kunkel, td. Kay's Luncheonette.* In the Circuit Court No. 2 of Baltimore City.

*Leonard J. Harmatz, etc. vs. Colonel Beverly Ober, Police Commissioner for Baltimore City, et al.* In the Circuit Court No. 2 of Baltimore City.

## Financial Statement of the State Law Department for the Fiscal Year Beginning July 1st, 1949, and Ending June 30th, 1950

| | | |
|---|---|---|
| Appropriation | | $54,511.00 |
| Appearance fees collected | | 307.95 |
| Sales of Attorney General's Reports outside of State | | 45.00 |
| Sundry reimbursements | | 12.53 |
| | | 54,876.48 |
| Appearance fees turned into State Treasury | | 307.95 |
| | | $54,568.53 |
| *Salaries:* | | |
| Attorney General | $8,000.00 | |
| Deputy Attorney General | 7,200.00 | |
| Assistant Attorney General (2) | 13,000.00 | |
| Chief Clerk | 3,850.00 | |
| Law Stenographer (2) | 5,664.00 | |
| Senior Typist | 2,405.00 | |
| Law Clerk (Part Time) | 1,514.27 | |
| Additional Clerical Assistance | 367.70 | |
| *Contractual Services:* | | |
| General Repairs | 237.50 | |
| Traveling | 701.37 | |
| Communication | 2,928.92 | |
| Printing, other than office supplies | 3,138.27 | |
| All Other | 945.46 | |
| Blue Sky Law Enforcement | 63.00 | |
| *Supplies:* | | |
| Office | $1,042.80 | |
| Motor Vehicle | 589.83 | |
| *Equipment:* | | |
| Office | 472.68 | |
| Educational, Vocational, etc. | 632.76 | |
| *Fixed Charges:* | | |
| Rent | 216.00 | |
| Insurance | 190.48 | |
| All Other | 276.00 | |
| | | $53,436.04 |
| Reverted to State Treasury | | $1,132.49 |

# OFFICIAL OPINIONS

of the

# ATTORNEY GENERAL of MARYLAND

## ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGES—LICENSES—APPLICATION MAY BE AMENDED TO PERMIT AN ADDITIONAL PERSON TO SIGN CERTIFICATE OF ACQUAINTANCE IF IT APPEARS THAT ONE OF ORIGINAL SIGNERS IS NOT QUALIFIED—CERTIFICATE OF ACQUAINTANCE MAY BE SIGNED BY ONE CO-OWNER OF PROPERTY.

January 4, 1950.

*Mr. L. Franklin Purnell, Chairman,*
*State Appeal Board,*
*Alcoholic Beverages Licenses.*

We have your letter in which you informed us that your Board was conducting a hearing in one of the Counties where there is no local Board and in which the State Appeal Board hears protests which are filed against the granting of licenses to sell alcoholic beverages.

At the hearing, it developed that the application for the license contained a certificate signed by nine, rather than ten, qualified persons, as required by sub-section 18 of Section 44 of Article 2B of the Annotated Code. That subsection provides that each application for a license to sell alcoholic beverages shall contain a certificate signed by at least ten persons who shall be the owners of real estate and registered voters in the precinct in which the business is to be conducted, setting forth the length of time that each has been acquainted with the applicant, or in the case of a corporation with the individuals making the application, that they have examined the application and that they have good reason to believe that all of the statements contained therein are true, and that they are of the opinion that the applicant is a suitable person to obtain a license. The certificate must contain a statement that the signers are familiar with the premises upon which the proposed business is to be conducted, and that they believe the premises are suitable for the conduct of the business of a retail dealer in alcoholic beverages.

When it was ascertained that one of the signers of the certificate did not possess the qualifications set forth in the law, the hearing was not postponed, but rather, because of the presence of the witnesses for the applicant and the protestants, the Board heard all of the evidence that each side desired to offer in order to avoid the necessity of conducting another hearing and requiring the witnesses to appear again. This course was pursued upon the assurance of the attorney for the applicant for the license that a tenth signer could be obtained without difficulty in order to supply the requisite number of names. You have asked if the procedure which you adopted was in accordance with the provisions of law.

We have had no occasion in the past to rule upon this question, and we are familiar with no court decision construing the statute here involved. However, it seems to us that the action of the Board in completing the hearing and allowing the applicant to furnish a qualified signer after the conclusion of the hearing was proper, under all the circumstances. The ten signers which the law requires the applicant to furnish do no more in effect than recommend him as a proper person to sell alcoholic beverages. The innocent and erroneous assumption that a person owns real estate and is a qualified voter in the precinct in which the business is to be conducted seems to us to result in a heavy penalty, entirely out of proportion to the irregularity, if his application is to be denied solely for that reason.

In 23 Opinions of the Attorney General, 118, the premises where the business was to be carried on were sold after the application was filed and the advertisement published. The original owner had signed the consent required by subsection 17, Section 44 of Article 2B of the Code. The question presented was whether a new application must be filed and readvertised, or if the ownership could be made to appear through an amendment of the original application. It was held that the purpose of the advertisement was to give notice to the general public that a license for a certain ap-

plicant at a given location was proposed, in order that there may be given an opportunity to protest against the establishment at the named location or against the conduct of the business by the applicant, and that the general public was not interested in the question of the ownership of the property. Accordingly, the applicant was permitted to show the changed ownership by amendment. What was said in that opinion applies, we think, with equal force in the instant case, and it is our view, therefore, that where, through an innocent mistake, it appears that one of the ten signers is unqualified, the State Appeal Board may allow a qualified signer to affix his name to the application. The case may then be considered as if his signature were on the application at the time it was filed. Your action in permitting this procedure, and in conducting the hearing to its conclusion was fully warranted under the law.

You ask our opinion also upon the propriety of one co-owner of real estate signing the certificate required by subsection 18 of Section 44, where his co-owners do not join therein. This question was considered by us in 21 Opinions of the Attorney General, 100, and it was stated there that:

> "The purpose of the requirement was obviously to insure that the persons certifying are substantial citizens of the community. Since the statute in no way fastens any lien on the property of such persons, and is merely in the nature of a qualification, there is no requirement for the joinder of persons having other interests in the property of a signer."

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES — AMUSEMENT LICENSES — AMUSEMENT LICENSES MAY BE GRANTED ONLY TO THE HOLDERS OF CLASS D BEER, WINE AND LIQUOR LICENSES.

March 21, 1950.

*Mr. Preston A. Pairo, Chairman,*
*Board of Liquor License Commissioners.*

We have your letter in which you inform us that the holder of a Class B, beer, wine and liquor license has applied to you for the issuance of an amusement license under Section 26 of Article 2B of the Code.

Amusement licenses may be granted to the holders of Class D, beer, wine and liquor licenses. The fee paid by the applicant for the license which he now holds is $750, while the fee for the amusement license is $500, and he has requested that the desired change be made by action of the Board in reducing the Class B license to a Class D license without the necessity of actually issuing a new license.

In view of the fact that Section 26 provides for the issuance of amusement licenses to the holders of Class D licenses, it is clear, we think, that the applicant may not secure the benefits of Section 26 until he is the holder of the class of license for which that Section provides. It is unfortunate that the applicant will be entitled to no refund. The statutory provision covering refunds is clear and unambiguous and requires no interpretation, Article 2B, Section 52.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—ZONING REGULATIONS—BOARD MAY NOT GRANT LICENSE CONTRARY TO ITS OWN ZONING REGULATIONS.

March 21, 1950.

*Mr. Preston A. Pairo, Chairman,*
*Board of Liquor License Commissioners.*

We have your letter of March 3 in which you inform us that the Reserve Officers' Club of Baltimore has made application for a Class "C" license and that by reason of the Club's location in zone #9, established by the Board under the authority conferred upon it by Section 34 of Article 2B of the Code, a license of the character applied for may not be granted.

A portion of the rule and regulation by which that zone was created provides that "no license of any type will be approved or granted except Special Class C licenses which shall be issued at the discretion of the Board". You have asked us if you have authority to grant the requested license.

Special Class "C" licenses are entirely distinct from regular Class "C" licenses (see Article 2B, Section 22) and upon the authority of our opinion addressed to Mr. Francis A. Michel, former Chairman of the Board of Liquor License Commissioners of Baltimore City, found in 33 Opinions of the Attorney General 87, it is our view that the requested license may not be granted.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—PAYMENT OF INCOME TAX TO STATE DOES NOT QUALIFY OFFICER OF A CORPORATION AS A TAXPAYER OF THE COUNTY OR A CITY.

March 31, 1950.

*Mr. Henry J. Tarantino,*
*Attorney for Board of License Commissioners for Anne Arundel County.*

We have your letter in which you ask if a license may be granted for the sale of alcoholic beverages in Anne Arundel County under the provisions of Article 2B of the Code, the applicants being three of the officers of a corporation. You state that none of the officers owns real estate or other taxable property in Anne Arundel County, but that one of them pays an income tax to the State. You ask if this qualifies him.

It does not appear that this question has ever been ruled on, but it seems from the phraseology of Section 32(b) of Article 2B that the payment of an income tax is insufficient. That Section provides that in the case of a corporation, the license shall be applied for by and shall be issued to three of the officers, as individuals for the use of the Corporation, at least one of whom shall be a registered voter and taxpayer of the County or City. In the case of licenses issued by the Comptroller, at least one of such officers shall, in addition to being a registered voter, be a taxpayer of the State.

The payment of the income tax to the State does not gratify the requirement that the officer be a taxpayer of the County or City and, we believe that this deficiency is not remedied by the fact that the State distributes to the various political subdivisions certain portions of the revenue derived from several taxes, including the income tax law. The taxes are in fact paid to the State and they do not lose that

characteristic by virtue of the ultimate distribution of a portion of them to the political subdivisions.

Our ruling in 32 Opinions of the Attorney General, 64, relating to protests against the granting of licenses in Queen Anne's County was based upon a statute which was quite different from the one which is under consideration here. That law required the protestants to be "voters and tax payers residing in the election district" and the views expressed there are to be understood as applying only to the statute under consideration.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—BEVERAGES PURCHASED IN TAVERNS BEFORE THE CLOSING HOUR MAY BE CONSUMED ON THE PREMISES EXCEPT BETWEEN THE HOURS OF TWO AND SIX O'CLOCK A. M.

October 19, 1950.

*Board of Liquor License Commissioners.*

We have your letter in which you inform us that recently in the Criminal Court of Baltimore, an acquittal resulted in a case against the holder of a Class D Beer, Wine and Liquor License. The offense charged in the indictment was that of making a sale of alcoholic beverages between 1 o'clock A.M. and 6 o'clock A.M. From the enclosures with your letter it appears that the evidence disclosed that the sale of the beverage was made before 1 o'clock. However, when the officer entered the premises after 1 o'clock, the beverage had not been consumed by the purchaser. The question which you raise now is apparently whether it is legally permissible for a person to consume alcoholic beverages at a tavern after 1 A.M. You direct our attention to Sections 73(d) and 74 of Article 2B of the Code, as well as to a ruling of this office, 30 Op. A. G, 1, striking down one of the regulations of your Board which permitted patrons of licensed establishments to consume alcoholic beverages on the premises for a period of thirty minutes after the closing time, provided the beverages were purchased prior to the closing hour.

The answer to your question is contained in the opinion above referred to, 30 Opinions of the Attorney General, 1. In that case reference was made to Section 42B, now Section 74 of Article 2B of the Code, as enacted by Chapter 763 of the Acts of 1941. That Section provides in part that:

> "Between the hours of 2 o'clock A.M. and 6 o'clock A.M. on any day, no person shall consume any alcoholic beverages on any premises open to the general public, any place of public entertain-

> ment, or any place at which set-ups or other component parts of mixed alcoholic drinks are sold under any license issued under the provisions of Article 56, and no owner, operator or manager of said premises or places shall knowingly permit such consumption."

In reaching the conclusion that the Board's rule which allowed only a period of thirty minutes after closing for the consumption of beverages was invalid, it was stated:

> "It can be plausibly argued that Section 42B has no relation or connection with licensed premises and that, therefore, your Rule 13 which deals only with licensees continues to be valid and proper. However, the primary source for ascertaining legislative intent is in the very words of the statute itself, and its known purpose cannot override plain and unambiguous language. Section 42B states so definitely that it is unlawful between the hours of 2 a.m. and 6 a.m. on any day to consume any alcoholic beverage on any premises 'open to the general public, any place of public entertainment, or any place at which set-ups' are sold, that we feel constrained to hold that Rule 13 is superseded and invalidated by the statute. Restaurants, hotels, night clubs and many other establishments, which sell alcoholic beverages are clearly embraced by the literal meaning of the language last quoted, and, further, many such establishments must be licensed under the provisions of Article 56 of the Code. This being so, it follows that Rule 13 must fall."

Implicit in that ruling is the conclusion that alcoholic beverages lawfully sold, may be consumed on the premises except between the hours of 2 o'clock A.M. and 6 o'clock A.M.

If Section 74 is not susceptible of the construction which we gave it more than five years ago, and if its application is to be limited to so-called "milk bars", obviously there is no conflict with the rule which we held was invalidated by it. There have been three regular sessions of the General Assembly of Maryland and several special sessions since the ruling of 1945, yet Section 74 has not been altered in so far as it relates to the question which you have presented. Under the circumstances, it is to be presumed that the Legislature, in failing to amend the law, has concurred in the construction which we have placed upon it. *Baltimore v. Machen,* 132 Md. 618; *Popham v. Conservation Comm.,* 186 Md. 62.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## ARCHITECTS

ARCHITECTS—ENGINEER, WHO IS NOT A REGISTERED ARCHITECT, MAY NOT LAWFULLY HAVE THE WORD "ARCHITECT" ON HIS WINDOW EVEN THOUGH HE EMPLOYS A REGISTERED ARCHITECT—PERSON MAY NOT BE ADMITTED TO CLASS B EXAMINATION UNLESS HE HAS BEEN ENGAGED LAWFULLY IN THE PRACTICE OF ARCHITECTURE FOR AT LEAST TEN YEARS.

September 26, 1950.

*Mr. T. Worth Jamison, Jr.,*
*Executive Secretary, Board of Examiners*
*and Registration of Architects.*

We have your letter in which you ask certain questions which have arisen under the provisions of the law regulating the practice of architecture, Code Article 43, Sections 457, et seq. The enclosures with your letter show that on an office window appears the name of an individual and beneath it the words "Consulting Engineer". To the right and below the name and designation of the individual are the words "Engineers", "Consultants", "Architects". The individual about whom you write graduated from the Engineering School of the Johns Hopkins University in 1932 and thereafter, until 1936, he was employed by a construction company. During the year last mentioned, he terminated that employment and opened his own office. Two questions arise, namely: Is the use of the term "Architects", as set forth above permissible? And, may the individual register with your Board without the necessity of submitting to a Class A examination?

It is clear beyond doubt, we think, that the use of the term "Architects" is not permitted in the instant case even if registered architects are in the employ of the person about whom you write. The only name which appears on the window is that of a consulting engineer and, we think the use

of the word 'Architects" has the misleading effect, however innocent it may be, of applying that term to the engineer. Section 462 of Article 43 of the Code exempts from the provisions of the law, among others, professional and practical engineers who are engaged in offering their services in connection with the structural design of buildings, ". . . provided, however, that no such engineer shall use the designation 'architect' unless licensed in accordance with the provisions of this sub-title." Under the circumstances enumerated above, it is our view that the individual is applying to himself the title of "architect" in violation of the law.

Your remaining question relates to the requirements for registration. Section 461 of Article 43, as amended by Chapter 101 of the Acts of 1947, permits the registration without examination of persons who are 21 years of age, of good moral character, who have completed satisfactorily a four year course of architecture in a recognized school in the State of Maryland, and who have served five years in the contracting business. Your letter and the enclosures therewith contain no information disclosing that the person in question falls within this exemption because there is no suggestion, first of all, that he has completed the prescribed four year course of architecture, neither is there a representation of fact that he has served in the contracting business for a period of five years.

Section 461 contains three classes of resident applicants: The exempted class to which we have referred, Class A which covers ". . . persons applying for examination who have been engaged in the independent professional practice of architecture as a principal for less than ten years", and Class B which relates to ". . . persons applying for examination who have been engaged in the rightful, independent professional practice of architecture as a principal for at least ten years." In connection with the last mentioned group, it may be observed that another provision of the statute is that "The Board shall hold examinations for Class B Applicants, to which shall be eligible any resident of the

State who shall have had ten years or more proved, independent, legal practice as a principal in the profession of architecture, and who shall desire to change his status from 'registered by exemption' to 'registered by examination'." We think it is clear that the Class B examinations are open only to those persons who have been engaged lawfully in the practice of architecture for at least ten years, and that the person about whom you write, if he desires to register, must submit to your Board as a Class A applicant.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## BANKS AND BANKING

BANKS AND BANKING—ANNUAL MEETINGS OF STOCKHOLDERS FOR ELECTION OF DIRECTORS—DIRECTORS SHOULD BE ELECTED IN JANUARY BUT ELECTION MAY BE POSTPONED FOR GOOD CAUSE.

March 7, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

You advise us that the annual stockholders' meeting of a bank chartered under the laws of this State was held on Wednesday, January 18, 1950, and, notwithstanding the fact that more than a majority of the stock of the bank was present in person or by proxy, the stockholders' meeting was immediately adjourned until May 3, 1950, without taking action on the election of Directors for the ensuing year. You have called our attention to Section 35 of Article 11 of the Annotated Code of Maryland (1939 Ed.), and have also advised that Section 1 of Article 2 of the By-Laws of the Bank provides that the annual meeting of stockholders of the bank shall be held on the third Wednesday in January of each year for the purpose of electing Directors to manage the affairs of the bank for the ensuing year. Section 2 of Article 2 of the By-Laws provides that in case an election of Directors shall not be held at the appointed time, Directors shall be elected at a subsequent meeting of which stockholders shall receive due notice.

You ask our advice with regard to the legality of adjourning the stockholders' meeting without electing Directors for the ensuing year.

As stated in 5 Fletcher, Cyclopedia of Corporations (1931), Section 2015:

> "In the absence of provisions to the contrary in the charter, statutes or by-laws, the stockholders or members at a corporate meeting may, by vote of the majority, adjourn to another day, or to a later hour on the same day. * * *" (Citing *Penobscot & K. R. Co. v. Dunn,* 39 Me. 587; *State v. Cronan,* 23 Nev. 437, 49 Pac. 41; *Warner v. Mower,* 11 Vt. 385; *Alliance Co-Op. Ins. Co. v. Gasche,* 93 Kan. 147, 142 Pac. 882; *In re Election, etc.,* 70 N.Y.S. 2d 478, 189 Misc. 316; *Sagness v. Farmers Co-op. Creamery Co.,* 67 S.D. 379, 293 N.W. 365.)

This general rule, however, seems to be altered by the provisions of Section 35 of Article 11. In so far as pertinent, they provide:

> ". . . directors shall be elected at a meeting held before the bank is authorized to commence business by the Bank Commissioner, and afterwards at the annual meeting of the stockholders to be held during the month of January; and if for any reason an election is not had at that meeting, it may be held at a subsequent meeting called for that purpose, of which due notice shall be given as provided in the by-laws of such bank. . . ."

Section 35 contains a clear and unmistakable direction that Directors of State banks shall be elected each year at an annual meeting of stockholders to be held during the month of January. Section 35 contemplates that under some circumstances the annual meeting of stockholders of a State bank may adjourn or otherwise be concluded without taking action on the election of Directors. However, we do not believe that it was the legislative intent that a meeting of stockholders might arbitrarily adjourn without electing Directors. Rather, it seems that adjournment without election of Directors is permitted only for good cause shown, such as unruliness of the meeting, inability of the majority of those present to agree on new Directors, or a like cause.

The facts which you have presented to us do not show what reason, if any, motivated the annual stockholders' meeting of the bank in question to adjourn without the election of Directors. Accordingly, we are unable to give you a definitive answer to your question. You are advised, however, that it is improper for an annual meeting of stockholders of a State chartered bank to be adjourned without the election of Directors, unless there is a sufficient and compelling reason for such adjournment. Mere whim of the stockholders present in person or by proxy, in our opinion, would not constitute a legally sufficient reason to adjourn an annual meeting of stockholders before the election of Directors, in view of the plain direction contained in Section 35 of Article 11.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

BANKS AND BANKING—SAVINGS BANK INCORPORATED BEFORE ENACTMENT OF ARTICLE 11 OF THE CODE MAY AMEND CHARTER PERMITTING BOARD OF DIRECTORS TO REDUCE SIZE OF BOARD FROM TIME TO TIME—FORMER OPINION DISTINGUISHED.

April 11, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

You have asked us to advise you of the propriety of the action of the Board of Directors of the Central Savings Bank under an amendment to its charter, filed with your Department in 1940, in reducing from time to time the number of Directors of that Savings Institution.

The Central Savings Bank was incorporated by Chapter 320 of the Acts of 1854. Section 1 of the Act named 25 persons as incorporators, and Section 5 provided:

> "Section 5. AND BE IT ENACTED, That the persons named in the first section of this act shall be the first directors of the said corporation, and all vacancies by death, resignation, or otherwise, in the office of directors, shall be filled by the board by ballot without unnecessary delay, and at least six votes shall be necessary for the election of any director; the said directors shall hold a regular meeting at least once in each month, to receive the reports of their officers as to the business and affairs of the corporation, and to transact such business as may be necessary, and any director omitting to attend the regular meetings of the board for six months in succession may thereupon at the election of said board, be considered as having vacated his place, and a successor may be elected to fill the same; the superior court of the city of Baltimore may at any time, for due cause, remove

> any director, on proper notice to such director, and affording him an opportunity to be heard in his defence."

In 1940 an amendment to Section 5 was duly filed with your Department in the following form:

> "Section 5. BE IT ENACTED, That the affairs of the corporation shall be conducted by a Board of Directors consisting of such number of members as the Board shall from time to time determine, but not less than fifteen (15) and not more than twenty-five (25) members, and that the persons named in the First Section of this Act shall be the first Directors of this Corporation; and any vacancies in said Board, occurring either by resignation, death or otherwise, shall be filled by the Board by ballot at any regular meeting or at a meeting called for that purpose, according to law, and at least six votes shall be necessary for the election of any Director; the said Directors shall hold a regular meeting at least once in each month, to receive the reports of their officers as to the business and affairs of the Corporation, and to transact such business as may be necessary, and any Director omitting to attend the regular meetings of the Board for six months in succession, may thereupon at the election of said Board, be considered as having vacated his place, and a successor may be elected to fill the same."

You advise that since the 1940 amendment, which was adopted because of the difficulty in obtaining qualified individuals to succeed Directors who retired or resigned, the Directors, at their regular monthly meetings, as distinguished from any regular annual meeting, have from time to time, upon the resignation or retirement of members of the Board of Directors, reduced the size of the Board of Directors.

You ask us to review the propriety of this practice in view of the provision contained in Section 40 of Article 11 of the Annotated Code of Maryland (1939 Ed.), relating to the incorporation of savings banks, which requires that "provision shall be made in the by-laws of the association for annual meetings for the purpose of electing Directors and members . . .", and our opinion in 28 Opinions of the Attorney General, 59 (1943). A question has arisen as to whether in view of the quoted language of Section 40 of Article 11, the amendment to the charter should not contain a provision for annual meetings for the purpose of electing directors and whether the power to reduce the size of the Board of Directors should not be exercised only at such annual meetings.

The present Section 40 of Article 11 was enacted as Section 30 of Chapter 219 of the Acts of 1910, a date subsequent to the granting of the charter of the Central Savings Bank. By Section 40 of Chapter 219 of the Acts of 1910, now codified as Section 53 of Article 11 of the Annotated Code of Maryland (1939 Ed.), the provisions of Section 30 of the Act (now Section 40 of the Code) were specifically made inapplicable to charters which had been theretofore granted. Unlike the regulations relating to trust companies, hereinafter discussed, Section 30 (now Section 40) cannot be construed as a legislative amendment of the charter of the Central Savings Bank; and, therefore, the terms and provisions of Section 30 (now Section 40) may not be read into the charter of the Central Savings Bank.

The 1940 amendment to the charter of the Central Savings Bank was adopted under the provisions of Section 50 of Article 11 of the Annotated Code of Maryland (1939 Ed.). That Section permits every savings institution incorporated under the provisions of Article 11, or incorporated before the enactment of Article 11, to amend its charter or articles of association in any manner not inconsistent with the provisions of law. We find nothing in the 1940 amendment inconsistent with any provision contained

in the applicable provisions of Article 11. The 1940 amendment authorized the reduction of the Board of Directors to a number not less than 15. This change clearly is in compliance with Section 40 of Article 11, which directs that the Board of Directors of a Savings Bank shall consist of not less than five members. The 1940 amendment also authorizes the Directors to reduce the size of the Board of Directors, from time to time, to the minimum number therein set forth. This change likewise is not inconsistent with any provision of Article 11. Section 40 which requires that the by-laws of a savings bank shall provide for annual meetings for the purpose of electing Directors has, by its terms, no application to the machinery for reducing the number of Directors. Particularly is this provision not violated by the 1940 amendment in view of the express legislative intent at the time of its enactment that it shall not apply to charters theretofore granted.

The views which we expressed in 28 Opinions of the Attorney General, 59, 1943, are not inconsistent with those contained herein. In that opinion your office was advised that it was improper for the Directors of a trust company to adopt a by-law increasing the number of Directors comprising the Board of Directors of that Company and then filling the vacancy it had itself created by virtue of the provision contained in Section 61 of Article 11 that Directors should be elected annually by the stockholders of the trust company. That advice was given with respect to a trust company incorporated by special act of the Legislature prior to the adoption of Section 61. In that opinion, Section 61 was properly dealt with as an integral part of the charter of the trust company; because, by the provisions of Section 62 of Article 11, Section 61 was made applicable to all trust companies theretofore incorporated by legislative charter. Section 40 of Article 11 is specifically inapplicable to savings banks chartered before its adoption in accordance with the provision of Section 53 of Article 11. Thus, there is no inconsistency between the views expressed here and the prior opinion of this office.

In summary, therefore, you are advised that the 1940 amendment to the charter of the Central Savings Bank was entirely proper and the actions and practice of the Directors under that amendment are not open to objection.

HALL HAMMOND, *Attorney General.*

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BANKS AND BANKING—LETTER OF FEDERAL BUILDING AND LOAN ASSOCIATION IMPRINTED "A FEDERAL SAVINGS INSTITUTION" AND REFERRING TO ORGANIZATION AS A "SAVINGS INSTITUTION", "MUTUAL SAVINGS INSTITUTION", ETC., VIOLATES PROHIBITION AGAINST CIRCULATION OF MATERIAL REFERRING TO ORGANIZATIONS, OTHER THAN BANKS, AS BANKING INSTITUTIONS.

March 21, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

You have transmitted to us a copy of a letter written by the President of Baltimore Federal Savings & Loan Association to two new shareholders of that Association, and have asked us to advise you whether the letter violates the provisions of Section 104 of Article 11 of the Annotated Code of Maryland (1939 Ed.) and particularly the interpretation placed thereon in 24 Opinions of the Attorney General, 148.

The letter divides itself into two parts, each of which will be considered by us separately. By way of background, it should be pointed out that Section 104 of Article 11 by criminal sanction prohibits a person, co-partnership or corporation not subject to supervision by or examination of the Bank Commissioner and not required to make reports to

him, to use any sign at the place where such business is transacted indicating that such place is the place or office of a banking institution, as defined in Article 11. Also prohibited is the use or circulation of letterheads, billheads, blank notes, blank receipts, certificates, circulars, or any written or printed, or partly written or printed paper indicating that such business is the business of a banking institution. By Section 63 of Article 11, the term banking institution is defined to include incorporated banks, savings institutions and trust companies. By that Section, that term is defined specifically to exclude building and loan associations. As you know, building and loan associations, whether chartered by the State or Federal government, have never been subject to supervision by your Department.

The letter is written on stationery bearing the name "Baltimore Federal Savings & Loan Association". At the top of the letter, in addition to the name of the organization, there is also imprinted its address and insignia. The bottom of the letter contains the imprint "A Federal Savings Institution".

Without more, as held in 24 Opinions of the Attorney General, 148, 150, the letter violates the provisions of Section 104 of Article 11. In that opinion, reference to a building and loan association as a "savings institution", even when its full name was also set forth, was considered to be a technical violation of the statute.

The letter which you have referred to us goes even further. It purports to be a letter of welcome to new shareholders of the Association. It states that it is hoped that these individuals will regard "Baltimore Federal as your savings institution." The body of the letter, in setting forth facts concerning the assets and dividend records of the organization, states that the information is "a little history of this mutual savings institution". Moreover, the letter, in closing, suggests that the persons to whom the letter is

written, recommend the Association "to anyone you may know who is interested in opening a savings account."

From this resume of the contents of the letter, it will be seen that the organization is referred to as a savings institution, a mutual savings institution, and a place where there may be opened a savings account. These phrases, both from the standpoint of Federal and State law are applicable only to banks and not to savings and loan associations. For example, a savings institution, mutual savings institution, and place where a savings account may be opened, in common parlance I believe, refers to a place where deposits may be made. Even under Federal Law, Section 1464(b) of Title 12 U.S.C.A., Federal Savings and Loan Associations are specifically prohibited from accepting deposits.

As pointed out above, the term savings institution and mutual savings institution, by statute, means a banking institution, and hence the use thereof by a savings and loan association is prohibited by the very terms of Section 104 of Article 11. The specific holding, therefore, in 24 Opinions of the Attorney General, 148, 150, is equally applicable to the body of this letter.

In summary, therefore, you are advised that the letter by its imprint and contents is in violation of Section 104 of Article 11 of the Annotated Code of Maryland (1939 Ed.).

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

BANKS AND BANKING—STATUTE PROHIBITING NON-BANKS FROM ADVERTISING THAT SUCH ARE BANKS—APPLICATION OF SUCH STATUTES TO BANKS AND OTHER ORGANIZATIONS CHARTERED UNDER FEDERAL LAW—SECTION 104 OF ARTICLE 11 APPLIES TO FEDERAL SAVINGS AND LOAN ASSOCIATIONS SINCE IT IS NOT IN DIRECT CONFLICT WITH FEDERAL LAW NOR DOES IT UNDULY HAMPER OPERATION OF FEDERAL LAW.

July 31, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

Under date of March 21, 1950, we advised you that a letter to new shareholders of Baltimore Federal Savings & Loan Association which referred to that organization as a "savings institution" and a "mutual savings institution" and which referred to the financial relationship between shareholders and that organization as a "savings account", constituted a violation of Section 104 of Article 11 of the Annotated Code of Maryland (1939 Ed.):

> "No person, co-partnership or corporation not subject to the supervision and examinations of the Bank Commissioner, and not required to make reports to him by the provisions of this Article, shall make use of any sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is the place or office of a banking institution as defined in this Article; nor shall such person or persons make use of or circulate any letter-heads, bill-heads, blank notes, blank receipts, certificates, circulars, or any written or printed, or partly written or printed paper whatever, having thereon any artificial or corporate name, or other word or words indicating that such business is the business of a banking institution.

> Any person or persons violating any of the provisions of this section, either individually or as an interested party in any co-partnership or corporation, shall be guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not more than one thousand dollars, or by imprisonment not more than one year, or by both fine and imprisonment. The provisions of this section shall not apply to persons, co-partnerships, or corporations which, on June 1, 1918, are engaged in business in incorporated towns or cities of the State of less than ten thousand inhabitants."

In reaching this conclusion, we relied on a former opinion of this office reported in 24 Opinions of the Attorney General, 148.

Thereafter we were requested by counsel for Baltimore Federal Savings & Loan Association, who were joined by counsel for the Federal Home Loan Bank Board, to withdraw that opinion and overrule or refuse to follow the opinion in 24 Opinions of the Attorney General, 148 (1939). Counsel for the Federal Home Loan Bank Board have submitted to us several memoranda embodying pertinent authorities and contentions to show that as a matter of constitutional law and statutory interpretation Section 104 of Article 11, *supra,* was not transgressed by Baltimore Federal Savings & Loan Association. We deem it advisable to set forth our views on these subjects.

The constitutional argument made is that Section 104 conflicts with federal legislation and, under Article VI of the Federal Constitution, the federal law is made supreme and therefore Section 104 can have no legal effect.

The general principles concerning the amenability of creatures and instrumentalities of the federal government to State law have been laid down in a number of cases concerning State regulation of national banks. These general

principles we think are equally applicable to State regulation of federal savings and loan associations in the absence of any direct authority to the contrary.

In the most recent case, *Anderson National Bank v. Luckett,* 321 U.S. 233, 88 L.Ed. 692 (1944), there was involved a Kentucky statute which related to escheat of abandoned bank deposits. An injunction was sought to restrain the enforcement of the statute on the ground, *inter alia,* that the statute as applied to national banks infringed the national banking laws and unconstitutionally interfered with the Anderson National Bank as an instrumentality of the federal government. As a general statement for the Court preparatory to the ultimate holding the statute validly applied to the bank, Chief Justice Stone said:

> "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions. * * * "

In an earlier case which held that the cashier of a national bank must obey a state statute requiring him to furnish a list of stockholders of the bank to local taxing authorities, *Waite v. Dawley,* 4 Otto (U.S.) 527, 24 L.Ed. 181 (1877), it was said:

> "We have more than once held in this Court that the national banks organized under the Acts of Congress are subject to state legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation."

To like effect is the decision of the Court of Appeals in *Thomas v. Farmers Bank,* 46 Md. 43, 52-54 (1877).

Our problem, thus, is to determine whether the Maryland law infringes upon the federal laws relating to building and loan associations, or imposes on federal building and loan associations an undue burden in the performance of their functions.

Baltimore Federal Savings & Loan Association was incorporated under Section 5 of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C.A. Sec. 1464. That law states that, in order to provide "local mutual thrift institutions in which people may invest their funds, and in order to provide for the financing of loans", the Federal Home Loan Bank Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations known as "Federal Savings and Loan Associations", and to issue charters therefor giving primary consideration to the best practices of "local mutual thrift and home-financing institutions in the United States". Sub-section (b) of Sec. 1464 states that such associations "shall raise their capital only in the form of payments on such shares as are authorized in their charter". It specifically states "no deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board." Sub-section (c) of Sec. 1464 regulates the methods in which such associations may lend their funds.

Section 104 of Article 11 of the Maryland Code prohibits non-banking institutions from employing terminology indicating that the business of such organizations is the business of a banking institution. As we pointed out in our former opinion, both by statutory definition and ordinary common parlance, the phrases "savings institution", "mutual savings institution", and "savings account" connote banks and banking institutions.

It is obvious that Section 1464 does not have reference to a banking institution. It refers to a mutual thrift associa-

tion and, in the absolute prohibition against such mutual thrift associations accepting deposits, it clearly indicates that an organization other than a bank is referred to. Consequently we do not see how, by any fair construction of either Section 1464 or Section 104 of Article 11, it may be said that these statutes are in conflict.

Nor do we believe that Section 104 conflicts with the National Housing Act. Section 402 of the National Housing Act, 12 U.S.C.A. Sec. 1725, creates the Federal Savings and Loan Insurance Corporation and Section 403 of the Act, 12 U.S.C.A. Sec. 1726, directs it to insure the "accounts" of all federal savings and loan associations and permits it to insure the "accounts" of building and loan, savings and loan and homestead associations and cooperative banks organized and operated under non-federal law. Throughout the statutes relating to the Federal Savings and Loan Insurance Corporation repeated reference is made to "insured accounts", a phrase defined by Section 401 of the Act, 12 U.S.C.A. Sec. 1724, to mean "a share, certificate, or deposit account . . ." While "insured accounts" may mean a deposit account, it does not follow that Congress recognized that investors in federal savings and loan associations stand in the relationship of creditor to such organizations and that such organizations may properly be considered as savings institutions and to maintain deposit accounts because, as before stated the Federal Savings and Loan Insurance Corporation insures the accounts of certain State banks as well as Federal savings and loan associations and the word "deposit" undoubtedly has reference to the former. Moreover this definition must take into account the specific limitations imposed by Congress that Federal savings and loan associations shall not accept deposits, 12 U.S.C.A. sec. 1464.

It is also contended, however, that Section 104 of Article 11 places an undue burden on Federal Savings and Loan Associations in carrying out their functions under Federal law. We see no substance in this argument because Federal Savings and Loan Associations are not banks and it would

seem not to be a proper function for them to indicate by deceptive advertisement to the public that they are banks. Such advertising would fly directly in the teeth of the specific statement by Congress that such associations shall not accept deposits. As we view the legislative intent of Congress, Section 104 of Article 11 directly buttresses and conforms to that intent.

It is argued that by the proper statutory interpretation of Section 104 of Article 11, it has no application to Federal Savings and Loan Associations. Section 104 applies by its terms to persons, co-partnerships or corporations not subject to the supervision and examination of the Bank Commissioner of this State. It is argued that national banks are, of course, not subject to supervision and examination by the Bank Commissioner of this State, that Section 104 of Article 11 cannot have application to national banks and, by the same token, cannot have application to Federal Savings and Loan Associations.

While Section 104 of Article 11 applies by its terms to organizations not subject to the supervision and examination of the Bank Commissioner of Maryland, this phrasing was undoubtedly adopted to distinguish between banks on the one hand, and non-banks on the other. To say, therefore, that Section 104 of Article 11 has no application to national banks is not to indicate that necessarily Section 104 of Article 11 cannot apply to Federal Savings and Loan Associations. Not to apply Section 104 of Article 11 to national banks obviously fulfills the legislative intent expressed in Section 104 of Article 11. Moreover, if Section 104 of Article 11 were to be applied literally to national banks and to prohibit such banks from advertising that they are banking institutions, that they receive deposits and that they carry on a general banking business would be to interpret Section 104 in conflict with the National Banking Act. Such a conflict, as is shown by the authorities discussed above, is not permitted under the Federal Constitution and the National Banking Act would prevail. That national banks have

authority to carry on all of the business of banking is indicated by 12 U.S.C.A. Section 24 which defines the corporate powers of national banks and states specifically that they shall have power "to exercise * * all such incidental powers as shall be necessary to carry on the business of banking." As before stated, the basic federal legislation relating to the creation, establishment and operation of federal savings and loan associations presents no such possible conflict with Section 104 if Section 104 is to be read literally.

Lastly, it is argued that Section 104, read literally, would prohibit a federal savings and loan association from employing the word "Savings" in its corporate name, a designation required by Federal Law, 12 U.S.C.A. sec. 1464(a). To this extent it is said there is a conflict between Federal and State law, that State law must yield and that having yielded as to name it must further yield with respect to all advertisements indicating that such associations accept deposits, maintain savings accounts, and are banking institutions. Were Section 104 to be applied in an attempt to prohibit a Federal Savings and Loan Association from employing the word "Savings" in its corporate name, we have no doubt that a conflict with federal law yould ensue and the State statute would be required to bow. However, as a matter of interpretation, Section 104 of Article 11, even as applied to State building associations has never been construed to prohibit the use of the word "Savings" in a corporate title of such associations. An examination of the list of presently incorporated and existing State building associations discloses that a substantial minority bear a corporate name employing the term "Savings". It has never been suggested that Section 104 of Article 11 prohibits this practice notwithstanding that the State Bank Commissioner has always been vigilant in preventing State building associations from advertising to the public that they accept savings accounts or that they are banking institutions. We conclude, therefore, that this argument too must fall because, as a matter of State interpretation of a State statute, Section

104 has never received the interpretation upon which the argument is premised.

For these reasons we conclude that it was proper for us, under date of March 21, 1950 to follow and apply the former opinion of this office in 24 Opinions of the Attorney General, 148 (1939), and we further conclude that there is no occasion to alter the views expressed in our opinion of March 21, 1950 (Vol. 35, page 102), or the former opinion.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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BANKS AND BANKING—USURY—USURY LAWS APPLICABLE TO LOANS AND NOT SALES OF NEGOTIABLE PAPER—DISCOUNT OF NOTE, BEARING INTEREST AT 6% WITH RECOURSE IS NOT PRIMA FACIA USURIOUS.

September 28, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

We have your letter in which you present the following hypothetical facts for our consideration and advice.

John Doe gives a $600.00 note drawn for one year from date with interest at six per cent. to "A" Motor Company. In turn, "A" Motor Company discounts this note at six per cent., with recourse, to the "B" Bank, which credits the proceeds of the discounted note, namely $564.00 to the "A" Motor Company's checking account. The bank then adds $36.00 to the original amount of the note on its books, and at the end of one year, as agreed, John Doe pays the bank $636.00, which is the principal amount of the note plus interest at six per cent. Thus, the bank actually receives

$72.00 income from this note over a period of one year, $36.00 of which is credited to discount and the other $36.00 credited to a commissions account.

You ask us to advise you whether or not the receipt by the bank of $72.00 income from a note, the face value of which is $600, in any manner violates the usury laws of the State.

The usury laws of the State are contained in Article 49 of the Annotated Code of Maryland (1939 Ed.). Section 1 thereof states that interest may be charged or deducted at the rate of six per cent. per annum. This Section restates, as to the rate of legal interest, Section 57 of Article III of the Constitution of Maryland, which fixes the legal rate of interest at six per cent. until a different rate is prescribed by the General Assembly.

At the outset it is clear that usury does not taint the giving of the note by John Doe to the "A" Motor Company since the interest thereon was at the legal rate. Usury, if it exists at all, comes into being when the "A" Motor Company discounts the note at six per cent., with recourse, to the "B" Bank. By Section 85 of Article 13 of the Annotated Code of Maryland (1939 Ed.), the effect of the "A" Motor Company's unqualified indorsement of the note is to make certain warranties and to engage to pay the amount of the note to the "B" Bank if John Doe fails to pay it and the necessary proceedings on dishonor are duly taken. Thus, there is an obligation on "A" Motor Company upon the happening of certain events to pay the "B" Bank the face amount of the note with interest. There is a contingent liability to repay $636.00 in consideration of $564.00 received as the result of the discount transaction.

Usury laws have application only to loans; their scope does not encompass sales, *Williams v. Reynolds,* 10 Md. 57 (1856); *Nichols v. Fearson,* 7 Pet. (U.S.) 103, 8 L.Ed. 623 (1833); 165 A.L.R. 626, 6 Williston, Contracts (1938 Ed.)

§ 1684; Restatement of The Law of Contracts, § 526, Comment b. As stated in 2 Paton's Digest of Legal Opinions (1942 Ed.) 2345, "it is essential to constitute a usurious transaction that a loan, rather than a sale, be involved."

Under the facts set forth, the problem, therefore, is whether the receipt by the "A" Motor Company of $564.00 from the "B" Bank constitutes a *loan* evidenced by the indorsement and discounting of John Doe's note or whether the transaction between the "A" Motor Company and the "B" Bank constitutes a *sale* of John Doe's note. There is no unanimity of result among the Courts which have considered this problem. Some have treated such a transaction as a sale, others as a loan and those which have called such a transaction a loan have differed as to the result. This contrariety of views is set forth in the leading case of *Becker's Investment Agency v. Rea,* 63 Minn. 459, 65 N.W. 928 (1896), where it was said:

> "If A, for a debt actually due to him, holds the note of the debtor, and discounts, indorses, and delivers it to B at a rate of discount greater than the rate of interest allowed by law, it is not necessarily a loan from B to A, in which the note was delivered to B as collateral security. The mere fact that A indorses the note does not necessarily stamp the transaction as a loan. The trial court or jury may find, from all the circumstances, that it was in fact a loan, and that the form of the transaction was merely a device to evade the usury law. All the courts agree that the transfer of such a note without any obligation on the part of the transferor to pay the same is merely a sale of a chattel, and may be made for any price the parties agree upon. 1 Daniel, Negotiable Instruments, Section 762a. But when the transferor indorses the instrument, so that he is conditionally liable to pay the same, different courts take four different positions: (1) That the transaction is usurious,

and both the indorsement and the transfer are vitiated, so that the indorsee cannot sue his indorser, or any prior party, on the note. Id Section 763 and cases cited. (2) That the indorsement is usurious, but the transfer is a valid sale, and that while the transferee cannot maintain a suit against the indorser, he may against all prior parties. Id Section 764, and cases cited. (3) Another class of cases, instead of holding the indorsement to be usurious, hold that it is made merely for the accommodation of the transferee in connection with a valid sale, and that, while the transferee cannot maintain a suit against the indorser, he may against all prior parties. Id Section 765, and cases cited. (4) That the transaction is not usurious, and that the transfer is not only a valid sale, but the indorser is also liable to the transferee. Id Secs. 766, 767. * * * We do not agree with the cases holding the first of the above propositions. We are of the opinion that the transfer of the note may in such a case be a valid sale."

See also Paton's, supra, 2345-2346; 165 A.L.R. 626, 684; 6 Williston, supra, § 1689.

The Restatement, *supra,* § 532 takes a middle position with respect to the problem. There, the rule is stated:

> "The sale of a pecuniary obligation of a third person at a discount greater than the rate of interest legally permissible is not usurious, but if the seller assumes responsibility for the payment of the obligation the transaction, *if intended as a device for a loan,* is usurious." (Emphasis supplied.)

The illustrations make clear that the usual bona fide discount where the paper sold is not valueless except for the guaranty or the parties do not intend the discount as a de-

vice for a loan does not constitute usury. See particularly Illustrations 1 and 3.

Those Courts which have treated such transactions as sales have followed the doctrine of the New York Court in *Cram v. Hendricks,* 7 Wend. (N.Y.) 569 (1831) while those treating them as loans have relied on the North Carolina Court in *McElwee v. Collins,* 20 N.C. 350, 4 Dev. & B.L. 209 (1839). While the jurisdictions in which it has been held such transactions are loans are numerically more numerous than those adopting the New York rule, we believe that Maryland falls within the last named group.

In *Williams v. Reynolds, supra,* a note was discounted without recourse at 12 per cent. Suit was brought by the indorsee against the maker who pleaded usury. In holding that the transaction constituted a sale to which *a fortiorari,* the usury laws have no application, the Court said:

> "* * * In *Cram v. Henricks,* 7 Wendell, 569, the whole subject is most fully and elaborately considered, and the rule there laid down by the Supreme Court of New York and affirmed by a majority of the Court of Errors is, that the transfer by the payee of a valid, available note, upon which when due, he might have maintained an action against the *maker,* and which he parts with at a *discount* beyond the legal rate of interest, is not a usurious transaction, although the payee on such a transfer endorses the note; and on non-payment by the maker, the *endorsee* may maintain an action against the endorser. In that case, the one of *Munn v. Commission Co.* 15 John. 44, was reviewed and fully endorsed. It is also quoted with apparent approval by the Court of Appeals in *Sauerwein v. Brunner,* I.H. & G. 477. In commenting on it in *Cram v. Hendricks, supra,* Judge Sutherland on behalf of the court says: 'That was an action of assumpsit, brought by the plaintiff, as endorsee,

against the defendants as acceptors of a bill of exchange; it was endorsed to the plaintiff by Oliver Ruggles, the payee of the bill, at a discount greater than the legal rate of interest, and it was contended that this was an usurious transaction, and avoided the bill. *The only doubt which the court entertained upon this point, was, whether the bill was available in the hands of Oliver Ruggles, the payee, and whether he could have maintained a suit upon it?* Judge Spencer, in delivering the opinion of the court, says, Upon a more careful examination of the case, we see no reason to doubt, that the bill, whilst in the hands of Oliver Ruggles, and before it was discounted by the plaintiff at a higher rate than the legal interest, was a perfect and available bill, and that when it became due he could have maintained an action upon it, either against the defendant, or Herman Rogers, the drawer. *This, he continues, appears to the court to be the true test in distinguishing between a case where the discount of a bill at a higher premium than the legal rate of interest will render the transaction legal, by considering it the purchase of a bill already perfect and available to the party holding it and where it will be illegal as an usurious loan of money.*' * * * "

It is to be noted that the *Williams* case was concerned with a discount *without* recourse, while the facts you present set forth a discount *with* recourse; it is significant that the conflict of authority to which we have heretofore referred does not exist to the same extent for the first type of discount. 2 Paton's, *supra,* 2344, 165 A.L.R. 626, 663, 684; Williston, *supra.* Nevertheless, the Court of Appeals in the *Williams* case has used language which seemingly adopts the New York rule with respect to both types of discount.

However, the Court, in the *Williams* case went on to say that the transfer of a note is inquirable into; "that is,

whether it be a *bona fide* sale, or merely a device to evade the statute of usury, and the question submitted to a jury where there are circumstances independent of the transfer to excite suspicion of an intent to evade the statute . . ." This is in effect the same thing that is said by the Restatement, *supra,* namely, that the sale of a pecuniary obligation of a third person at a discount granting the rate of interest permissible is not usurious but "if the seller assumes responsibility for the payment of the obligation, the transfer *if intended as a device for a loan* is usurious." (Emphasis supplied.)

It is our view that prima facia, there is no transgression of the usury laws in the situation which you present and, of course, in similar situations, but that such transactions should be scrutinized to make sure that the transfer is a sale and not a loan. In such a scrutiny, your Department is the jury about which the Court of Appeals speaks.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## BOARD OF MOTION PICTURE CENSORS

BOARD OF MOTION PICTURE CENSORS—AUTHORITY DELEGATED TO BOARD ORDINARILY CAN BE EXERCISED ONLY BY MAJORITY OF BOARD—STATUTE CHANGES RULE AS APPLIED TO CENSOR BOARD AND AUTHORITY TO CENSOR FILMS CAN BE EXERCISED BY SINGLE MEMBER OF BOARD.

June 13, 1950.

*Mr. Sidney R. Traub, Chairman,*
*Maryland State Board of*
*Motion Picture Censors.*

You ask whether a single member of the Board, upon reviewing a film alone, may issue an order in the name of the Board, either approving, rejecting, or deleting such film without the signature of another member. In other words, you ask whether a single member may solely, on his own, act and cause any order whatsoever to be issued as an Order of the Board, without the signature of at least an additional member appearing thereon.

The general rule with respect to the power directed to be exercised by a board or commission is that the power may be exercised only by a majority of the members of the board or commission acting in concert. Mecham, Public Officers (1890) Sec. 572, 43 Am. Jur. (Administrative Law) Secs. 72 and 73. As a corollary to the rule there is the proposition that delegated discretionary or quasi judicial authority cannot be further delegated by a board, commission or public officer to a subordinate or a single member of the Board. It would appear that this general rule has application to the censoring of motion pictures because Section 6 of Article 66A of the Annotated Code of Maryland (1939 Ed.) states: "The Board shall examine or supervise the

examination of all films or views to be exhibited or used in the State of Maryland * * *."

Notwithstanding these general rules, it seems clear that they may be changed by statute and, in fact, have been changed in so far as their application to the Maryland State Board of Censors is concerned. Section 19 of Article 66A provides as follows:

> "If any elimination or disapproval of a film or view is ordered by the Board, the person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly re-examined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City."

Thus the statute contemplates that if any elimination or disapproval of a film or view is ordered, the person submitting the film or view may have it re-examined by at least two members of the Board. This procedure, it seems to us, is in the nature of an appeal and it could hardly be contemplated by the Legislature that an appeal to the Board would be necessary if the Board itself were in the first instance required to examine the film as a Board. Thus, we believe that the statute contemplates that the original examinaion of a film may be made by one member of the Board acting alone subject, in the case of rejection or deletion of the film, to a review by at least a majority of the Board at the option of the person submitting the film.

In the exercise of this power, however, we believe that it would be improper for a member of the Board not viewing a film in the first instance to sign an order approving, rejecting or deleting such film in the name of the Board.

In other words, we believe that the Order, upon initial view, should be signed in the name of the Board by the person viewing the film. To do otherwise would seem unnecessarily misleading.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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MOTION PICTURE CENSOR BOARD—SALARY OF MEMBER OF, MAY NOT BE INCREASED BY BUDGET AMENDMENT DURING TERM OF OFFICE.

November 15, 1950.

*Mr. Sydney R. Traub, Chairman,*
*State Board of Motion Picture Censors.*

You have asked for our written opinion concerning the legality of an increase in the salaries of the members of the Maryland State Board of Motion Picture Censors by budget amendment. In this connection you point out that, effective July 1, 1949, the salaries of the members were increased 10% in the State budget.

As you know, the State Constitution specifically prohibits an increase or decrease in the salary of any public officer during his term of office. It has consistently been the view of this office that a member of the State Board of Motion Picture Censors is a public officer within the meaning of that constitutional provision. See 18 Opinions of the Attorney General, 407; 20 Opinions of the Attorney General, 598, 603.

As applied to your Board, the effect of the ruling is to mean that the salaries of members may not be increased

or decreased except by abolishing and reconstituting the office, effective on the date when the change in salary is to begin. In our opinion this is the only manner in which a change of salary may be brought about. Furthermore, to the extent that the salary increase effective July 1, 1949 applies to members of the Board who took office before that date, it is our opinion that such increase is illegal.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## BOARD OF PUBLIC WORKS

BOARD OF PUBLIC WORKS—AWARDING OF BIDS FOR STATE BONDS—AWARD FOR THREE SIMULTANEOUS ISSUES MAY NOT BE MADE ON ALL OR NONE BASIS UNLESS EACH INDIVIDUAL BID IS HIGHEST FOR EACH INDIVIDUAL ISSUE.

June 20, 1950.

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

You have asked for confirmation of oral advice given the Board of Public Works on May 31, 1950, concerning the awarding of bids for the second instalment of the General Public School Construction Loan of 1949 in the principal amount of $12,319,000.00, the second instalment of the General Public School Assistance Loan in the principal amount of $7,308,000.00 and the first instalment of the General Construction Loan of 1949 in the principal amount of $5,373,000.00.

The Board of Public Works concluded to authorize the issuance of each of these instalments on May 9, 1950, and directed that advertisements be placed to invite sealed proposals, which were to be opened by the Board of Public Works at 2:00 P. M. on May 31, 1950. Separate advertisements for each of the three instalments were run and the advertisements made no mention of the authority of prospective bidders to bid on an all or none basis; that is, to bid on each instalment, stipulating that the bid was placed and could be accepted only upon the award of bids of the same bidder for the other instalments being issued simultaneously therewith. The descriptive literature which was furnished each bidder stated that the Board of Public Works would accept bids on an all or none basis. This literature,

however, called to the attention of prospective bidders that if bids were submitted on an all or none basis, such bids could not be accepted unless the bid for each issue was the highest bid submitted.

When the bids were opened on May 31, 1950, it appeared, in so far as is pertinent herein, that the highest bidders had bid as follows:

June 20, 1950.

BIDS RECEIVED MAY 31, 1950
FOR
$12,319,000 INSTALMENT GENERAL PUBLIC SCHOOL CONSTRUCTION LOAN OF 1949

7,308,000 INSTALMENT GENERAL PUBLIC SCHOOL ASSISTANCE LOAN OF 1949

5,373,000 INSTALMENT GENERAL CONSTRUCTION LOAN OF 1949

| Bidders | Amount Bid For | Coupon Rate | Bid |
|---|---|---|---|
| National City Bank | $12,319,000.00 | 1½% | $12,431,398.56 |
| of New York & | 7,308,000.00 | 1½% | 7,374,670.88 |
| Associates | 5,373,000.00 | 1½% | 5,422,017.88 |
| Harris Trust & | 12,319,000.00 | 1½% | 12,353,825.81 |
| Savings Bank | 7,308,000.00 | 1¼% | 7,328,659.72 |
| & Associates | 5,373,000.00 | 1½% | 5,388,189.47 |

The bids of National City Bank of New York & Associates as shown on the tabulation were individual bids. No stipulation was made that such bids were made on an all or none basis. The bids of Harris Trust & Savings Bank & Associates, however, were all made on an all or none basis. Dollars wise, the bids of National City Bank of New York & Associates for the second instalment of the Gen-

eral Public School Construction Loan of 1949 and the first instalment of the General Construction Loan of 1949 were the highest. The bid of Harris Trust and Savings Bank & Associates for the second instalment of the General Public School assistance Loan of 1949 was the highest bid for that issue when due allowance is made for the lower rate of interest. In fact, the bid of Harris Trust, in this respect, was sufficiently high so that if the bids of Harris Trust for the other issues were accepted so as to comply with the all or none condition of the bid on the instalment of the General Public School Assistance Loan of 1949, the State would receive $14,570.18 more than the total of the amounts of the bids by National City Bank.

On these facts, the Board of Public Works was advised that it could not accept the three bids of Harris Trust. This advice stemmed from a construction of each of the three Acts governing the issuance of the three loans. Section 4 of Chapter 277 of the Acts of 1949, as amended by Chapter 53 of the Acts of 1950, creating the General Construction Loan of 1949, Section 3 of Chapter 1 of the Acts of 1949, Extraordinary Session, creating the General Public School Construction Loan of 1949, and Section 3 of Chapter 502 of the Acts of 1949, as amended by Chapter 52 of the Acts of 1950, creating the General Public School Assistance Loan of 1949, are identical and specific. They all provide for the advertising in newspapers published in Baltimore City of notices that the Treasurer of the State will accept bids for those portions of the various loans proposed to be issued. The Sections direct that on the day mentioned as the day for opening the bids sealed proposals for the purchase of as many of the bonds as are proposed to be issued shall be received. The Sections then state:

> "* * * on the opening of such sealed proposals, as many of said bonds or Certificates of Indebtedness as have been so bid for shall be awarded by the Governor, Comptroller of the Treasury and Treasurer, or majority of them, to the highest re-

sponsible bidder or bidders therefor for cash * * *."

None of the Acts creating each of the three loans makes reference to either of the others. Each contemplates that the bonds evidencing the loan created therein will be issued and sold as an entity unto itself. Each directs that, with respect to the sale of the bonds evidencing the loan created by it, the sale shall be made to the highest responsible bidder for cash.

In order to carry out the mandate of the statute, we believe that the Board of Public Works was required to make an award to the highest responsible bidder for each issue. When this rule is applied, clearly the Board of Public Works was required to make an award to National City Bank of New York & Associates on the basis of their bids for the second instalment of the General Public School Construction Loan of 1949 and the first instalment of the General Construction Loan of 1949. In as much as National City Bank of New York & Associates was the highest responsible bidder for each of these two issues, no award could be made to Harris Trust and Savings Bank & Associates on the basis of their bid for the second instalment of the General Public School Assistance Loan of 1949 since the Board was unable to comply with the conditions attached to the bid therefor. It necessarily followed that the bid of Harris Trust and Savings Bank & Associates for the second instalment of the General Public School Assistance Loan of 1949 was required to be rejected and an award made to the next highest unconditional bidder.

In summary, it is our opinion that the action of the Board of Public Works in accepting the bids of National City Bank of New York & Associates for each of the three issues was entirely proper and was, in fact, the only award which could have been made in accordance with the law.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Assistant Attorney General.*

## CLERKS OF COURT

CLERKS OF COURT—RECORDING OF CHATTEL DEED OF TRUST TO SECURE LOAN BY RECONSTRUCTION FINANCE CORPORATION—SHOULD BE RECORDED IN CREDIT LIEN BOOK —MAY BE RECORDED AMONG CHATTEL MORTGAGES.

March 21, 1950.

*Mr Clayton K. Watkins, Clerk,*
*Circuit Court for Montgomery County.*

You have sent us a copy of a chattel "Deed of Trust" presented to you for docketing in the Credit Lien Book, as provided in Sections 56 and 62 of Article 21 of the Annotated Code of Maryland (1947 Supp.). You advise us that at the time this document was presented for docketing in the Credit Lien Book a duplicate original copy was also recorded in the regular chattel mortgage records.

You ask us whether you are required to record such a document in both the Credit Lien Book and the regular chattel mortgage records and, secondly, whether the documents may be properly recorded in the Credit Lien Book, in view of the fact that Section 62 of Article 21 requires you to docket the name of the mortgagor and *mortgagee,* and Section 66 of Article 21 provides that releases of mortgages properly recordable in the Credit Lien Book may be made by the mortgagee, its assignee, attorney or duly authorized agent. These latter considerations, as you point out, are important because technically, under a deed of trust, there is no mortgagee, nor may a deed of trust be released solely by the act of the person whose loan is secured.

The instrument with which we are concerned is by and between Modern Age Cleaners, Inc., a Maryland Corpora-

tion, and two individuals, one of whom is a resident of Richmond, Virginia, and the other of Baltimore, Maryland, as trustees. The agreement recites a loan in the amount of $30,000 by Reconstruction Finance Corporation to Modern Age Cleaners, Inc., with interest at the rate of 4% per annum, payable in five years, and the desire of the borrower to secure the prompt payment of the principal and interest of the loan by execution of the deed of trust. The deed of trust seems to be in customary form and is a conveyance to the individuals, as trustees of certain plant machinery and equipment, office equipment and motor vehicles with appropriate authority to the trustees, in the event of a default in any payment of the principal and interest of the loan, to proceed to sell the described chattels and personal property. The agreement provides that if one of the individual trustees resigns or is removed, the holder of the note evidencing the loan, that is Reconstruction Finance Corporation, is authorized and required to appoint a successor trustee.

Section 56 of Article 21 permits any person, association, partnership or corporation to enter into an agreement with and borrow funds from, *inter alia,* the Reconstruction Finance Corporation, and to secure the repayment of the funds so borrowed by a chattel mortgage upon personal property of any kind, character or description. By the terms of that Section such a mortgage shall be a lien upon the property therein described from the time of docketing as against subsequent creditors, purchasers, mortgagees or other lienors or encumbrancers. By Section 62 of Article 21, such a mortgage is required to be filed in the office of the Clerk of the Circuit Court for the County in which the chattels are located. The Clerk is directed to docket such instruments, when presented, in a book to be known as a "Credit Lien Book," and to "alphabetically index same therein setting forth the date of the lien, the name of the mortgagor and mortgagee, the amount advanced and the limit thereof, and a brief description of the chattels described therein and/or the crops affected and the property

on which said chattels and/or crops are located." By the specific provisions of Section 62, "No recordation, indexing or docketing, other than docketing and indexing under this Section shall be necessary for the validity of any mortgage or lien created under this sub-title."

There can be little doubt that the agreement which we have described falls squarely within the provisions of Section 56 of Article 21, in that it secures a loan from the Reconstruction Finance Corporation by chattel mortgage upon personal property of the borrower. It is true that the agreement takes the form of a deed of trust, rather than the ordinary chattel mortgage, but, as provided by statute (Section 1 of Article 66 of the Code (1939 Ed.) ) the deed of trust must be considered as a mortgage. See also *Manor Coal Co. v. Beckman,* 151 Md. 102 (1926) and *Northrop v. Beale,* 170 Md. 439 (1936), cert den 299 U. S. 516 (1937).

Notwithstanding that Section 62 of Article 21 which prescribes the manner in which you should docket chattel mortgages and refers specifically to an index of the names of the mortgagor and mortgagee, we believe that the instrument under consideration should be docketed as provided in Section 62. By the terms of Section 70 of Article 21 of the Annotated Code of Maryland (1939 Ed.), the subtitle referring to the types of instruments set forth in Section 56 of Article 21 ". . . shall be liberally construed to effectuate the purpose hereof and substantial compliance herewith shall be sufficient hereunder." It would seem, therefore, that the requirement of Section 62 that the name of the mortgagee be docketed would be fully met if you would docket the names of the trustees and note that they are trustees for the benefit of the Reconstruction Finance Corporation.

Section 66 of Article 21, which relates to releases of chattel mortgages entered into under the provisions of the subtitle, need give you little concern as a bar to the docketing

of the agreement under consideration in the Credit Lien Book. By its terms it provides that a chattel mortgage *may* be released by the mortgagee, its assignee, attorney or other duly authorized agent. Since there is no requirement that the releases must be executed by the mortgagee, etc., it would seem of no moment that a deed of trust cannot be released solely by the act of the lender.

To answer your inquiry concerning whether you may be required to record the agreement which you have sent us in both the Credit Lien Book and the regular chattel mortgages, the quoted lanquage of Section 62, *supra,* by its terms, provides that docketing in the Credit Lien Book shall be sufficient for the validity of any mortgage or lien created under the subtitle and that it shall not be necessary to have any other recordation, indexing or docketing. Also Section 70 of Article 21 provides that: "The provisions of this subtitle, so far as the same are applicable, shall govern and control chattel mortgages given under and pursuant hereto." We view this language as containing a direction that docketing should be made under Section 62 of Article 21. We think also that the language imparts a negative intention to require compliance with any other sections of the Code relating to the recordation of chattel mortgages. In short, we believe that the agreement should be docketed *solely* under the provisions of Section 62.

This conclusion, however, does not mean that there was any impropriety in your recording the agreement also under the general laws relating to the recordation of chattel mortgages. As pointed out in 29 Opinions of the Attorney General, 65, and 21 Opinions of the Attorney General, 241, while you cannot be required to record such instruments under the general law relating to the recordation of chattel mortgages, you may, if you see fit, so record such instruments.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## Clerks Of Courts—Not Entitled To Commissions On Money Collected For County Commissioners, Except With The Consent of The Commissioners.

March 22, 1950.

*Mr. John H. Hopkins, 3rd,*
*Clerk of the Circuit Court*
*for Anne Arundel County.*

We have your letter of March 1st in which you inform us that you have been deducting 5% commission under the provisions of Section 19 of Article 17 of the Code for licenses which you issue under the provisions of Chapter 321 of the Acts of 1941, and the question has arisen, you state, whether you are entitled to make that deduction.

Section 19 of Article 17 of the Code (1939 Ed.), which provided for the deduction of commissions on public monies collected by the Clerks of Courts was repealed by Chapter 988 of the Acts of 1943, and the salaries of the Clerks of the several Courts throughout the State were established by the same Act. Chapter 984 of the Acts of the same year revised the schedule of fees to be collected by the Clerks of the several Courts. This Act, as amended by Chapter 19 of the Acts of 1947, appears as Section 12 of Article 36 of the Code. Sub-section (39) thereof provides for commission of 5% for collecting public money, except by the Clerk of the Court of Common Pleas whose commission was fixed at 1%. However, Sub-section (39A) provides:

> "No charge shall be made by the Clerks of Court against the County Commissioners of any county of the State for any of the services enumerated herein, rendered such county, except with the consent of the County Commissioners of such county;"

I think it is clear, therefore, that under the provisions of Sub-section (39A), without reference to Section 377B

of Article 2 of the Code of Public Local Laws, as enacted by Chapter 321 of the Acts of 1941, you are not entitled to a commission for issuing amusement licenses in Anne Arundel County unless possibly the County Commissioners give their consent to that deduction by you.

J. EDGAR HARVEY, *Deputy Attorney General*

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CLERKS OF COURTS—RECORDING—CLERK NOT REQUIRED TO RECORD "DEED OF APPOINTMENT"—CLERK MAY RECORD SUCH INSTRUMENT IN HIS DISCRETION.

June 7, 1950.

*Mr. Clayton K. Watkins, Clerk,*
*Circuit Court for Montgomery County.*

You have forwarded to us an instrument entitled "Deed of Appointment," which was offered for recordation, and you ask us to advise you whether you are required to record this instrument among the Land Records of your County.

The Deed of Appointment recites that by a prior instrument, known as "Declaration of Covenants," certain named persons were designated to perform certain acts of approval in connection with the lots in the subdivision known as "Connecticut Gardens" in Montgomery County, Maryland. It is stated that the majority of the lots covered by those covenants have now been sold and are about to be transferred. The Deed of Appointment then recites that, in consideration of the sum of One Dollar ($1.00), the persons constituting the committee to perform certain acts of approval in the original Declaration of Covenants resign as members of the committee, and in their place and stead, appoint certain other named individuals with full

power to act in their place and stead as members of the committee of approval and to have all the rights, powers, privileges and duties as said committee, as set forth in the Declaration of Covenants.

We had occasion to consider a similar problem, namely whether the Clerks of Court are required to record contracts relating to the sale of real estate, which was considered in 21 Opinions of the Attorney General, 241. It was there pointed out that the obligation of the Clerks of the Circuit Courts for the several Counties and of the Superior Court of Baltimore City to record various instruments is defined by statute (the present statute being Section 65 of Article 17 of the Annotated Code of Maryland (1947 Supp.) ), and that the statute directs the recording of only those instruments "required to be recorded." An examination of the various provisions of the Code, relating to the recording of various instruments does not indicate that the so-called "Deed of Appointment" is required to be recorded under the laws of this State. Consequently, we conclude that it is not mandatory that you record this instrument.

However, as further pointed out in 21 Opinions of the Attorney General, 241, 29 Opinions of the Attorney General 65, and opinion to you dated March 21, 1950 (Vol. 35, page 102), you may record this instrument if you so desire.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

Clerks Of Court—Recording—Conditional Contract Of Sale of Oil Furnace Which Provides for Installation Upon Identified Real Property, but Furnace Not To Become Part of Freehold, Is Recordable Among Land Records If Properly Executed, Attested and Acknowledged.

June 16, 1950.

*Mr. T. Braden Silcott, Clerk,*
*Circuit Court for Baltimore County.*

Your letter of May 16 states that Esso Standard Oil Company has presented for recording among the Land Records of Baltimore County a document described as a "Conditional Sales Agreement, Guarantee and Installation Contract." The document is executed by the Company and by the purchaser and provides for (1) the sale of an oil burner furnace, conditioned upon the payment by the purchaser of the stated consideration in installments, (2) the installation of the furnace upon the real property of the purchaser, described as 7612 Cypress Avenue, Baltimore 24, Maryland, which is in Baltimore County, (3) permission to the seller to remove the furnace in the event of breach of contract by the purchaser, (4) title to the burner to remain in the seller until the price has been paid in full, the furnace to remain personal property and not to become part of the freehold, and (5) that the purchaser will not encumber the equipment or do anything to prejudice the seller's title. You state also that the equipment was actually installed in the property on April 12, 1950. It seems to be conceded as a fact by all parties that the furnace would ordinarily be a fixture so as to become part of the freehold in the absence of an agreement to the contrary. You ask our opinion as to whether this document should be accepted for recording among the Land Records.

Article 21, Section 71 of the Code, as amended by Chapter 430 of the Acts of 1949, provides for the recording of

conditional contracts of sale of chattels. It has been held prior to the 1949 amendment that where a conditional contract of sale of a chattel is recorded under this Section and the chattel is subsequently affixed to the freehold so as to become a fixture, the recording of the contract is not notice to a subsequent bona fide purchaser of the freehold. The reason is that the chattel ceases to be a chattel. *Abramson v. Penn,* 156 Md. 186; *Heating and Plumbing Finance Corporation v. Glyndon Permanent Building Association,* 167 Md. 222. See also *Bankers' and Merchants' Credit Company v. Harlem Park Building and Loan Association,* 160 Md. 230; *Schofer v. Hoffman,* 182 Md. 270.

Section 71, before the 1949 amendment (when the above cases were decided), provided that conditional contracts of sale as defined therein shall be void as to "third parties without notice until" the contract is recorded and that such recording shall be sufficient to give actual or constructive notice to "third parties" when the paper is executed and recorded as provided therein. The only change made by Chapter 430 of the Acts of 1949 was to substitute for the words "third parties" the words "subsequent purchasers, mortgagees, incumbrancers, landlords with liens, pledgees, receivers, and creditors who acquired a lien by judicial proceedings on such goods and chattels." Apparently, the amendment was made to prevent such contracts from being void when not recorded as to third parties other than those specifically mentioned therein, as in the case of subsequent general unsecured creditors. See *Robertson & Co. v. Robinson,* 141 Md. 37; *Stieff v. Wilson,* 151 Md. 597; *Gunby v. Motor Truck Corporation,* 156 Md. 19; *Meyer Motor Car Company v. First National Bank,* 154 Md. 77; *In Re Wilhelm,* 25 F.S. 440. Whatever its purpose, we do not believe the amendment affects the doctrine of *Abramson v. Penn.*

In any event, Article 17, Section 65 of the Code (1947 Supplement), requires Clerks of the Courts to record among the Land Records "all deeds, mortgages and other instru-

ments affecting the title to or any interest in land, required to be recorded." The document to which your letter refers certainly is designed to affect an interest in land. It prevents from becoming part of the land something which, without the instrument, would be part of the land. For this reason, we believe the instrument ought to be accepted for recording among the Land Records, provided the formalities as to execution, attestation and acknowledgment of deeds of real estate set forth in Article 21 are complied with. In view of the provisions of Article 66, Section 1, the contract in question could conceivably be considered a mortgage. Hence, it may be advisable also that the vendor-mortgagee make affidavit as to the consideration as required by Article 21, Section 34. Your letter is silent as to whether or not these formalities have been performed.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

# CONSERVATION

CONSERVATION—FISH—SEINES—RULES AND REGULATIONS DEALING WITH HAUL SEINES.

June 8, 1950.

*Mr. David H. Wallace, Chairman,*
*Department of Tidewater Fisheries.*

You have asked our advice concerning the provisions of Section 30 (a) of Article 39 of the Annotated Code of Maryland (1947 Supp.) in connection with rules and regulations which are now under consideration by the Commission of Tidewater Fisheries. The Section provides, among other things, that "It shall be unlawful to drag any seine by the use of a vessel or boat . . . Nothing in this Section shall be construed to prevent the setting of a seine from a vessel or boat in the customary manner." As a background for the regulations which you contemplate promulgating, you inform us that in 1947 a Regulation was devised which provided, among other things, that whenever one end of a haul seine was carried ashore by a boat, it was not to be considered dragging, as prohibited by the statute in question, provided the other end of the net was fixed by stake or anchor to the shore, or as near mean low water as was practical, provided further, that the end of the net so anchored did not extend beyond water three feet in depth. The Regulation then proceeded, as follows: "The use of more than one motor boat in a seining operation will be considered dragging and illegal, and if one end of the net is not affixed as described above the seiner will be considered in violation of hauling a seine in other than the customary manner and will be in violation of the law." This regulation, you inform us, was held to be invalid by Judge John B. Gray, Jr., and it is in an apparent effort to

replace it that the revised regulations have been drafted. They are as follows:

"1. Seines may be set by one power boat only, but no dragging whatsoever will be permitted, as per Section 30 (a) of Article 39 which states, 'It shall be unlawful to drag any seine by the use of a vessel or boat, or to use any haul seine more than 600 yards in length except that if the State of Virginia should take action making it unlawful to use haul seines more than 500 yards in length or should take such action contingent upon a similar action by the State of Maryland, then it shall be unlawful to use any haul seines more than 500 yards in length. Nothing in this section shall be construed to prevent the setting of a seine from a vessel or boat in the customary manner.'

"2. Seines measuring over 600 yards in length are classified as illegal, as per section quoted above.

"3. Boats equipped with stationary hand or power winders may be used in hauling the seine only if they are anchored in 3 feet or less of water.

"4. Licensees convicted of two haul seining violations must appear before the Tidewater Fisheries Commission to show cause why their licenses should not be revoked. This is a restatement of the previous policy of the Commission, under authority vested in it by Article 39, Section 63C of the Annotated Code of Maryland."

Rule 1 above provides that seines may be set by one power boat only. We find nothing in the statute that authorizes this restriction unless that was the customary manner of setting seines at the time of the enactment of this law by Chapter 709 of the Acts of 1941, but as to that we have no information. Suffice it to say, the statute in question does not change the customary method of setting seines because, by its very terms, the customary manner of performing that work is permitted to continue under the Act of 1941. Therefore, unless the custom which prevailed at that time was the use of one power boat for that operation, we believe that the limitation contained in this regulation is beyond the power of the Commission to prescribe.

Rule 2 relates to the length of seines and is in accordance with the measurements prescribed by Section 30. We think it is valid.

Rule 3 presents a question which, in our view, is not entirely free from doubt. Under its provisions, hand or power winders on boats anchored in three feet or less of water may be used in hauling seines. Literally, the statute provides that it shall be unlawful to drag a seine "by the use of a vessel or boat." It may be argued that if the General Assembly had intended to permit the use of boats with winders attached to them, it would not have employed the quoted language. Furthermore, it may well be questioned why a boat equipped with a winder may be used for this purpose if the boat is anchored in three feet of water, and yet prohibited in water of greater depth. However, in view of the specialized knowledge which the members of your Commission have in matters of this sort, we should be reluctant to strike down a regulation as void in the absence of the most persuasive reasons. It has been the law of this State for many years that seines may not be hauled by boat. See 14 Opinions of the Attorney General 52. You inform us that the practice has been to set seines by boat and then to carry the line to the shore and pull it in by

hand. It is the view of the Commission that a boat anchored in three feet of water cannot, except under unusual circumstances or with extreme difficulty drag a seine, and that the winding operation merely eliminates the use of manpower but does not permit the seine to be hauled in at a rate of speed that will injure fish. While we are not unmindful of the possible arguments that may be made in favor of a construction of the statute that will prohibit this regulation, we do not feel that we should undertake to strike it down as a violation of the law or as an excessive use of your rule-making power.

The fourth rule provides for the appearance before the Commission of licensees convicted of two haul seine violations to show cause why their licenses should not be revoked. This, we think, is permitted by Section 63C of Article 39.

A further question which you present to us is whether the rule and regulation of 1947 may be taken as furnishing the standard for the customary manner of hauling seine. As we have pointed out above, the statute relates to the customary manner of setting rather than hauling a seine, but in any event, we do not believe that that regulation, having been stricken down as void by a court, can be used for this purpose. The word "customary" means according or conforming to custom or usage; conventional; usual; habitual; common. It was in that sense, we think, that the term was used by the General Assembly, and we are obliged to accord it that meaning.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

CONSERVATION—OYSTERS—SEASON LAW DOES NOT APPLY TO POSSESSION OF OYSTERS LAWFULLY CAUGHT IN OTHER STATES AND SHIPPED INTO MARYLAND.

August 23, 1950

*Mr. David H. Wallace, Chairman,*
*Department of Tidewater Fisheries.*

Your letter of August 16th requests our opinion as to whether it is legal to have possession of oysters in the shell which have been legally caught in other States and brought into Maryland for shucking before the opening of the oyster season here. The applicable law is Section 9(b) of Article 72 of the Maryland Code (1947 Supp.), which is in part, as follows:

> "Season for Packing Oysters. It shall be unlawful for any person to take or catch oysters or to have oysters in his possession between the fifteenth day of April to the first day of September each year, except that oysters caught on or before the fifteenth day of April may be kept in possession through the twenty-fifth day of April . . ."

*Christy v. Clark*, 72 A. 2d 718 (Maryland, 1950) held constitutional the cull law (Article 72, Section 4) which expressly applies to oysters in the shell found anywhere within the State, whether they have been caught within this State or shipped or brought into Maryland from other States. However, there is no provision expressly making Section 9(b) applicable to oysters brought into Maryland from other States.

*Dickhaut v. State*, 85 Md. 451 (1897) held that an Act which prohibited any person to "shoot, or in any manner catch, kill or have in possession any rabbit" out of season applies only to rabbits caught in Maryland.

*Tyler v. State* 93 Md. 309 (1901) construed the then cull law to include only oysters caught in Maryland. The law applied to "any person who shall have oysters in his possession which contain more than five per cent shells" etc., with no express provision making the law applicable to oysters caught out of the State. In support of its holding, the Court said (93 Md. at 313-314):

> ". . . But any such prohibition to have been effectual must under the rulings in *Dickhaut's case* have included in plain and distinct terms all unculled oysters from whatever source obtained and that has certainly not been done in Sec. 8."

Following these decisions, we must hold that Section 9(b) was intended to apply only to oysters caught in Maryland. The necessary result is that oysters lawfully caught in other States may be brought into Maryland in the shell during the closed season.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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CONSERVATION — OYSTERS — MORTGAGE OF OYSTER LEASE NOT AN ASSIGNMENT BUT PURCHASER AT FORECLOSURE MUST BE QUALIFIED LESSEE.

October 9, 1950.

*Mr. John C. Widener, Engineer,*
*State Department of Tidewater Fisheries.*

You ask whether the lessee of an oyster bottom may mortgage his interest to an incorporated bank.

Article 72, Section 12(d) of the Maryland Annotated Code (1947 Supp.) restricts those who may obtain oys-

ter leases to residents of Maryland "provided, however, that no corporation or joint stock company shall be permitted to lease or to take up or acquire by assignment or otherwise any lands of the State for the purpose of planting or cultivating oysters or other shell fish." Sub-section (q) prevents assignment of leases to non-residents, corporations or joint stock companies, or to any person in such a way that the assignee shall become the holder of more than specified amounts of acreage. The exact language dealing with corporations is as follows: "If any assignment of any interest created by this sub-title is attempted to be made to any corporation or joint stock company, all the interest of the grantor or assignor shall revert to the State as if no lease had ever been made." This provision has remained unchanged since its original enactment by Section 110 of Chapter 711 of the Acts of 1906.

Is a mortgage an "assignment" within the meaning of sub-section (q). One of the definitions of "assignment" given in Bouvier's Law Dictionary is as follows: "A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." This, of course, could include a mortgage.

Maryland recognizes the "title" theory of mortgages which holds that the mortgagee has legal title to the property subject to defeasance if the mortgagor performs his covenants within the specified time. In equity however the mortgagor is considered the real owner and the mortgagee has merely a security interest. Tiffany, Real Property, 1930 Ed., Vol. 5, Secs. 1379, 1380. *Jamieson v. Bruce*, 6 G. & J. 72, 74.

For purposes of the insolvency laws, a mortgage by the weight of authority usually is not considered an assignment. *Wilson v. Russell*, 13 Md. 494, 530-531; *Bates v. Coe*, 10 Conn. 280, 294; *Stiles v. Champion*, 24 A. 403, 406, 49 N. J. Equity (4 Dick.) 446; Burrill, Assignments (6th Ed. 1894), Sections 6 and 7. On the other hand the word "as-

signs," when used in a covenant running with the land, usually includes a mortgagee. *Taylor v. Carter,* 178 N.W. 712, 211 Mich. 365.

It thus appears that little aid in interpreting sub-section (q) can be found by the use of analogy, and we must examine the policy of the legislation. The main purpose of Chapter 711 of the Acts of 1906, commonly known as the "Haman Oyster Culture Law," was to encourage oyster culture by private enterprise on barren bottoms and to prevent the leasing of the natural bars. First Report of the Shellfish Commission of Maryland (1907) page 29. But running through that law and zealously adhered to ever since is the policy to safeguard the oyster culture industry from the clutches of large, non-resident interests. We are told that this fate has befallen the industry in other States, and the fear of it here has been uppermost in the minds of Maryland waterman for generations. Hence the provisions against leasing to non-residents and corporations, and the limitation of the number of acres which may be held by any single individual.

Will this policy be violated by allowing individuals to borrow money from such institutions as they please and as security to mortgage their leasehold interests? In our opinion, it will not, so long as the corporate mortgagee acquires no right of possession as in *Jamieson v. Bruce, Supra.* Most mortgages specifically provide that the mortgagor may remain in possession and that in the event of default, the property may be sold by the mortgagee or an attorney, or by a trustee pursuant to a consent decree. Code Article 66, Sections 6 to 16, as amended by Chapter 12 of the Acts of 1950. Under such mortgages, the mortgagee never acquires possession unless he buys in the property at the foreclosure sale. We therefore do not believe that such mortgages constitute assignments within the meaning of sub-section (q) at the time they are made. They will in fact tend to promote the policy of our oyster laws by facilitating the financing of private oyster culture on a small scale by individual owners.

When default occurs and a sale is made however, if the corporate mortgagee or any other corporation or joint stock company or any person prohibited from acquiring a lease under sub-section (q) buys in the property and attempts to take title thereto, all interest in the lease will immediately revert to the State by operation of law. Thus any purchaser at a foreclosure sale must be qualified under sub-section (q).

This result is fortified by the language of sub-section (d), which must be read in connection with sub-section (q). The former prohibits the acquisition by any corporation or joint stock company by assignment or otherwise of any lands " *for the purpose of planting or cultivating oysters or other shellfish.*" (Emphasis added.) A mortgagee acquires his mortgage not to plant and cultivate shellfish, but as security for the payment of a debt.

We believe our opinion is not at variance with that reported in 20 Opinions of the Attorney General, 247. It was there held that an oyster lease could not be assigned to a corporation as security for a debt. Apparently the conveyance there considered was in form an absolute assignment of the lease and not a mortgage. It presumably contained no defeasance clause nor any reservation of the right of possession in favor of the assignor.

Your further question as to the right of the estate of a deceased mortgagor to assign an oyster lease is, we believe, covered in 21 Opinions of the Attorney General, 266. It was there held that an administrator or executor of a decedent's estate may assign such a lease to an individual qualified under sub-section (q) if authorized by the decedent's will or by Order of the Orphan's Court. Such assignment would of course be subject to the mortgage unless the mortgage were previously or contemporaneously released.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

## CONSTITUTION

### CONSTITUTION—GENERAL ASSEMBLY—GOVERNOR NOT REQUIRED TO SUBMIT RECESS APPOINTMENTS TO SHORT SESSIONS OF LEGISLATURE IN EVEN YEARS.

January 25, 1950.

*Hon. Wm. Preston Lane, Jr.,*
*Governor of Maryland.*

You have requested us to advise you whether you are required by the Constitution to submit nominations of persons appointed by you during the recess of the General Assembly to the Senate at the session which will convene on the first Wednesday of February, next.

Section II of Article II of the Constitution requires:

> "In case of any vacancy during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force 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, or of some other person in his place, shall be made to the Senate within thirty days after the next meeting of the Legislature."

The question becomes important now because by Chapter 497 of the Acts of 1947, the General Assembly proposed amendments to Sections 14, 15 and 52 of Article III of the Constitution. These amendments were ratified at the election held on November 2, 1948, and they are now therefore a part of the Constitution. Section 14 now pro-

vides that the General Assembly shall meet on the first Wednesday of January, 1949, and on the same day in every second year thereafter, and on the first Wednesday in February, 1950, and on the same day of every second year thereafter, and at no other time unless convened by proclamation of the Governor. Section 15 provides, among other things, that the General Assembly may continue in session so long as, in its judgment, the public interest may require for a period of not longer than 90 days in odd years and 30 days in even years. The amendment to Section 52 deals with budget procedure at the even year sessions. Thus, by the amendments proposed in 1947, and later ratified by the voters, meetings of the General Assembly are required to be held in each year, rather than every alternate year as heretofore, and the first of the so-called short sessions of the General Assembly will begin on February 1st next.

In proposing the amendments to provide for annual meetings of the General Assembly, the Legislature did not undertake to alter Section 11 of Article II. Very soon after the State Law Department was organized under the provisions of Chapter 560 of the Acts of 1916, the Attorney General, the late Albert C. Ritchie, was requested by Governor Emerson C. Harrington to advise him if recess appointments were required by the Constitution to be submitted to an extraordinary session of the Legislature which had been called then. The Attorney General said, in part:

> "In my opinion, the 'next session of the Legislature' contemplated by this provision, is the next *regular* session. The Governor is expressly given thirty days after the meeting of the Legislature within which to make his recess nominations, and an extra session may very well not last this long. Indeed, Art. 3, Sec. 15 of the Constitution provides that an extra session 'shall not continue longer than thirty days,' so that the thirty day pro-

vision in Section 11 of Article 2 would be of no effect at all if applied to an extra session.

"It is, therefore, my opinion that your recess appointments should not be sent for confirmation to the coming extra sessions of the Legislature. They should be sent to the regular session of 1918."

2 Opinions of the Attorney General, 358.

In 1935 the Attorney General had occasion to consider this question again, and the earlier opinion was followed. 20 Opinions of the Attorney General, 368.

It is true that the even year sessions of the General Assembly are regular sessions, rather than special or extraordinary ones, but their primary purpose is to deal with fiscal and budgetary matters, rather than to consider all legislative questions which may with propriety be presented at the odd year sessions which may continue for 90 days. This is demonstrated by Section 15 of Article III which provides that:

> "In any of said thirty-day sessions in even years, the General Assembly shall consider no bills other than (1) Bills having to do with budgetary, revenue and financial matters of the State Government, (2) legislation dealing with an acute emergency, and (3) legislation in the general public welfare."

It is true also that nominations of public officers and "bills," as that term is used in the constitutional provision above quoted, are not synonymous. Nevertheless, in amending the Constitution to provide for annual sessions, it is quite clear that the scope of the short sessions is limited, and that it was not the intention of the General Assembly, in proposing the amendments, that the odd year sessions and the even year sessions should parallel the work of each

other. The reasoning of the late Governor Ritchie, as Attorney General, that recess appointments were not required to be submitted to extraordinary sessions of the General Assembly applies with equal force to the even year sessions, because they, like the extraordinary sessions, are limited to a maximum duration of 30 days. Section 11 of Article II of the Constitution requires the submission to the Senate of recess appointments within 30 days after the next meeting of the Legislature. Thus the time within which the Governor is required to submit such nominations and the final day that the General Assembly may meet in even year sessions coincide and, as Attorney General Ritchie observed in his opinion, the session may well continue for less than 30 days, and in that event, the requirement for submitting the nominations would be nugatory.

It is our conclusion, therefore, that the scope and purpose of the even year sessions of the General Assembly, considered in connection with the limitation placed upon the duration of the session, and the time within which nominations of recess appointments must be made, lead inevitably to the conclusion that those nominations must be made only to the 90 day odd year sessions, and that there is no constitutional requirement that you submit them to the Senate within 30 days after the General Assembly convenes on February 1, 1950.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—BILL TO PROVIDE FOR PAYMENT OF BONUS TO VETERANS OF WORLD WAR II MUST SPECIFY THE TAXES TO BE LEVIED TO PAY THE PRINCIPAL AND INTEREST OF THE BONDS AUTHORIZED—SUCH A BILL IS A SUPPLEMENTARY APPROPRIATION BILL AND SUBJECT TO THE BUDGET LAW.

February 8, 1950.

*Hon. Harry T. Phoebus,*
*State Senator for Somerset County.*

You have presented to me a draft of a Bill which has been prepared at your request, and which you contemplate introducing in the Senate during the present Session of the General Assembly. This Bill provides for a bond issue in the amount of $89,998,800, the proceeds of which are to be used for the payment of a bonus to veterans of World War II. You have asked my views on the legality of the proposed measure.

Section 59 of Article III of the Constitution abolished the office of State Pension Commissioner, and provides that the Legislature shall not create such office or establish any general pension system within the State. That provision of the Constitution was held by the Court of Appeals in *Baltimore v. Fuget,* 164 Md. 335, to apply only to military pensions. However, the injunction of Section 59 of Article III does not relate to a bonus bill, such as you propose, because by the ratification by the voters of an amendment to Section 34 of Article III of the Constitution, submitted by Chapter 327 of the Acts of 1924, the General Assembly is authorized, under certain circumstances, to raise funds for the purpose of aiding or compensating citizens of this State who have served with honor their country and State in time of war.

The Bill provides for its submission to the voters at the election in November, 1950, in compliance with the constitutional amendment of 1924.

In one very important respect, the Bill, in my opinion, does not conform to the mandate of the Constitution. Section 34 of Article III provides, among other things, that no debt shall be hereafter created by the General Assembly unless such debt is authorized by a law providing for the collection of an annual tax or taxes sufficient to pay the interest on such debt as it falls due, and to discharge the principal thereof within fifteen years from the time it is contracted. The taxes laid for that purpose shall not be repealed or applied to any other object until the debt and the interest thereon have been fully discharged. Section 12 of the proposed Bill was included therein no doubt for the purpose of complying with the constitutional provision above mentioned, but, in my opinion, it fails to meet its requirements. Section 12 is as follows:

> "AND BE IT FURTHER ENACTED, That there shall be levied and collected an annual tax sufficient to pay the principal and interest on the certificates issued pursuant to the provisions of this Act, as the same shall fall due, agreeable to the requirements of Section 34 of Article 3 of the Constitution of Maryland and to the provisions of Section 28 of Article 81 of the Annotated Code of Maryland, (1939 Edition, as amended). The Governor of Maryland, as required by Section 52, subsection 4 of Article 3 of the Constitution of Maryland, shall include in the Budget submitted to the General Assembly each year, a sum sufficient to meet the payments of interest and principal on the certificates issued pursuant to this Act which will be due and payable during the fiscal year for which that Budget is submitted."

It is quite clear, I think, that a mere general requirement, such as that set forth in the above Section, that a tax be levied in an amount sufficient to pay the principal and interest of the debt incurred, is not in keeping with the Con-

stitution, in that it does not provide "for the collection of an annual tax or taxes sufficient to pay the interest on such debt as it falls due, and also to discharge the principal thereof within fifteen years." I know of no instance in which an Act of the General Assembly creating a debt of the State and authorizing the issuance of bonds has not itself specified the taxes to be levied and collected to satisfy the debt as it matured and, in my view, anything short of that is beyond the bounds of the Constitution.

In addition, there must be considered the effect of Section 52 of Article III of the Constitution, which provides the budget system of the State. Paragraph (2) of that Section states that every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation. Paragraph (8) provides that neither House shall consider other appropriations until the Budget Bill has been finally acted upon, and that no other appropriation shall be valid except as therein set forth. The first condition is that every appropriation bill shall be limited to some single work, object or purpose. The second is: "Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made (by) a tax, direct or indirect, to be levied and collected as shall be directed in said bill."

There can be no doubt that a bond bill, such as you propose, is a Supplementary Appropriation Bill. See *Bickel v. Nice*, 173 Md. 1, which involved the bond issue for the State Office Building.

The purposes of the budget amendment to the Constitution are too well-known to require elaboration. As Mr. Hooper S. Miles puts it in his booklet, "The Maryland Executive Budget System," published in 1942:

> "The old method often witnessed 'log-rolling' or 'you help me and I'll help you' tactics among many of the members of the Legislature in their

> efforts to insure passage of the particular appropriations in which they had some selfish or political interest. It was not unusual for excessive appropriations to result from such tactics . . ."

The budget amendment was drafted by a Special Commission designated as "The Commission on Economy and Efficiency on a Budget System," headed by the late Dr. Frank J. Goodnow, President of Johns Hopkins University. In its report submitted to Governor Harrington in 1916, the Commission summarized the objectives of the then proposed and now existing amendment, and described one of its objectives in the following language:

> "To permit the Legislature to make provision for any purpose not included in the Governor's plan, on the condition that *it* provide also for the revenue, which the accomplishment of its purpose necessitates."

It is obvious, both from the language of Section 52 itself, and the statement of the Commission which drafted that language, which the people of Maryland later adopted, that in a supplemental appropriation bill, the obligation is upon the Legislature to provide the revenues, and that this obligation cannot be discharged by general language directing the Governor to include sufficient funds in the Budget. The Legislature must provide the specific tax or taxes, which are to accomplish the purpose. As we have said, this requirement is also spelled out by Section 34. It is reiterated by Section 52. Section 52 itself provides that nothing therein shall in any manner affect the provisions of Section 34.

In view of what I have set forth, it is my opinion that the bill as drafted is unconstitutional in that it, itself, fails to provide for the collection of a specific tax or taxes to pay the principal and interest of the debt, as required by the constitutional provisions.

HALL HAMMOND, *Attorney General.*

# CORPORATIONS

CORPORATIONS—CHARTER GRANTED BY THE LEGISLATURE PRIOR TO ADOPTION OF SECTION 48 OF ARTICLE III OF THE MARYLAND CONSTITUTION MAY BE AMENDED BY SPECIAL ACT OF THE LEGISLATURE OR UNDER GENERAL PERMISSIVE CORPORATION LAWS.

July 28, 1950.

*Mr. Richard F. Cleveland, Chairman,*
*Board of Visitors and Governors,*
*St. Johns College.*

You advise us that the Charter of St. Johns College in Annapolis was granted by Chapter 37 of the Acts of the General Assembly of 1784. You state that the Charter obviously contains much obsolete and irrelevant matter and that the Board of Visitors and Governors believes that amendments to the Charter are highly desirable.

You ask whether the Charter may be amended under the general permissive corporation statutes of this State, contained in Article 23 of the Code, without the necessity of any direct action by the General Assembly.

The question you present concerns the proper interpretation to be afforded Section 48 of Article III of the Constitution of Maryland, the pertinent portions of which are as follows:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general Laws exist, providing for the creation of corporations of the same general character as the corporation proposed to be created * *."

You will note that by its terms, Section 48 relates to the formation of corporations as distinguished from amendments to the charters of corporations theretofore granted. Such is the interpretation which has been placed upon Section 48 by the Maryland cases. In *Hodges v. Baltimore Union Passenger Ry. Co.,* 58 Md. 603 (1882), the Legislature in 1882 undertook to amend the Charter of the Baltimore Union Passenger Railway Company by granting it an additional franchise. The amendatory Act was assailed on the ground that it violated Section 48 of Article III of the Maryland Constitution. In holding that the Legislature could constitutionally amend the Charter of a corporation granted before or after the adoption of Section 48 of Article III of the Maryland Constitution, the Court said:

> "* * * The right to amend the charters of all corporations created under the general corporation laws of this State is expressly reserved to the Legislature. * * * We find nothing in the Constitution to justify the construction that such amendments must be made by general laws operating alike on all corporations. One corporation may need to have its powers enlarged, while it may not be advisable or necessary to confer such powers on other corporations. And besides, the objects and purposes of corporations differ so widely that it would hardly be practicable to provide by general law for such amendments as they may from time to time require. From the adoption of the Constitution to the present, the Legislature has exercised this power by special acts, and the rights and privileges conferred on corporations by these acts have been repeatedly before this court for determination, but the power of the Legislature to make such amendments has never been questioned."

To like effect is the case of *State v. Title Guarantee & Trust Co.,* 168 Md. 376 (1935). There the Court sustained the validity of a series of special acts of the General As-

sembly amending the Charter of Title Guarantee & Trust Company against the contention that they violated Section 48 of Article III.

Of course, any special act adopted by the General Assembly amending the charter of a corporation is subject to the limitation of Section 33 of Article III which states that the General Assembly shall pass no special law for any case for which provision has been made by an existing general law. See *Hodges v. Baltimore Union Passenger Ry. Co., supra,* and *State v. Title Guarantee* & *Trust Co., supra.* It should be noted, however, that this State has no particular permissive statutes covering all features of educational corporations of the college or university type and that, in general, the Court of Appeals, in applying the prohibition of Section 33 of Article III to the power of the General Assembly to amend charters of corporations, has been liberal in sustaining the General Assembly's power.

Thus it would appear that the General Assembly, subject to the limitation of Section 33 of Article III of the Constitution, is possessed of power to pass a special act amending the Charter of St. Johns College. It does not follow, however, that this is the only method by which the Charter may be amended, for it clearly appears that the permissive statutes under which charters of corporations may be amended are available to the Board of Visitors and Governors of St. Johns College. Section 1 of Article 23 of the Annotated Code of Maryland (1939 Ed.) states that: "Except as therein otherwise provided, the sections of this Article, numbered 1 to 37, 61 to 63 and 66 to 104, all inclusive, shall * * * apply to and govern all corporations then existing, and thereafter formed * * *." The numbers referred to in Section 1 refer to the numbers of sections contained in the Annotated Code of Maryland (1912 Ed.) and when these numbers are transposed to our current numbering system, they include all of the presently existing sections relating to the amendment of the charters of non-stock corporations.

Thus, by the terms of Section 1 of Article 23, the provisions of Article 23 relating to the amendment of charters are available to the Board of Visitors and Governors of St. Johns College. In this connection, it has been held in *The Williamsport & Hagerstown Turnpike Co. v. Startzman*, 86 Md. 363 (1897), and *State v. The Consolidation Coal Co.*, 46 Md. 1 (1877), that similar statutes may be applied to corporations existing before their enactment in the absence of legislative interference with irrepealable contracts. Since we understand that the Board of Visitors and Governors of St. Johns College desires to avail itself of this authority to amend the Charter of St. Johns College, there would be no constitutional objection.

We conclude, therefore, that the Charter of St. Johns College may, subject to the limitations of Section 33 of Article III, be amended by a special act of the General Assembly, or may be amended under the permissive corporation laws of this State.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## CRIMINAL LAW

CRIMINAL LAW—SENTENCE—SENTENCES IMPOSED BY DIFFERENT COURTS RUN CONCURRENTLY UNLESS THE JUDGMENT IN THE LATER CASE PROVIDES OTHERWISE.

April 15, 1950

*Mr. Harold E. Donnell,*
*Superintendent of Prisons.*

We have your letter with enclosures relative to William Edward Beal who, on November 27, 1944, was sentenced to be confined in the Maryland House of Correction for a term of six years by the Criminal Court of Baltimore. Thereafter, Beal escaped and while out of the institution on escape, he was apprehended and tried for burglary in the Circuit Court for Allegany County, and on April 26, 1945, was sentenced by that Court to be confined in the same institution for a period of five years. Subsequently, he was indicted by the Grand Jury for Anne Arundel County for the crime of escaping from the Maryland House of Correction, and on April 23, 1946, was sentenced therefor to serve a term of two years "sentence in this case to run concurrently with the five-year sentence which you are now serving in the Maryland House of Correction." The question which you have raised is whether the two sentences first mentioned run concurrently or consecutively.

It appears from an enclosure with your letter that on March 9, 1950, Beal had a hearing on a petition for writ of habeas corpus before the Honorable Robert France, one of the Judges of the Supreme Bench of Baltimore City, that following the hearing, Judge France remanded him to the House of Correction, and that Judge France indicated that if Beal was held in custody after the termination of the original six-year sentence imposed by the Crim-

inal Court of Baltimore, another petition for a writ of habeas corpus would be entertained and that he would discharge the prisoner.

There are several rulings of former Attorneys General that sentences imposed by different courts at different times operate consecutively, rather than concurrently. 14 Opinions of the Attorney General, 96, 15 Opinions of the Attorney General, 88, 18 Opinions of the Attorney General, 233. Those rulings were departed from in 20 Opinions of the Attorney General, 297. There, two sentences were imposed on the same day by two Magistrates in Worcester County. Neither sentence referred to the other. It was held that the sentences ran concurrently rather than consecutively. Reference was made to 14 Opinions of the Attorney General, 96, and 18 Opinions of the Attorney General, 233, and it was observed that the facts upon which those opinions were based were similar to those then being considered. It was stated that the views of the majority of the courts were that sentences under such circumstances did not run consecutively.

In 15 Am. Jur., page 126, it is said:

> "While there is some authority to the effect that sentences imposed by different courts run successively even though the later sentence does not so state, ordinarily, where a person under sentence for a crime is convicted and sentenced for another offense in a different court, the sentences run concurrently unless the judgment in one stipulates that imprisonment shall commence at the expiration of the imprisonment upon the other conviction or a statute provides a different rule.
>
> "Sentences are not cumulative merely because the imprisonments thereunder are made successive in point of time, if the prisoner is convicted of separate offenses under separate informations and

> receives a separate definite sentence for each offense."

It is our view that this is an accurate statement of the law and consequently we prefer to follow the ruling in 20 Opinions of the Attorney General, 297, rather than the earlier ruling.

In *Rigor v. State*, 101 Md. 465, Rigor was indicted by the Grand Jury for Baltimore City upon the charge of assault with intent to kill. Before being brought to trial on that indictment, he was convicted of another charge in the Circuit Court for Baltimore County and was sentenced to be confined in the Maryland Penitentiary for a term of five years. A writ of habeas corpus was issued for his production in the Criminal Court of Baltimore for trial on the charge which was pending in that Court, and upon his trial there, he was convicted and sentenced to be confined in the Maryland Penitentiary for a term of nine years, to begin upon the expiration of the sentence previously imposed by the Circuit Court for Baltimore County. In disposing of his contention that the second sentence was improper, the Court of Appeals, speaking through Chief Judge McSherry, said:

> ". . . If a Court exercising jurisdiction in criminal cases may lawfully impose a sentence to begin in the future upon the expiration of a prior sentence, it can make no possible difference whether the prior sentence was imposed by the same or some other Court deriving its power from the same authority. Jurisdiction to inflict cumulative punishment is dependent, not on the accident that the offender has been convicted twice or oftener before the same tribunal, but upon the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate and, therefore, cumulative penalties. . . ."

Later in the opinion it was said:

> ". . . As the warden of the penitentiary is required by law . . . to keep a record of the terms for which all convicts are sentenced, it would have been sufficient if the Judge of the Criminal Court in imposing the sentence had directed that it should begin upon the expiration of the sentence inflicted by the Circuit Court for Baltimore County without further reference to the prior case."

While, of course, the question whether the second sentence was to operate consecutively or concurrently with the first was not before the court because that question was put at rest by the specific language of the Criminal Court of Baltimore in providing that it was to run consecutively, the language of the Court of Appeals is significant and it may be argued that it indicates that for successive sentences to run consecutively, they must be so imposed. We have found no case in the Court of Appeals which deals expressly with the question which you have presented, but as stated above, we think the authorities which we have cited, lead to the conclusion that sentences imposed by different courts at different times run concurrently unless the later sentences provide to the contrary.

It follows, therefore, in our opinion that the five-year sentence which was imposed on Beal on April 26, 1945, by the Circuit Court for Allegany County runs concurrently with the sentence which he received previously in the Criminal Court of Baltimore. The copies of the docket entries which you have submitted to us do not disclose a contrary intention, and there is no statute in this State requiring a different interpretation. The sentence which was imposed by the Circuit Court for Anne Arundel County provides, of course, that it is to run concurrently with the term he was then serving, hence there is no question concerning it.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

DEPARTMENT OF CORRECTION—STATUTE AUTHORIZING DIMINUTION OF SENTENCES FOR GOOD BEHAVIOR AND EXCEPTIONAL INDUSTRY IS APPLICABLE WHILE PERSONS ARE IN PENAL INSTITUTIONS AND DOES NOT APPLY WHILE PRISONERS ARE CONFINED IN A STATE HOSPITAL FOR TREATMENT.

August 30, 1950.

*Mr. Harold E. Donnell,*
*Superintendent of Prisons,*
*Department of Correction.*

We have your letter in which you ask if the statute providing for deductions from sentences of imprisonment, allowed for good behavior and exceptional industry, is applicable in cases where prisoners are declared to be insane and, as a result thereof, they are transferred from penal institutions to State hospitals which care for and treat insane persons.

Section 770 of Article 27 of the Code, as amended by Chapter 65 of the Acts of 1950, provides that each prisoner "in any of said institutions" shall be entitled to a diminution of the period of his confinement to the extent therein mentioned for good behavior and for exceptional industry, application and skill in the performance of the work assigned to him. That Section appears in the Article of the Code denominated "Crimes and Punishments," under the sub-title "Department of Correction." Throughout that sub-title reference is made to the various penal institutions of the State, and that the institutions referred to in Section 770 are the penal institutions is clear, we think. For instance, by Section 763, it is provided that the Board of Correction "shall have the control and management of the financial affairs of said institutions." Section 769 refers to the power of the Board of Correction to make rules and regulations for the maintenance, discipline and conduct "of institutions . . . by this sub-title placed under its super-

vision or control . . ." We think it is likewise those same institutions to which Section 770 applies.

Inasmuch as time deducted from a sentence by reason of good behavior is a benefit conferred by the State and is entirely dependent upon statute, 41 *Am. Jur.* 914, 916, it follows, in our opinion, that Section 770 of Article 27 of the Code does not authorize the reduction of any part of a sentence which is served in a hospital for insane persons, notwithstanding the fact that persons, while undergoing treatment at said hospitals, are guilty of no violations of the rules thereof and that they perform the tasks which are assigned to them.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## DEPARTMENT OF MENTAL HYGIENE

DEPARTMENT OF MENTAL HYGIENE—COMMISSIONER OF MENTAL HYGIENE MAY TRANSFER PERSONNEL BETWEEN MENTAL HOSPITALS WITHOUT REGARD TO MERIT SYSTEM LAW—COMMISSIONER MAY, HOWEVER, PROPERLY COMPLY WITH SPIRIT OF LATTER.

August 1, 1950.

*Dr. Clifton T. Perkins, Commissioner,*
*State Department of Mental Hygiene.*

You advise that the Eastern Shore State Hospital is facing a very serious problem in regard to professional care and treatment for sick people. Efforts to obtain voluntary and cooperative help from other State mental hospitals has not been productive, and a situation constituting an actual emergency has arisen at the Eastern Shore State Hospital.

In view of these facts, you ask if you have the authority to transfer an employee from another State mental hospital to the Eastern Shore State Hospital for either a temporary or permanent period, provided that the acting heads of the institution from which the transfer is made and of the Eastern Shore State Hospital agree to such transfer.

The authority conferred on you to transfer personnel among the various State mental hospitals is contained in Section 20 of Article 59 of the Annotated Code, as amended by Chapter 685 of the Acts of 1949. That Section states that Spring Grove State Hospital, Springfield State Hospital, the Eastern Shore State Hospital, Crownsville State Hospital and Rosewood State Training School shall exercise their functions under the supervision, direction and control of the Department of Mental Hygiene. The Section provides that the appointment of superintendents for each

of these hospitals shall be made by the Commissioner of Mental Hygiene upon recommendation of the Advisory Board, and then states:

> "All other appointments of personnel attached to said institutions shall be made by the Superintendent thereof under the provisions of the Merit System Law, subject to transfer from one institution to another by the Department of Mental Hygiene, provided the Superintendents of the respective institutions agree to the transfer and provided that no reduction in salary is made."

You will note that by a further reading of Section 20, it directs the appointment of personnel, other than the Superintendents, in accordance with the provisions of the Merit System Law. An exception is made in the case of transfers from one institution to another and, as we view the plain meaning of Section 20, such transfers need not be made in accordance with the Merit System Law.

The lack of legal compulsion to comply strictly with the Merit System Law does not necessarily act as a deterrent from complying with the spirit of that law. The Merit System Law, by Section 18 of Article 64A of the Annotated Code of Maryland (1939 Ed.), authorizes the Employment Commissioner to provide by rule for the transfer of employees. Pursuant to that grant of authority, the Employment Commissioner has adopted Rule 46 which states, *inter alia,* that the transfer of an employee in the Classified Service to another position in the Classified Service may be made as follows:

> "Any transfer of an employee involving a change in his place of residence, a change of organization, a change from one class to another, other than a demotion or a promotion, or an increase or decrease in the rate of compensation may be made only upon the recommendation of the ap-

> pointing authority or authorities concerned, approved by the Commissioner . . ."

Since the procedure prescribed by Rule 64 differs from the conditions required by Section 20, in that the former includes all of the latter as well as the necessity for approval of the Employment Commissioner, we believe that it would be wise administration of your functions under Section 20 to obtain the approval of the Employment Commissioner to any proposed transfer notwithstanding that we conclude, as a matter of law, that such approval is not a condition precedent to its exercise.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

# ELECTIONS

ELECTIONS—SUPERVISORS OF ELECTIONS MAY ESTABLISH NEW PRECINCTS AND DESIGNATE THEM BY A NUMBER AND LETTER OF THE ALPHABET.

February 14, 1950.

*Mr. Leo M. Welsh, President,*
*Board of Supervisors of Elections*
*of Baltimore City.*

You have informed us that the Board of Supervisors of Elections of Baltimore City contemplates establishing new election precincts within various wards, and you have asked if you may designate such precincts by number, with a letter following, for example, 8A. Otherwise, you state, it will be necessary to renumber many of the precincts which will not be affected in any other way by the subdivision which you now propose to make.

Section 656H of Article 4 of the Code of Public Local Laws (1930 Ed.) provides, among other things, that your Board shall divide the wards of Baltimore City into a suitable number of election precincts.

Section 11 of Article 33 of the Annotated Code (1947 Supp.) authorizes the Supervisors of Elections of the several Counties and Baltimore City, "whenever in their judgment and discretion it shall be expedient for the convenience of the voters so to do," to subdivide any election district in any of the respective Counties or any election precinct in said City, and to designate additional polling places therein. Notice, of course, of such action is required to be given in accordance with the requirements of Section 10 of Article 33.

We know of no statute which requires such precincts to be numbered without additional designation by letters of the alphabet, and in our opinion, the plan which you propose to adopt is permissable. You inform us that unless you do adopt this plan, it will require re-numbering an entire ward in the event the first precinct is subdivided, and this, you state, will entail considerable work entirely out of proportion to the benefit which will be accomplished. In view of these considerations, we think it is well within your power to designate the new precincts in the manner suggested in your letter.

You are no doubt familiar with the requirements of Section 11 that notice of the boundaries of the additional precincts and the location of the additional polling places shall be given, as provided in Section 10 of the Election Laws. Those and the other provisions of that Section should be followed strictly.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

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ELECTIONS—REGISTRATION OF VOTERS—SENATE BILL NO. 48, 1950 SESSION, AUTHORIZING REGISTRATION OF VOTERS AT OFFICES OF SUPERVISORS, IS SUBJECT TO THE RESTRICTION OF SECTION 25 OF THE ELECTION LAWS.

March 24, 1950

*Hon. Wm. Preston Lane, Jr.,*
*Governor of Maryland.*

Senate Bill No. 48, which was passed by the General Assembly at its 1950 Session, has been presented to your for your consideration. The purpose of the bill is to amend Section 16 of Article 33 of the Code, as that Section was

amended by Chapters 150 and 220 of the Acts of 1949 by adding a new subsection thereto. That section now authorizes the Boards of Supervisors of Elections of the several Counties to provide for the registration of voters at their respective offices in the County seats on such days and during such hours as they shall determine, except in Prince George's County, where the Supervisors are authorized to provide for the registration of voters at such additional places as they deem advisable or necessary, and in Harford County, where it is mandatory that the registration of voters be conducted at least one day in each month.

Senate Bill No. 48, if approved by you, will add to the authority conferred by Section 16 by providing, in effect that in any County where the office of the Supervisors of Elections keeps one or more full time employees on regular duty ". . .the Supervisors and any of said employees upon request at any time the said office is open during the usual hours of business, shall permit any person to register as a voter, or to transfer, affiliate or change his registration, subject always to the requirements of Section 25 of this Article . . ." This bill was amended in the General Assembly to provide that no person shall be registered, affiliated, transferred, nor shall his party affiliation be changed, unless there are present two persons, either employees or members of the Board, and not of the same political party, who shall for the purpose of this sub-section constitute a Board of Registry.

The question which has arisen results from the inclusion in the bill of the language that a person may register, transfer, affiliate or change his party registration "at any time", and "subject always to the requirements of Section 25 of this Article. . . ." Section 25, as amended by Chapter 62 of the Acts of the Special Session of 1948, provides, among other things, for the closing of the books during specified periods prior to and following all elections and is at present applicable only to Baltimore City and those Counties in which systems of permanent registration have been adopted.

This result flows from the language of Section 20 of Article 33, which states that:

> "The provisions of Sections 12, 13 and 15 to 19, inclusive, shall not apply to Baltimore City, Montgomery County and Washington County except as specifically provided, but a system of permanent registration as hereinafter provided in Sections 22 to 31, inclusive, of this Article shall be followed. Any other county in the State may elect to be governed by said Sections 22 to 31, inclusive, when such action is recommended by the Board of Election Supervisors and approved by the County Commissioners thereof . . ."

In those Counties in which systems of permanent registration are not in force, the registration of voters is governed by Sections 15 and 16 of the Election Laws. The former provides for the registration of voters in the precincts on the Tuesday preceding the primary election (except in Prince George's County, where it is held on the Tuesday of the fourth week preceding that election) and on the Tuesdays which are five weeks and four weeks, respectively, preceding a general election.

The inquiry here is when may persons who are eligible for registration present themselves for that purpose under the provisions of Senate Bill No. 48, if it is approved by you. The use of the words "at any time", has caused some concern because if the only limitation imposed by the pending measure is contained in that phrase, there would seem to be no reason why a person may not call at the office of the Board of Supervisors on the day preceding an election and register as a qualified voter. In most, if not all the Counties throughout the State, it is the prevailing practice to deliver the registration books, ballot boxes and other paraphernalia to the Judges of Elections some two or three days prior to the election. Of course, it would be impossible for the Supervisors and their employees to register an applicant

after the books have left their custody and are in possession of the Judges of Elections.

It is our view that the phrase, "subject always to the requirement of Section 25" restricts the exercise of the powers which will be conferred upon the Supervisors of Elections if Senate Bill No. 48 is approved by you, since it necessarily imports the time limitations of Section 25 into the new law to the same extent as if they were set forth in full therein. It is not an unusual device to restrict the operation of one law by reference to another. Its purpose is to incorporate into the new law the provisions of the other statute by reference and adoption, and thereby avoid encumbering the statute books by unnecessary repetition. The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated therein in full. 50 Am. Jur. page 57, et seq.

In *Engel v. Davenport,* 271 U.S. 333, 70 L.Ed. 813, 46 S. Ct. 410, the Court said:

> "The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. . . . It brings into the later act 'all that is fairly covered by the reference' . . .; that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act. It is clear that the provision of the Employers' Liability Act as to the time within which a suit may be instituted, is directly applicable to the subject-matter of the Merchant Marine Act and covered by the reference. In the Panama R. Co. Case, P. 392, it was held that the contention that the Merchant Marine Act did not possess the uniformity in operation essential to its validity as a modification of the maritime law, was unfounded, since the Employers' Liability Act, which it adopted, had a uniform operation, which could not be deflected from 'by local statutes or

local views of common-law rules.' The period of time within which an action may be commenced is a material element in such uniformity of operation. And plainly, Congress, in incorporating the provisions of the Employers' Liability Act into the Merchant Marine Act, did not intend to exclude a provision so material, and to permit the uniform operation of the Merchant Marine Act to be destroyed by the varying provisions of the state statutes of limitation.

"We conclude that the provision of Sec. 6 of the Employers' Liability Act relating to the time of commencing the action, is a material provision of the statutes 'modifying or extending the common-law right or remedy in cases of personal injuries to railway employees,' which was adopted by and incorporated in the Merchant Marine Act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control in an action brought in a state court under the Merchant Marine Act, regardless of any statute of limitations of the state. . . ."

Upon these authorities we conclude that if Senate Bill No. 48 is approved by you, the restrictions of Section 25 will be applicable thereto to the same extent as if they had been set forth therein in full.

HALL HAMMOND, *Attorney General.*

ELECTIONS — DECLARATION OF INTENTIONS — FEDERAL RESERVATIONS—PERSON COMING TO MARYLAND FROM ANOTHER STATE NEED NOT PROVE THAT HIS REGISTRATION IN THE OTHER STATE HAS BEEN CANCELED—PERSONS RESIDING ON LAND OVER WHICH UNITED STATES HAS TAKEN EXCLUSIVE JURISDICTION MAY NOT VOTE, BUT IF STATE RETAINS JURISDICTION OVER LAND ACQUIRED BY UNITED STATES, PERSONS LIVING THEREON MAY REGISTER AND VOTE.

June 8, 1950.

*Mr. William O. E. Sterling, Jr.,*
*Counsel, Board of Supervisors of Elections for*
*St. Mary's County.*

In your capacity as the attorney for the Board of Supervisors of Elections for St. Mary's County, you have asked if it is necessary, in view of the repeal of the Declaration of Intentions Act, for a person to present a certificate from the proper official of another State where he formerly voted, showing that his name has been removed from the voting books thereof. The Declaration of Intentions Act did not prescribe the qualifications of voters. It dealt merely with the evidence which was necessary to establish the requisite qualifications, *Pope v. Williams,* 98 Md. 59, 69. With the repeal of that law by Chapter 421 of the Acts of 1949, the production of a certificate that the prospective voter declared his intention to become a citizen of Maryland one year before the election at which he seeks to vote is rendered unnecessary, and the proof of citizenship and residence may be established by other evidence.

It seems to us that a certificate that the person's name has been stricken off the books in another State is hardly an essential element of the proof required, because it is entirely possible that a voter may have his name stricken off the books of another State, although he has resided in Maryland for less than the period of one year, required

by our Constitution. It is our view that the inquiry and proof in this State should go to the duration of the residence here, rather than the appearance or non-appearance of the applicant's name on the registration books of the State from which he removed.

You asked if persons residing at the United States Naval Air Station in St. Mary's County and also upon the area taken over by the United States Navy from the Federal Housing Administration are entitled to vote in Maryland.

We are informed by the Archivist at the Hall of Records that the United States took jurisdiction of the Naval Air Station at Cedar Point in St. Mary's County on June 19, 1942. It appears, therefore, that persons residing on that reservation are not citizens of Maryland and are not eligible to vote in elections held in this State. With respect to the area which was taken over by the United States Navy from the Federal Housing Administration, it is our understanding that on March 17, 1950, the Federal Government did undertake to assume jurisdiction thereof, but in view of the enactment of Chapter 687 of the Acts of 1943, Code Article 96, Section 41, we think that the State retains its jurisdiction over this area and that, therefore, the persons residing thereon, if otherwise qualified, may register and vote in elections held in Maryland. See 33 Opinions of the Attorney General, 202.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ELECTIONS—TIME FOR FILING WITHDRAWALS OF CERTIFICATES OF CANDIDACY AND FOR FILING NOMINATING PETITIONS.

August 2, 1950.

*Miss Vivian V. Simpson,*
*Secretary of State.*

We have your letter of August 1st in which you ask us to prepare instructions for the guidance of voters for the coming Primary Election, for the political subdivisions where paper ballots are used, as well as for Baltimore City and the Counties in which voting machines are used. The instructions are attached hereto.

You ask us to advise you of the dead line for the filing of withdrawals of certificates of candidacy, as well as the time within which nominating petitions may be filed. On March 2, 1949, in a letter addressed to your predecessor, Mr. Bertram L. Boone, II, we specified the dates for filing withdrawals and nominating petitions. However, in view of the enactment of Chapter 1 of the Acts of the Extraordinary Session of 1950, we presume you deemed it necessary to present this question anew.

The Act of the Extraordinary Session of 1950 changed the date of the Primary Election from September 11th to September 18th, provided for a new precinct registration in Baltimore City, fixed the pre-General Election Registration of Voters in Baltimore City, specified that the pre-Primary Registration days provided for by Section 15 of Article 33 should be determined as if the Primary Election were held on September 11th, and provided that, in the Counties, the period during which the registration books shall be closed under Section 25, preceding the Primary Election, shall be determined as if the Primary Election date remained at September 11th. The Act then provided that "All provisions of this Article shall remain in full force

and effect except as otherwise expressly provided in this Section."

It is our view, therefore, that the provisions of Section 47 remain unaltered by the recent legislation, and that under its provisions, a candidate for nomination in the coming Primary may withdraw his certificate of candidacy at least 30 days before September 18th. Therefore, the final date for withdrawing a certificate of candidacy is August 19, 1950.

Similarly, Section 44 of Article 33 of the Code, as amended by Chapter 472 of the Acts of 1949, was not altered by Chapter 1 of the Acts of the 1950 Special Session. It requires nominating petitions to be filed not later than 15 days before the day on which the Primary Election is held or should be held under the Primary Election Law. September 3rd, which is the 15th day before the Primary, falls on Sunday and, of course, no question could arise about the timely filing of a petition deposited in your office prior to that date. However, as pointed out in our letter of March 2, 1949, and in our opinion addressed to Mr. Boone under date of February 26, 1948 (Volume 33 of the Opinions of the Attorney General, page 166), we expressed doubt that the courts would invalidate a petition filed on the Monday following. September 4th is Labor Day, a legal holiday, and consequently it is probable that such a petition filed in your office on Tuesday, September 5th, would be held by the courts to have been filed within the time required by law, especially in view of the provisions of Section 2 of Article 94 of the Code (1947 Supp.), which provides that: "The last day of the period so computed is to be included unless: (1) It is a Sunday or legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday or a holiday; . . ."

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ELECTIONS—INCREASE IN POPULATION WILL NOT PERMIT COUNTIES TO ELECT EXTRA DELEGATES IN GENERAL ASSEMBLY UNLESS CENSUS FIGURES ARE MADE FINAL AND THE REQUIRED PROCLAMATION OF THE GOVERNOR IS ISSUED PRIOR TO GENERAL ELECTION.

August 3, 1950.

*Mr. Ralph G. Hoffman,*
*Attorney to Supervisors of Elections*
*for Carroll County.*

We have your letter in which you inform us that upon the basis of the population of Carroll County, as shown by the preliminary figures of the 1950 census, it appears that its representation in the General Assembly will be increased from four Delegates to five Delegates. You ask if the additional Delegate will be elected at the election this year or whether that change will be postponed to the election in 1954.

Section 4 of Article III of the Constitution provides for the representation of Baltimore City and the several Counties in the General Assembly based, of course, upon their population. Section 5 of that Article provides that after each national census or any State enumeration it shall be the duty of the Governor to arrange the representation in the House of Delegates in accordance with the apportionment provided for in the Constitution and to declare, by proclamation, the number of Delegates to which each County and the City of Baltimore shall be entitled.

The answer to your inquiry depends largely, we think, upon the finality of the population figures. In order to apprise ourselves of their status, we have communicated with the Director of the Bureau of the Census in this connection and he has informed us that: "It is expected that the final population figures for Counties in Maryland will become available during the early months of 1951, but we are un-

able to give you a definite date at this time." In view of the fact that the population figures released up to this time are preliminary only and that the final figures will not be known or available until 1951, we are inclined to the view that the Governor should not undertake to issue his proclamation until the Bureau of the Census has released the official figures on the population of the several political subdivisions of this State.

It follows, therefore, that the number of representatives in the General Assembly of the several Counties will not be altered until after the official returns of the enumeration are received and the proclamation of the Governor has been issued, and, unless those events occur prior to the November election, the number of Delegates to which each County will be entitled will be the same as the number elected in 1946.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## EMPLOYEES' RETIREMENT SYSTEM

EMPLOYEES' RETIREMENT SYSTEM—REDUCTION OF DISABILITY PAYMENTS BECAUSE OF COMPENSATION FROM EMPLOYMENT CANNOT BE CONTINUED WHEN BENEFICIARY ATTAINS AGE OF 60.

January 17, 1950.

*Mr. J. P. Mannion, Director,*
*Employees' Retirement System.*

One of the members of the Employees' Retirement System was retired for disability as of September 1, 1947. We are not advised whether the retirement was caused by ordinary disability or accidental disability, but, as will hereinafter appear, that fact is immaterial. At the time of his retirement, he was less than 60 years old, and disability payments were begun, computed as prescribed by the applicable provisions of Article 73B.

In February, 1948, the portion of the disability allowance paid by the State, as distinguished from the actuarial equivalent of the member's accumulated contributions at the time of his retirement, was reduced, and again reduced a further amount in 1949, because of the fact that the retired member's earnings in private employment exceeded the difference between his average annual compensation at the time of retirement and the amount of his annual retirement allowance. These reductions were made pursuant to the provisions of Section 7(7) of Article 73B of the Annotated Code of Maryland (1947 Supp.).

The retired member has now attained the age of 60 years, and the Board of Trustees of the Employees' Retirement System asks us to advise them concerning their power to restore full disability payments to this retired

member, because of that fact, notwithstanding that there has been no change in the amount of earnings derived by the retired member from outside sources.

We believe that the answer to the question which you present is found in an analysis of the provisions of Section 7(7) of Article 73B. That Section provides with respect to members retired for ordinary disability, or for accidental disability that, *in case of a member who has not yet attained the age of* 60, such member should undergo a medical examination each year during the first five years following retirement, and once in every three year period thereafter. Should the Medical Board report and certify to the Board of Trustees that any disability beneficiary is engaged in, or about to engage in a gainful occupation, paying more than the difference between his retirement allowance and his average final compensation, and should the report be adopted by the Board of Trustees, then the pension part of the disability allowance shall be reduced to an amount which, together with the annuity and the amount earnable by the retired member, shall equal the amount of his average final compensation.

From these provisions, it is apparent that the Board of Trustees, in the case of retired members who have not attained the age of 60, has the authority, and under certain circumstances is required, to have retired members re-examined to determine their physical ability to perform remunerative employment. Upon the proper finding that the recipient of a disability allowance is or can perform remunerative employment to the extent that his income from such employment, coupled with his retirement allowance, exceeds the compensation he received while in State employment, the pension part of the retirement allowance, that is the part paid solely by the State, is required to be reduced. Since these provisions relate only to retired members who have not attained the age of 60 at the time of retirement, and since there are no provisions relating to the reduction of the pension portion of a disability benefit for

members who have attained the age of 60 at the time of retirement, it seems perfectly clear that the Board of Trustees has no authority to reduce the pension portion of a disability benefit when the retired member has attained the age of 60 prior to disability retirement. In the case of such members, the Legislature, by the absence of legislation, has, in effect, created a conclusive presumption that a member, retired for disability after attaining the age of 60, is unable to engage in other remunerative employment.

Should the pension part of the disability allowance of a retired member who is retired for disability before attaining the age of 60 be reduced after one of the examinations provided for, and should his earning capacity be later changed, the law provides, "the amount of his pension may be further modified, provided that the new pension shall not exceed the amount of the pension originally granted nor an amount which, when added to the amount earnable by the beneficiary together with his annuity, equals the amount of his average final compensation."

It is this latter quoted phrase which lies at the heart of your inquiry. Specifically the problem is, in the case of a beneficiary who attains the age of 60 after disability retirement, does the power to modify further the pension portion of a disability retirement allowance depend upon a determination that earning capacity is changed, or may it be exercised solely because the retired member has subsequently attained the age of 60?

Inasmuch as the provisions of Section 7(7) relating to the mechanics for a determination of physical ability to work of a member retired for disability depend solely upon the fact that the member has not yet attained the age of 60, the Legislature has provided no machinery whereby the pension portion of a disability retirement allowance can be increased or decreased after the member has attained the age of 60. From this absence of legislation necessary to administer a construction of the law that after the age of 60

the same regulatory power over the pension portion of a disability retirement allowance exists as in the case of a member retired for disability who has not attained the age of 60, we believe it can be concluded that the Legislature did not intend, when a member retired for disability attains the age of 60 after his retirement, that his disability allowance should be decreased in the manner provided in Section 7(7) of Article 73B. In short, we believe that a member who retires for disability before attaining the age of 60 is in exactly the same status when he attains the age of 60 as a member who had attained the age of 60 at the time he retired, namely, that he should receive the maximum disability allowance payable at the time of retirement.

You are advised therefore that the Board of Trustees has the obligation and duty of restoring the retired member to whom you refer to his full disability allowance when he attains the age of 60, regardless of his ability to produce income from other remunerative employment.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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EMPLOYEES' RETIREMENT SYSTEM—MEMBERS OF—EMPLOYEES OF DEPARTMENT OF EMPLOYMENT SECURITY WHO BECAME SUCH WHEN THAT DEPARTMENT WAS UNDER FEDERAL CONTROL NOT ENTITLED TO MEMBERSHIP IN RETIREMENT SYSTEM AS OF THAT DATE—SUCH EMPLOYEES ENTITLED TO MEMBERSHIP AS OF DATE FEDERAL CONTROL CEASED AND STATE CONTROL RESUMED.

January 20, 1950.

*Mr. J. P. Mannion, Director,*
*Employees' Retirement System.*

You have referred to us correspondence from counsel for the Maryland Classified Employees' Association, Inc.

concerning the retirement system status of employees of the Department of Employment Security. The correspondence deals with those employees who first joined the unit when it was under the jurisdiction of the United States Employment Service and when all of its employees were paid exclusively from Federal funds.

You ask, now that the Department of Employment Security has been returned to State control and its employees paid by State funds, whether such employees may enroll as members of the Employees' Retirement System as of the date when they first were employed by that Department, while it was under Federal jurisdiction and control. You also ask if such employees may not be enrolled until such time as jurisdiction and control over the Department was returned to the State, whether the date of enrollment, should be the date of transfer of control or the date when each such employee's duties were classified by the State Employment Commissioner.

Section 3 of Article 73B of the Annotated Code of Maryland (1947 Supp.) provides that membership in the Employees' Retirement System shall consist of employees on the date of establishment of the System, and employees who become such after the date of establishment. Section 1 (3) of Article 73B defines "employee" to mean "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 . . ." That Section provides that the term "employee" shall exclude "any class of employees whose compensation is only partly paid by the State. . ." The Board of Trustees under that Section, in cases of doubt. is given authority to determine whether any person is an employee irrespective of the method of payment.

The discretionary power of the Board of Trustees to determine what persons are employees seems to have no application to the situation which you present, because it is

perfectly clear that, if employees of the Department of Employment Security were first employed while that Department was under Federal control and while salaries of all such personnel were being paid by the Federal Government, such employees were not employees of the State of Maryland as defined by Section 1(3) of Article 73B. The basic reason for this conclusion is, of course, that the salaries of those employees were not being paid, even in part, by the State of Maryland. Accordingly, such employees are not entitled to be enrolled as members of the Employees' Retirement System as of the date they were first employed.

After jurisdiction and control of the Department of Employment Security was returned to the State of Maryland and the salaries of all personnel were begun to be paid from State funds, the employees to which you refer became employees of the State of Maryland within the meaning of Section 1(3) and were forthwith entitled to be enrolled as members of the Employees' Retirement System. As soon as their salaries were paid entirely by State funds, they were required to be enrolled, and we can find no justification for postponing their enrollment date until such time as their duties were surveyed and they received a permanent classification by the State Employment Commissioner. We note that you advise that, in some instances, the survey of duties and assignment of permanent classification took as long as two years.

Accordingly, it is our advice that, under the present state of the law, the employees to which you refer were not entitled to be enrolled as members of the Employees' Retirement System as of the date of their first employment when the Department of Employment Security was under supervision and control of the Federal Government and salaries were being paid by Federal funds. In this connection, we call your attention to Section 12(a) of Article 95A of the Annotated Code of Maryland (1947 Supp.), which relates to persons in the employ of the Division of Employment

Service prior to the exercise of supervision and control by the Federal Government. With respect to this group of persons, a special procedure is set forth in Section 12(a) to afford them service credit during the period that the unit was under the jurisdiction of the United States Employment Service.

It is also our advice that those employees who are not entitled to the privileges of Section 12(a) of Article 95A, because they were not employed until the jurisdiction and control of the United States Employment Service had been asserted, are entitled to enrollment as of the date when jurisdiction and control of the United States Employment Service ceased and not the later date when the survey of their duties was complete and they were assigned permanent classification.

HALL HAMMOND, *Attorney General.*

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EMPLOYEES' RETIREMENT SYSTEM—PERSONS ELIGIBLE FOR MEMBERSHIP—CUSTODIAN OF WAR MEMORIAL BUILDING NOT ENTITLED TO MEMBERSHIP.

May 19, 1950.

*Mr. J. P. Mannion, Director,*
*Employees' Retirement System.*

You have asked us to advise you with respect to the claim for prior service credit made by Brigadier General Harry C. Ruhl.

We understand that General Ruhl was in the armed service at the date of establishment of the Employees' Retirement System. Immediately after his discharge, he became an employee of the State Military Department and,

under the provisions of Section 96 of Article 65 of the Annotated Code of Maryland, as amended by Chapter 238 of the Acts of 1949, he claims, upon his enrollment in the Employees' Retirement System, prior service credit for the period of 1925 to 1938, inclusive. During that time, General Ruhl was a member of the War Memorial Commission, was designated as the Secretary of the Commission, and was also employed as Superintendent of the War Memorial Building.

The War Memorial Commission was established in 1924. The provisions of law relating to its creation, composition and powers, are contained in Sections 85 to 89, inclusive, of Article 65 of the Annotated Code of Maryland (1939 Ed. and 1947 Supp.). Section 85 establishes a Commission consisting of ten members, five of whom are appointed by the Governor and five by the Mayor of Baltimore City, and Section 86 describes the terms of the members of the Commission. Section 86 also states that "No member of said Commission shall receive any salary or compensation, except payment of actual expenses authorized by a vote of the Commission and so recorded in its minutes."

Section 88 authorizes the Commission to appoint a custodian for the War Memorial Building, to be paid from such funds as may, from time to time, be appropriated by the General Assembly of Maryland, and the Mayor and City Council of Baltimore, for the maintenance and administration of the War Memorial Building. It is pursuant to the provisions of Section 88 that General Ruhl received annual pay for the period of February 1, 1925 to December 31, 1934, in the amount of $1,800, and for the period of January 1, 1935 to December 31, 1938, in the amount of $2,000. Examination of the Budget Acts of the General Assembly for each of the years during that period discloses that half of such salary was paid by the General Assembly. Other information discloses that the remainder was paid by the Mayor and City Council of Baltimore.

The Employees' Retirement System, as you know, permits "employees," as they are defined, to become members of the System and to receive prior service credit for all service as an employee rendered prior to the date of establishment of the System. "Employee" is defined by Section 1(3) of Article 73B of the Annotated Code of Maryland (1947 Supp.) 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 . . ." Section 1(3) specifically states that the definition of "employee" shall not include "any class of employees whose compensation is only partly paid by the State . . ." In view of the fact that General Ruhl's service as Superintendent of the War Memorial Building was paid only partly from State funds, it would appear that he does not clearly fall within the group included in the definition of the term "employee" but rather falls within the group excluded from the definition of the term "employee," and consequently, is not entitled to prior service credit for his period of service in that capacity.

We recognize, however, that Section 1(3) specifically states that "in cases of doubt, the Board of Trustees . . . shall determine whether any person is an employee as defined in this Article, irrespective of the method of payment." While such discretion is lodged in the Board of Trustees, there would seem to be no occasion to exercise it in the present case because it appears that, as a matter of administrative procedure, all other employees of the War Memorial Commission, including General Ruhl's successor, are members of the Employees' Retirement System of the City of Baltimore. At the time the Employees' Retirement System of the City of Baltimore was established, General Ruhl executed a non-election blank, i.e. he stated affirmatively, under oath, that he did not choose to become a member of that System. Additionally, during the 1949 Session of the Legislature, House Bill No. 416 was introduced, the purpose of which was to permit employees of the War Memorial Commission to be considered as em-

ployees of the State, for the purposes of Article 73B, so as to authorize them to become members of the Employees' Retirement System of the State. This proposed legislation failed of enactment, indicating, we think, that the prior administrative construction, namely, that the employees of the War Memorial Commission were eligible to become members of the Retirement System of the City and not of the State was deemed to be correct by the General Assembly.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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EMPLOYEES' RETIREMENT SYSTEM—PERSON IN ARMED SERVICE ON DATE OF ESTABLISHMENT ENTITLED TO PRIOR SERVICE CREDIT IF ENROLLED UPON RELEASE FROM ARMED SERVICES IF PRIOR SERVICE CREDIT IS CLAIMED WITHIN ONE YEAR—ALLOWANCE OF MILITARY SERVICE CREDIT—PERSONS ENTITLED TO MEMBERSHIP IN RETIREMENT SYSTEM—DISCRETION OF BOARD OF TRUSTEES AS TO WHO ARE EMPLOYEES.

May 26, 1950.

*Mr. J. P. Mannion, Director,*
*Employees' Retirement System.*

You have forwarded to me the request of the Board of Trustees for advice with respect to the request of Major Joseph M. Parvis, Jr., for prior service credit, military service credit in World War II and the right to continue as a member in service of the Employees' Retirement System notwithstanding that he is no longer on the State payroll.

Major Parvis was appointed a Penal Guard in the Maryland House of Correction in October, 1937. In February, 1941, he left State service to enlist in the United States Army. Upon his honorable discharge in December, 1946, he was appointed a Regimental Clerk in the 115th Infantry of the Maryland National Guard. He retained that position and was enrolled as a member of the Employees' Retirement System in November, 1947. On September 1, 1948, he was appointed an Assistant Administrative Officer for the 115th Infantry of the Maryland National Guard and became an inactive member of the Employees' Retirement System because the Federal Government had assumed jurisdiction and control over the Maryland National Guard and Major Parvis was no longer paid from State funds.

From these facts, it will be noted that Major Parvis was absent in military service on the date of establishment (October 1, 1941) of the Employees' Retirement System. Had he been a State employee on October 1, 1941, he would have been entitled, at his option, to be enrolled as a member of the Employees' Retirement System; and under the provisions of Section 5 of Article 73B, Annotated Code of Maryland, 1947 Supplement, he would have been entitled to prior service credit for all service as an employee rendered by him prior to the date of establishment. The claim for prior service credit, however, must have been made within a year after the date of establishment.

While it is true that Major Parvis was not active in State service on the date of establishment of Employees' Retirement System and hence could not enroll and claim prior service within a year thereafter, his rights and status therein have been preserved by Section 96, of Article 65 of the Annotated Code of Maryland, as amended by Chapter 238 of the Acts of 1949. That section guarantees and preserves the rights and status of any person entering military service within the period September 1, 1940 to December 31, 1945, with respect to any pension or retirement fund or system. We construe that section as preserving to

Major Parvis his right to enroll in the Employees' Retirement System as of the date of establishment and to claim prior service rendered by him as an employee of the State. While that right was preserved, however, it was not completely exercised by Major Parvis, because as the facts show, Major Parvis enrolled in the Employees' Retirement System but failed to claim prior service credit for more than one year after the date of his enrollment. It is our opinion, therefore, that Major Parvis cannot now, more than one year after the date of his enrollment in the Employees' Retirement System, claim prior service credit for service rendered by him as an employee prior to the date of establishment.

With respect to the military credit, a different conclusion is indicated. Section 96 of Article 65, *supra,* grants service credit to persons entering military service within the aforesaid period during their absence provided that such persons (a) do not withdraw any part of their accumulated contributions, and (c) return to active duty or service to the employer unit by which they were employed at the time of entry into military service within one year after discharge, and (c) have not taken any other employment between the date of discharge and re-employment by the same employer or employing unit. Section 96 does not specifically require that any claim for military service credit be made within any particular period of time. Since it appears that Major Parvis entered military service within the period covered by Section 96 and since it further appears that he affirmatively meets the conditions upon which the operation of Section 96 is predicated, we conclude that he is entitled to credit for military service.

Lastly, you ask whether Major Parvis may be continued as an active member of the Employees' Retirement System notwithstanding that he is no longer on the State payroll. Membership in the Employees' Retirement System is confined to "employees" as defined in Section 1 (3) of Article 73B, *supra,* which states in effect that an employee is a per-

son whose compensation is paid from State funds or provided for by State appropriations. Excluded from the definition "employees" are persons whose compensation is only partly paid by the State. However, the Board of Trustees is authorized to determine in cases of doubt whether any person is an employee irrespective of the method of payment.

From this recital, it seems clear that it cannot be said that by direction of the law alone, Major Parvis must be considered as an employee and hence be entitled to be an active member of the Employees' Retirement System. It is our opinion, however, that the assumption of jurisdiction and control over the Maryland National Guard by the Federal Government which results in Major Parvis performing functions contemplated to be performed by State employees makes his employment status peculiarly a matter to be determined by the Board of Trustees in its discretion. We conclude therefore, that the Board of Trustees, may in its discretion decide that Major Parvis may be continued as an active member of the Employees' Retirement System notwithstanding that he is presently paid from Federal funds.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

EMPLOYEES' RETIREMENT SYSTEM—RETIREMENT AT AGE 70 COMPULSORY EXCEPT FOR ELECTED OR APPOINTED OFFICIALS—WHAT IS AN "OFFICIAL"—MEMBER OF ANNE ARUNDEL COUNTY SANITARY COMMISSION NOT AN APPOINTED OFFICIAL.

December 8, 1950.

*Mr. John P. Mannion, Director,*
*Employees' Retirement System.*

You have sent to us a letter received by you from the Secretary-Treasurer of the Anne Arundel County Sanitary Commission, asking whether a member of that Commission who will attain the age of 70 in the near future will be required forthwith to retire.

In 1948 the members of the Anne Arundel County Sanitary Commission became members of the Employees' Retirement System, pursuant to the general permissive portions of Article 73B of the Annotated Code of Maryland (1947 Supp.) (Sections 17-24, inclusive). As such they became subject to the provisions of Section 7(1)(b) which states that a member of the system "* * * who is not an elected 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."

The Anne Arundel County Sanitary Commission is created by Section 487 of the Code of Public Local Laws of Anne Arundel County (1947 Ed.), as amended by Chapter 87 of the Acts of 1950. That Section provides that the Sanitary District in Anne Arundel County, as defined by other Sections of the law, shall be under the jurisdiction of a Commission of three adequate persons. The three Commissioners are appointed by the Board of County Commissioners of Anne Arundel County, Section 489 of the Code of Public Local Laws of Anne Arundel County (1947 Ed.) states that the members of the Commission shall be a body

corporate with the right to use a common seal, to sue and to be sued and to do any and all other corporate acts necessary for the purpose of carrying out the duties of the Commission. Inter alia the Commission may take and acquire land, structures and buildings by purchase or condemnation; it may purchase land at a tax sale; it may borrow money; it may cause surveys, plans, specifications and estimates made for water supply, sewerage and drainage systems in the Sanitary District; it may issue bonds to provide funds for the design, construction, establishment, purchase or condemnation of the water supply, sewerage and drainage systems in the Sanitary District, and it may levy taxes against property in the Sanitary District for the purpose of paying interest on and the principal of bonds which the Commission issues. There is no statement in the law that the members of the Commission must take any oath to qualify as a member of the Commission; nor is there any requirement that the members of the Commission must file a bond for the faithful performance of their duties, although the law does require that the Secretary-Treasurer give a bond for the performance of his duties and the accounting for monies which he shall receive for the account of the Commission.

The answer to the question which you posed depends upon a proper interpretation of Section 7(1)(b) of Article 73B, *supra.* That Section states that a member of the Retirement System, upon attaining the age of 70, must forthwith retire or retire on the first day of the next calendar month unless such member is an elected or appointed official. In order to come within the exception to mandatory retirement at age 70, it must appear that the member is either elected or appointed *and* that the member is an "official" within the meaning of the statute.

This office has found it necessary to consider an interpretation of Section 7(1)(b) of Article 73B, *supra,* on prior occasions. In 26 Opinions of the Attorney General, 337 and 32 Opinions of the Attorney General, 93, 240, we have con-

sidered the meaning of the Section as applied to Clerks of Court, Deputy Clerks of Court, Registers of Wills and Deputy Registers of Wills. In the past, we have construed the word "official", as contained in Section 7(1)(b) to be synonymous with the word "officer", as used in various provisions of the Constitution and statutes of this State. See also 20 Opinions of the Attorney General, 598, in which a comprehensive list of those positions, the incumbents of which are to be deemed public officers within the meaning of the Constitution was compiled.

There can be no doubt that the members of the Anne Arundel County Sanitary Commission are appointed, because the statute clearly states that they are appointed by the Board of County Commissioners of Anne Arundel County. A more troublesome problem is a determination of whether they are "officials", within the meaning of Section 7(1)(b), *supra,* that is, as has been our past construction of that Section, whether they are "public officers" in the generally accepted sense.

Several decisions of the Court of Appeals indicate the result which must obtain. Those decisions attempt to formulate general definitions of what are "public officers", although the court has specifically recognized that "* * * it is easier to conceive the general requirements of an office than to express them with precision in a definition that shall be entirely faultless * * *", and therefore "the Courts have ordinarily, in the different cases considered by them, passed upon the facts of each case and reached their conclusion from such facts whether the essential requirements of an office were or were not found therein", *State Tax Comm. v. Harrington,* 126 Md. 157, 159 (1915). In that same case, the Court of Appeals stated that "* * * The most general distinction of a public office is that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the State." This case also held that a public office may be created by statute as well as by the Constitution.

In an earlier case, *Board of County School Commissioners of Worcester County v. Goldsborough,* 90 Md. 193, 206 (1899), the Court stated: "The nature of the duties, the particular method in which they are to be performed, the end to be attained, the depository of the power conferred and the whole surroundings must be considered when a question as to whether a position is a public office or not is to be solved."

In the latest case involving a determination of whether a particular position was a public office, *Jackson v. Cosby,* 179 Md. 671 (1941), the Court held that relevant data to be considered is whether the incumbent receives a commission, takes an oath of office, has a fixed term of office, and exercises a portion of the sovereign power of the government.

On their facts, two decisions of the Court of Appeals clearly indicate that a member of the Anne Arundel County Sanitary Commission is not a public officer, and hence, is not an official within the meaning of Section 7(1)(b) of Article 73B, *supra. Board of County School Commissioners of Worcester County v. Goldsborough, supra,* involved the question whether a member of the Board of County School Commissioners of Worcester County was a civil officer and could be removed by the Governor pursuant to the provisions of Section 15 of Article II of the Constitution. The Board of County School Commissioners was a public corporation composed of members. The management of the public schools in Worcester County was confided to the Board. The statute relating to the powers of the Board was specific in that it conferred no power upon any individual commissioner or member of the Board, but rather conferred the power on the Board which could act by a majority of its members. By a consideration of the statute, the Court concluded that individual members of the Board were not civil officers since no authority was vested in them as individuals. The Court stated: "* * * There is not conferred upon the members of these boards a single

power to be exercised by them personally, save the right to administer an oath in matters relating to the schools. A commissioner can do nothing but that which a majority of the board orders and no matter what his individual views or judgment may dictate, he is powerless to put those views or that judgment in force if he happens to be in the minority. Alone he can do nothing—he has no power whatever. * * * it could not have been contemplated that the members of the boards were to be independent civil officers * * *".

*Clark v. Harford Agricultural and Breeders' Asso.*, 118 Md. 608 (1912), concerned the Harford County Racing Commission. One of the questions decided in the case was whether the Commission was properly constituted in that no member of the Commission had taken the oath required by Section 6 of Article I of the Constitution as a prerequisite to the performance of the duties of any office of profit or trust under the Constitution or the laws made pursuant thereto. The Court pointed out that the statute contemplated that the Commission would operate as a Commission and the individual members thereof were invested with no authority which they could exercise as individuals. The Court concluded, therefore, that the members of the Commission, since they were invested with no individual authority, could not be considered persons who held an office of profit or trust.

The members of the Anne Arundel County Sanitary Commission seem to be in precisely the same situation as the members of the Board of County School Commissioners and the members of the Harford County Racing Commission. No member as an individual has any duties under the statute. The statute confers power and authority upon the Commission and that power and authority can be exercised, not by the individual members of the Commission, but by a majority of the members of the Commission acting in concert. Accordingly, it would seem that one of the plain tests of a public officer, namely the delegation of suffi-

cient authority so that it might be said that in the exercise of that authority he exercises a part of the sovereignty of the State is entirely lacking.

While we have stressed the lack of authority of a member of the Commission as an individual, we should not be deemed to rule that no member of any commission or public body can be a public officer, see *Sappington v. Slade,* 91 Md. 640 (1900) ; 20 Opinions of the Attorney General, 598.

We conclude, therefore, that the members of the Anne Arundel County Sanitary Commission are not public officers in the accepted sense, that they are not officials within the meaning of Section 7(1) (b) of Article 73B, *supra,* and that upon attaining the age of 70 years, they are required to retire forthwith, or on the first of the next calendar month.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## ESTATE

ESTATE—JOINT TENANCY—IN A CONVEYANCE TO HUSBAND, WIEE AND THIRD PARTY AS "JOINT TENANTS," THE USE OF THE QUOTED PHRASE IS SUFFICIENT TO REBUT THE PRESUMPTION THAT HUSBAND AND WIFE TAKE ONE-HALF AS TENANTS BY ENTIRETIES, AND THIRD PARTY TAKES OTHER ONE-HALF INTEREST.

July 18, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

The question is whether a conveyance to husband and wife and a third party with the qualifying words "joint tenants" conveys an estate to husband and wife, as tenants by the entireties, to one-half the premises and an estate to the stranger, as a joint tenant with husband and wife, as to the other one-half.

The presumption at common law was that a conveyance to husband and wife and a stranger, when there were no qualifying words whatever, operated to give the husband and wife a one-half interest held by entireties and to give the stranger the other one-half interest held as tenant in common with the husband and wife. This rule was tacitly recognized in *Tizer v. Tizer,* 162 Md. 492, and in *Baker v. Baker,* 123 Md. 32, and was probably first formally established in *Haid v. Haid,* 167 Md. 493. In this last named case, a boat was registered in the name of a husband and wife and their stepson, with no qualifying words whatever and no words indicating what interest each was to have. The Court in that case said that the evidence was legally sufficient to go to the jury to show that husband and wife held one-half as tenants by the entireties and the stepson held one-half as tenant in common with the husband and wife.

The Court recognized this as the presumption in the absence of qualifying words.

*Tiffany,* Section 431, at page 222, 26 *Am. Jur., p.* 700 and 30 *L.R.A.,* p. 326(n) all agree that this common law presumption is a rule of construction and must give way to a contrary intent shown. For example, the cases of *Fladung v. Rose,* 53 Md. 13, and *Wolf v. Johnson,* 157 Md. 112, hold that a conveyance to a husband and wife "as joint tenants" without more, creates a joint tenancy and not a tenancy by the entireties. Although this may be the minority rule in the country generally, it is the settled law of Maryland.

In 22 Opinions of the Attorney General 628, in reliance on *Haid v. Haid* and *Tizer v. Tizer,* it was held that a conveyance to husband and wife and a third party created an estate in the husband and wife as tenants by the entireties as to one-half and a tenancy in common in the stranger as to the other one-half. However, in that opinion, there was no discussion of the effect of any qualifying words. This opinion was followed in 24 Opinions of the Attorney General 842, where it is said that use of the words "joint tenants" does not indicate a contrary intent but indicates merely that the third person holds as joint tenant with the husband and wife, who, as between themselves, hold as tenants by the entireties. The opinion cites the *Haid* case, *Tiffany* and ruling Case Law.

However, the rule in Maryland today is apparently otherwise. In *Kolker v. Gorn,* Md. 67A (2d) 258, the conveyance was to "John Gorn, Samuel Gorn, and Margaret Gorn, his wife, as joint tenants, and not as tenants in common, their assigns, the survivors or survivor of them, and the survivors' or survivor's heirs and assigns, in fee simple." Judge Henderson recognized the common law presumption that in the absence of qualifying words the husband and wife would take by entireties and the third party as a tenant in common, but said that the use of the words "joint tenants" re-

buts the presumption. This rule seems to be more in accord with the apparent intent, with logical reasoning and with the authorities. It should be noted, however, that in this case Judge Henderson allowed extrinsic evidence to be admitted to show the true intent of the parties in order to defeat the rights of an attaching creditor. The decision of the lower court was that there was sufficient admissable evidence to show a mutual mistake, and the Court allowed the deed to be reformed so as to pass a one-half interest to the husband and wife as tenants by the entireties and a one-half interest to the third party as a tenant in common. The decision of the lower court was affirmed on this appeal.

Therefore, in view of this case and the inferences drawn from the authorities relied on in the decision, I believe that the Maryland rule is that, in the absence of any qualifying words whatever, a conveyance to husband and wife and a third party passes an estate by entireties to the husband and wife in common with the third party. But this rule, being a rule of construction, must give way to a contrary intent and use of the words "joint tenants", without more, is sufficient to show a contrary intent and rebut the presumption.

HALL HAMMOND, *Attorney General.*

## EXECUTORS AND ADMINISTRATORS

EXECUTORS AND ADMINISTRATORS — ORPHANS' COURT — POWER TO APPOINT ALIEN FOREIGN CONSUL AS ADMINISTRATOR OF ALIEN'S ESTATE.

January 4, 1950.

*Mr. Alex Berg,*
*Vice-Consul in Charge,*
*Royal Norwegian Consulate.*

This will answer your letter of October 17th and forwarding letter to Mr. Charles G. Page of October 19th. You state that you are a resident of Baltimore but a citizen of Norway and that you are Vice Consul of Norway in charge of the Norwegian Consulate in Baltimore. The question is whether the Orphans' Court has power to appoint you administrator of the estates of Norwegian citizens who die intestate in Maryland without leaving any next of kin or creditors here. You state that the problem arises frequently when Norwegian seamen die while temporarily here, leaving very small estates which no one else desires to administer.

Article 93, Section 32 of the Maryland Annotated Code (1939 Ed.) provides in substance that if there is no husband, wife, relative or creditor capable or willing to act as administrator, "administration may be granted at the discretion of the court". Section 18 requires that "the qualifications of an administrator shall in all respects be the same as herein prescribed for an executor". Qualifications for executors, which have been held in *Mobley v. Mobley,* 149 Md. 401, to apply to administrators, are set forth in Section 56 as follows:

> "If any person named as executor in a will shall be, at the time when administration ought to be

> granted, under the age of eighteen years or of unsound mind, incapable according to law of making a contract, or convicted of any crime rendering him infamous according to law, or if any person named as executor shall not be a citizen of the United States, letters testamentary or of administration (as the case may require) may be granted in the same manner as if such person had not been named in the will."

Section 59 makes it clear that the disqualification in Section 56 extends to any person who is not a naturalized or "natural born" citizen of the United States, or is not a citizen's wife residing in the United States.

Mr. Page argues forcefully that Section 56 leaves the qualifications of an alien to the discretion of the Orphans' Court—that an alien cannot assert a right to be administrator, but may, in the Court's discretion, be so appointed.

Article XXIII of the "Treaty of Friendship, Commerce and Consular Rights", between this country and Norway, proclaimed September 15, 1932 (Treaty Series, No. 852) is as follows:

> "In case of the death of a national of either of the High Contracting Parties without will or testament whereby he has appointed testamentary executors, in the territory of the other High Contracting Party, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of death, shall so far as the laws of the country permit and pending the appointment of an administrator and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of the same. Such consular officer shall have the right to be ap-

> pointed as administrator within the discretion of a tribunal or other agency controlling the administration of estates *provided the laws of the place where the estate is administered so permit.*" (Emphasis added.)

*Schneider v. Hawkins,* 179 Md. 21, held under an identical treaty provision that a consular officer had no right to administration should the Orphans' Court in its discretion refuse his appointment. *Chryssickos v. Demarco,* 134 Md. 533, is to the same effect.

As Mr. Page points out, these cases on first impression seem to imply that the Orphans' Court (though not required by the treaty to do so) *may* grant letters to a foreign consul where no one else has a prior statutory right. But nowhere in either opinion is such a statement expressly made; nor does it appear in either case that the consular officer involved was not a citizen of the United States. An examination of the records and briefs show that in the *Chryssickos* case, the question of citizenship was touched upon only cursorily, and in the *Schneider* case was not presented at all. In neither opinion was it considered. The cases hold only that the treaties involved do not supersede "the statutory law of Maryland by divesting the Orphans' Court of its discretion." 179 Md. at 24.

On the other hand, *Mobley v. Mobley, supra,* 149 Md. 408, after citing the Sections of the 1924 Code which are now numbered Sections 18 and 56 (supra) of the 1939 Code, made this direct statement:

> "The orphans' court *must not* grant letters of administration to any person, who, at the time of the application, is . . . not a citizen of the United States." (Emphasis added.)

True, the statement is pure, and perhaps inconsidered, dictum. But it is clear and mandatory, and until changed by higher authority, we cannot ignore it.

The rule thus expressed may be contrary to the implication of Attorney General Armstrong's opinion in 7 Opinions of the Attorney General, 492, cited by Mr. Page. But that opinion did not consider the citizenship question under Sections 18 and 56. It held only that a foreign consul had no preferred right to be administrator, and, if so appointed, would be subject to all the provisions of Maryland law. Furthermore, the opinion was rendered prior to the *Mobley* decision.

We recognize and regret the practical problem with which you are faced. But we feel that our law, as thus far construed by the Maryland Court of Appeals, prevents the appointment of an alien as administrator of a decedent's estate. And under *Schneider v. Hawkins, supra,* the above-quoted treaty provision is unquestionably subject to State law.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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EXECUTORS AND ADMINISTRATORS — WILLS — ATTESTING WITNESSES—WHERE ONE OF ATTESTING WITNESSES IS ABSENT, PROOF MAY BE GIVEN OF THE SIGNATURE OF THE TESTATOR OR ABSENT WITNESS BY CREDIBLE TESTIMONY.

March 15, 1950.

*Mr. Griffith S. Oursler,*
*Register of Wills for Prince George's County.*

Your recent inquiry is directed to the proper method of proving a will where one of the witnesses is either dead, or non-resident or otherwise unavailable. You say that

twice recently in such case the other witness has appeared to prove his own signature and that of the missing witness. You wish to know whether this is legally sufficient or whether there must be some other credible witness as to the signature of the non-resident or the deceased witness or the signature of the testator.

Three statutes seem to cover the situation, all of which are in Article 93. The first is Section 365, which permits the Register or his Deputy, under an order of the Orphans' Court, to take the deposition of all witnesses who cannot conveniently attend the office of the Register with the same effect as if the witnesses had appeared. This Section concludes by stating that the Orphans' Court may, in its discretion, "accept proof of any will, in the manner prescribed in Section 368, when the attendance of the witnesses thereto cannot, in the judgment of the said court, be conveniently had."

Section 365A, added by the Legislature of 1941, provides that in addition to the method set forth in Section 365, the Register of Wills, when directed by the Orphans' Court, may cause to be made a photostatic copy of the will and forwarded by registered mail to any officer designated in said order, authorized by the laws of Maryland to take acknowledgments of deeds, to examine the witnesses and make a return to the Register of Wills.

Section 368 provides that if any witness dies or is beyond the jurisdiction of the Court "then proof by any credible witness of the signature of the testator or of the signature of any such deceased or absent witness shall have the same effect upon the probate of said will as if said deceased or absent witness had been present at said probate and had testified that said will was duly executed."

That the language quoted from Section 368 has the meaning which it literally seems to have is free from doubt in my opinion. The discussion in the opinion of the Court of

Appeals in the case of *Preston v. Preston,* 149 Md. 498, and the cases cited and relied upon make it plain that one attesting witness can act as the credible witness to prove the signature of the testator and the signature of the other missing witness.

Of course, it is far better policy, in my opinion, to proceed under Section 365 or Section 365A if such a course is practicable; and, indeed, if Section 368 is followed, an additional witness would certainly be desirable besides the attesting witness who is available.

HALL HAMMOND, *Attorney General.*

## FINES AND FORFEITURES

FINES AND FORFEITURES — CONTEMPT FINES IN ANNE ARUNDEL COUNTY PAYABLE TO STATE.

April 5, 1950.

*Mr. Joseph O'C. McCusker,*
*Chief Deputy Comptroller.*

We have your letter of March 14 concerning the proper disposition, under Chapter 808 of the Acts of 1943, of contempt fines imposed by the Circuit Court for Anne Arundel County.

The general law covering the disposition of fines is contained in Article 38, Sections 2 and 5, of the Annotated Code of Maryland (1947 Supplement). Section 2 requires the payment of "all fines, penalties and forfeitures" to the County or City where the offense occurred or the cause of action originated "unless directed to be paid otherwise by law imposing them." Section 5 provides that "one-half of the fines imposed and recognizances forfeited to the Circuit Court for the several counties shall be paid" to the Clerks of the Courts for library purposes, as therein more particularly set forth. Article 16, Section 194, provides that contempt fines imposed by an equity court shall be paid to "the Treasurer, for the use of the State." It has been ruled in 19 Opinions of the Attorney General, 290, 20 Opinions of the Attorney General, 352, and 22 Opinions of the Attorney General, 321, that fines imposed under this Section differ materially from ordinary criminal fines and are payable to the State, regardless of contrary provisions of local law relating to fines generally. It was further specifically ruled in 32 Opinions of the Attorney General, 174, that the provisions of Section 5 of Article 38 do not apply to fines imposed for criminal contempt, which under Section 1 of Article 26 are likewise payable to the State.

Chapter 808 of the Acts of 1943, amending Section 187 of Article 2 of the Public Local Laws of Anne Arundel County, is obviously a local substitute for Section 5 of Article 38 of the General Laws. The local provision is as follows:

> "187. One-half of the fines imposed and recognizances forfeited to the Circuit Court for Anne Arundel County shall be paid to the clerk of said court to be expended under the direction of the judge or judges of said court for the augmentation of the library of said court, and for such other purposes or expenses connected with the operation of said court, including the salary of the librarian, as the judge or judges of said court may find necessary or appropriate. All provisions of the Code of Public General Laws and all acts or parts of acts heretofore or hereafter passed making any application of fines and forfeitures or portions therefor, inconsistent with the provisions of this section shall be construed as meaning that in Anne Arundel County one-half of such fines and forfeitures shall be paid to the clerk of said court to be expended as provided in this section and the other one-half shall be paid to the County Commissioners of said County for the use of the County, unless it be expressly stated therein that in Anne Arundel County it shall be otherwise disposed of."

The pertinent language of the first sentence of Section 187 is identical with that of Section 5, and, we think, must receive the same construction. Like Section 5, it must be read in connection with Section 2, which deals only with those fines ordinarily payable to the County or City, and expressly excepts fines directed to be paid otherwise by the law imposing them. We do not believe the second sentence of Section 187 changes this result. It does not purport to broaden the scope of the Section but merely clarifies

the disposition of those types of fines to which the Section refers.

In our opinion, therefore, contempt fines imposed by the Circuit Court for Anne Arundel County are payable to the State Treasurer.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

## INDUSTRIAL FINANCE ACT

INDUSTRIAL FINANCE ACT — PROPER FOR LICENSEE TO CHARGE AND COLLECT 5% PENALTY EACH MONTH AFTER DEFAULT WHERE DEFAULT IS NOT CORRECTED BY PAYMENT OF UNPAID BALANCE AND PARTIES DO NOT AGREE THAT PAYMENT OF SUBSEQUENT INSTALLMENTS SHALL NOT APPLY FIRST TO UNPAID BALANCE.

September 6, 1950.

*Mr. John D. Hospelhorn,*
*Deputy Bank Commissioner.*

You have presented the following hypothetical case for our views with respect to Section 186(A) (3) of Article 11 of the Annotated Code of Maryland, 1947 Supplement (known as the Maryland Industrial Finance Law).

A borrower obtains a loan in the amount of $648.00, payable in twelve instalments of $54.00 each. The first instalment is due on March 21 of the year in question and the successive instalments are due on the 21st of each month following, the final instalment being due on February 21 of the following year. During the year of making the loan, the borrower fails to meet the instalment due in May in full and pays only one-half of the amount due on that date. In June, without making any reference to how the payment tendered is to be applied, the borrower tenders the full amount of the instalment due on that date. The same procedure is followed with respect to successive months.

Pursuant to Section 186(A) (3) of Article 11, the lender, which is licensed as an industrial finance company, imposes a delinquent charge on the portion of the May instalment which is not met by the borrower. For subsequent months, the lender asserts a like penalty on the theory that the

June payment was to be applied first towards payment of the unpaid portion of the May instalment and the remainder, if any, to the June instalment. Obviously, the amount tendered in June would be insufficient to pay the unpaid portion of the May instalment and also to pay, in full, the June instalment. The borrower, however, asserts that a default occurred when the May instalment was not met in full and that this default continued throughout the duration of the loan as the same default.

The rights of the parties are governed by the Section of the statute referred to, which permits a lender to impose a delinquent charge of five percent "for each default continuing for five (5) or more days * * * at the time any periodical instalment is made, provided, however, that such delinquent charge shall not be imposed more than once for the same default." The statute, therefore, permits a penalty for each separate and distinct default, but in the case of a single default permits the penalty to be imposed only once.

Proper application of this rule requires an analysis of the transaction outlined above. Obviously, when the May instalment was not met in full for more than five days after its due date, a penalty was properly imposed. The question remains whether this same default continues throughout the duration of the loan or whether the payment for each subsequent month is in itself a separate and distinct default.

Solution of the problem depends primarily upon the transaction and agreement between the parties. After the default in the May instalment, it is conceivable that the parties might agree that the unpaid balance of the May instalment remain unpaid but that subsequent payments by the borrower may be treated as payment in full of the instalments due for subsequent months. In that event, it would seem clear that the lender could impose the penalty only once because there would be no default with respect to subsequent instalments after the original default had occurred.

In the absence of such an agreement, however, the existence of which could certainly be ascertained by reference to the statement required to be furnished to a borrower by the lender, pursuant to Section 187(2) of Article 11, we feel that the penalty may be properly invoked with respect to each instalment subsequent to the May default. This conclusion arises from the fact that under standard accounting practice tender of payment is to be applied to the oldest item on an account. When this rule is applied, it would appear that the June payment could properly be applied by the lender first in payment of the unpaid balance of the May instalment and then to payment of the June instalment. Likewise, in July, the payment made then could be applied to payment of the unpaid balance of the June instalment and then to the July instalment. Since for each month the borrower tenders less than the sum of the instalment due for that month and the unpaid balance of the instalment of the preceding month, it appears that a separate and distinct default occurs each month. Therefore, we conclude that the penalty may be properly imposed thereon.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

# INSURANCE

INSURANCE—INVESTMENT OF DOMESTIC INSURANCE COMPANY IN IMPROVED REAL PROPERTY FOLLOWED BY LEASE CONTAINING OPTION TO REPURCHASE TO SELLER IS NOT 100% MORTGAGE AND HENCE IS PROPER INVESTMENT.

January 13, 1950.

*Mr. Hazelton A. Joyce,*
*Deputy Insurance Commissioner.*

The Baltimore Life Insurance Company, a domestic life insurance company, the investment of the reserves of which is governed by Section 25 of Article 48A of the Annotated Code of Maryland (1947 Supp.), as amended by Chapter 564 of the Acts of 1949, contemplates the purchase of certain improved real property. Simultaneously with the purchase of the property, the Company plans to lease the same to the seller for a term of years, and the lease will contain an absolute option to repurchase the property at any time at its value shown on the books of the Company.

You ask us to advise you whether the proposed transaction will constitute a proper investment permitted by Section 25 of Article 48A, as amended.

Sub-section (1) (k-a) of Section 25 authorizes domestic stock and mutual life insurance companies to invest their reserves in unencumbered fee simple or improved leasehold real estate other than property to be used primarily for mining, recreational, amusement, hotel or club purposes. That sub-section limits the amount of the total assets of the Company which may be so invested and prescribes the manner of computing the book value at which the investment shall be carried from year to year.

The proposed transaction outlined above, in our opinion, falls squarely within the permissive power to invest reserves contained in Section 25 (1) (k-a), since we understand that the improved real propertly will not be used for mining, recreational, amusement, hotel or club purposes. We understand that rather, it will be used for office purposes, and the cost of the property when added to the book value of other real or leasehold property held by the Company for investment purposes, will not exceed the maximum amount of permissive investment in such assets contained in Section 25 (1) (k-a).

It has been suggested to us that the proposed transaction might violate sub-section (1) (g) of Section 25. That Section permits the investment of reserves in first mortgages or deeds of trust only to the extent of 66⅔ of the fair market value of the real estate. It is argued that the purchase of improved real property and simultaneous lease thereof to the seller, with an absolute option to repurchase at any time, constitutes, in effect, a 100% mortgage, and sub-section (1) (g) of Section 25 permits mortgages only to the extent of two-thirds of the fair market value of the property.

With this reasoning, we are unable to agree. It may be very true that in practical effect, the seller of the real estate acquires the same advantages, rights and obligations under a true 100% mortgage as it would under the proposed transaction. Yet, in the eyes of the law, the differences between a true 100% mortgage and a lease containing an absolute option to repurchase at any time, are manifest. Certainly, it cannot be said that, in the abstract, a lease containing an option to purchase is in any manner unusual. In permitting an insurance company to invest in real estate for the production of income, the Legislature obviously authorized the insurance company to negotiate leases in order to acquire income from real estate, and to make a part of such leases any of the usual provisions, including an option to purchase. Although, as before stated, the practical effect of some forms of leases with

options to purchase may be the same as a 100% mortgage, we do not believe that the Legislature intended the former to be treated as the latter.

The conclusion we reach is fully in accord with the over-all legislative policy underlying Section 25 in its entirety. That Section regulates the investment reserves of domestic life insurance companies. The only justification for this type of regulation is to insure safety to policyholders and, to the extent economically possible, to make certain that the protection which policyholders purchase will be delivered to them upon the happening of the contingencies insured against. Since the Legislature has authorized a domestic life insurance company to invest a portion of its reserves by purchasing real estate for the production of income, and thereby to incur certain risks, we believe from the economic point of view, which we perceive to be the underlying basis of the legislation, that the proposed transaction will not do violence to the legislative intent, because an obligation to sell an investment at its precise value as carried on the books of an insurance company involves no greater risk or possibility of impairment of the reserves of that company than mere ownership of the investment outlined.

You are advised, therefore, that the proposed transaction fully complies with all of the provisions of Section 25(1)(k-a), notwithstanding that Section 25(1)(g) permits investments in mortgages only to the extent of two-thirds of the fair market value of the simple or improved leasehold real estate.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

INSURANCE — FRATERNAL BENEFICIARY ASSOCIATION MAY NOT CONTRACT TO PAY DEATH BENEFITS ON THE LIVES OF CHILDREN IN EXCESS OF THAT FIXED BY LAW— IMPLIED REPEAL OF STATUTES.

June 16, 1950.

*Mr. Hazelton A. Joyce,*
*Deputy Commissioner,*
*State Insurance Department.*

You have asked us to advise you concerning the proper interpretation of the provisions of Sections 185 and 217 of Article 48A of the Annotated Code of Maryland (1947 Supplement). Both of these sections relate to fraternal beneficiary associations.

Section 185 limits permissible beneficiaries of policies of insurance written by fraternal beneficiary associations. It sets forth that the payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, estate, father-in-law, mother-in-law, etc., and then states " * * * provided, further, that any fraternal beneficiary association authorized to do business in this State *** may as to such class enter into such contracts with such persons upon such showing of eligibility in such forms and granting such benefits payable to such persons and beneficiaries within the above restrictions under such conditions as its constitution and laws may provide." Section 217 deals specifically with the writing of policies of insurance upon the lives of children. It permits any fraternal benefit society to organize and operate branches for children and states that membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The Section then provides:

"The total benefits payable as above provided shall in no case exceed the following amounts at

> ages at next birthday at time of death, respectively, as follows: One, One Hundred Dollars; Two, One Hundred Fifty Dollars; Three, Two Hundred Dollars; Four, Three Hundred Dollars; Five, Three Hundred Fifty Dollars; Six, Four Hundred Dollars; Seven, Five Hundred Dollars; Eight, Six Hundred Fifty Dollars; Nine, Eight Hundred Dollars; Ten and Over; One Thousand Dollars."

Specifically, you ask whether a fraternal benefit association may provide death benefits greater than those set forth in Section 217. You advise that it has been contended that the quoted language of Section 185, which states that fraternal beneficiary associations may grant such benefits as its constitution and laws may provide, acts as an implied repeal of the schedule of benefits contained in Section 217.

Section 185 was first enacted by Chapter 492 of the Acts of 1922. The quoted language, upon which reliance is placed by those seeking to avoid the restrictions of Section 217, was added by Chapter 370 of the Acts of 1935. Section 217 was first enacted by Chapter 614 of the Acts of 1927; that is, prior to the quoted language of Section 185. Both Sections 185 and 217 were amended in 1943 by Chapter 547 of the Acts of 1943 and Chapter 548 of the Acts of 1943, respectively.

As before stated, when the quoted language of Section 185 was first enacted the restrictions as to death benefits payable on the lives of children already existed. Section 185 did not expressly repeal the restrictions of Section 217. Therefore, in order for Section 185 to supersede the provisions of Section 217, there must have been an implied repeal.

The law does not favor implied repeals and unless there is a manifest inconsistency between a statute and a later one or unless their provisions are so repugnant and irrecon-

cilable that they cannot stand together, no implied repeal will be found, *Buchholtz v. Hill,* 178 Md. 280 (1940); *Adams v. St. Mary's County,* 180 Md. 550 (1942); *Pressman v. Elgin,* 187 Md. 446, 169 A.L.R. 646 (1947). Thus, the doctrine of implied repeal rests upon the finding of repugnancy.

We find no repugnancy between the quoted provisions of Section 185 and the limitations of Section 217 relating to death benefits payable on the deaths of children. It is true that Section 185 states that within the limitations contained therein as to permissible beneficiaries a fraternal beneficiary association may grant such benefits as its constitution and laws may provide. This general statement, however, is contained as a proviso to specific language which sets forth permissible beneficiaries and, as such, it could hardly be intended by the Legislature as permission for a fraternal beneficiary association to ignore the clear limitations contained in Section 217, which were in existence at the time.

Moreover, it is a necessary part of the rule of repeals by implication that, as between two public general laws, the latter in point of time will prevail over the former if there exists a repugnancy between the two. As appears from the recital of the legislative history of Sections 185 and 217, the latter was the one approved last in point of time in 1943 when both Sections were amended. If, therefore, we were to find a repugnancy between the two Sections, we would necessarily reach the conclusion that Section 217, to the extent inconsistent, prevails over Section 185, *Strauss v. Heiss,* 48 Md. 292 (1878); *State v. Davis,* 70 Md. 237 (1889); *Musgrove v. B. &O. Railroad Company,* 111 Md. 629 (1909).

It is our conclusion, therefore, that a fraternal beneficiary association may not, under the quoted language of Section 185, write policies providing death benefits payable

on the deaths of children in excess of the amounts specified in Section 217.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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INSURANCE—LICENSING OF INSURANCE ADVISERS—PERSONS REQUIRED TO BE LICENSED—BALTIMORE REPRESENTATIVE OF MASSACHUSETTS ADVISER ACTING AS LIAISON BETWEEN LICENSEE AND CLIENTS AND DISCUSSING INSURANCE ADVICE REQUIRED TO HAVE SEPARATE LICENSE.

December 8, 1950.

*Mr. Hazelton A. Joyce,*
*Deputy Commissioner,*
*State Insurance Department.*

You ask whether the Baltimore representative of a Massachusetts insurance adviser firm is required to obtain a license from your Department as an insurance adviser. Section 94A of Article 48A of the Annotated Code of Maryland (1947 Supplement) requires insurance advisers to obtain a license from your Department in the manner prescribed by that Section. The term "insurance adviser" is stated, *inter alia,* to mean "* * * any person who, for money, fee, commission or any other thing of value offers to examine, or examines any policy of insurance or any annuity or pure endowment contract for the purpose of giving, or gives or offers to give, any advice, counsel, recommendation or information in respect to the terms, conditions, benefits, coverage or premium of any such policy or contract, or in respect to the expediency or advisability of altering, changing, exchanging, converting, replacing, surrendering, continuing or rejecting any such policy or

contract, or of accepting or procuring any such policy or contract from any insurer, * * *".

The Massachusetts insurance adviser is a single proprietary business. The proprietor is licensed as an insurance adviser under the laws of Massachusetts. He maintains no office as such in this State but employs his son to aid and assist him in the carrying on of his business. Correspondence from the father indicates that the son's duties are "property inspections, rate analysis, research or fact finding, abstracting of policies, transcribing appraisal data, and liaison between me and the clients in the Baltimore-Washington area and between the clients and their insurance people." The father states that the son is authorized "* * * to discuss rates, operating hazards and loss prevention methods with the clients * * *." The father also advises that the son has been expected to follow up formal reports and other written recommendations sent to clients by the father to see if they are understood and executed by the client, and he is expected to transmit to the father questions and information on which the father passes judgment in formulating replies and recommendations and carrying on his business as an insurance adviser. The father specifically states that the son is forbidden to make recommendations or to advise in any way in matters which will affect changes of program or the purchase of insurance, although the son may discuss with clients recommendations or matters of advice which have been included in the reports or correspondence sent by the father.

Compensation to the son is paid on a strict salary basis. The son is not paid a commission on sales, nor is his salary dependent on producing new accounts. He receives no percentage of fees which the father obtains for his services as insurance adviser.

As appears from the quoted portion of the statute, the term "insurance adviser" is not intended to include every agent, employee, clerk and investigator who may take part

in the gathering, assembling and analysis of relevant data incident to the giving of insurance advice. Rather, the term includes only those persons who, for money, fee, commission, or any other thing of value, performs one or more of the acts specifically set forth.

As applied to the situation under consideration, the statute would not seem to prohibit the gathering of relevant data and analysis and transmission of the same to the father, who is a licensed insurance adviser. But to the extent that the son would transmit to the client his original recommendations or elaborate, explain and discuss his father's recommendations, we think that he is included within the definition and must be licensed. From the description of the son's duties which you have received from the father, it is apparent that the son does more than just obtain data which is transmitted to the father. The father is candid in stating that the son is expected to follow up, and may discuss, final reports and written recommendations to see if they are understood and that the son, in general, acts as liaison between the father and clients in the Baltimore-Washington area and between clients and their insurance people. Such activities are, in our opinion, of such nature that a license as an insurance adviser is required as a condition precedent to their lawful performance.

A word should be said about the son's method of compensation. It might be argued that, since the son is not paid directly from the person who is advised, does not receive commissions or does not receive a fixed percentage of a fee, but rather works on a straight salary basis for his father, he does not fall within the definition of insurance adviser since it has application only to persons who "* * * for money, fee, commission or any other thing of value * * *" perform any of the enumerated activities. In other words it might be argued that since the son is paid by the father and not by the client, his method of compensation is not such as to include him within the term "insurance adviser."

Section 94A of Article 48A, *supra,* in so far as it defines the method of compensation of persons performing the activities of insurance advisers within its scope is extremely broad. We deem the language used to be, in substance, an expression that any person performing any of the enumerated acts for commercial purposes or as a business is within the definition and hence required to be licensed. By such a test, it matters not if technically compensation is received from one's employer rather than directly from the clients of one's employer.

In summary, we conclude that the activities of the son are such that he is an insurance adviser within the meaning of Section 94A of Article 48A, *supra,* and, therefore, is required to obtain a license as an insurance adviser for the lawful continuation of such activities.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## MERIT SYSTEM

MERIT SYSTEM—STATE EMPLOYEE WHO IS ELECTED TO PUBLIC OFFICE MAY BE REQUIRED TO RELINQUISH HIS EMPLOYMENT IF HIS ELECTIVE OFFICE INTERFERES WITH THE PERFORMANCE OF HIS DUTIES AS A STATE EMPLOYEE.

April 20, 1950

*Mr. F. Murray Benson, Director,*
*Division of Parole and Probation.*

We have your letter in which you inform us that one of the Parole Officers on your staff has indicated his intention to become a candidate for the General Assembly at the coming election. You state that if he is nominated and elected, the work which he is now performing will suffer because you will be unable to replace him with a temporary employee, and it will be impossible to transfer his duties to other employees since they are now occupied fully with their own duties. The question which you present for our consideration is, therefore, whether the employee is permitted to be a candidate for the General Assembly

Any person who possesses the qualifications prescribed by the Constitution, Article III, Sections 9, 10, and 11, is eligible as a Senator or a Delegate. However, it does not follow that a State employee may hold elective public office and at the same time retain his employment with the State. In *Rogan v. Cook*, 188 Md. 345, a deputy assessor was dismissed from his position because he became a candidate for public office. Employees of the Division of Parole and Probation are subject to the requirements of the Merit System Law, Code Article 31, Section 77, and of course, the time allowed them for leaves of absence are regulated by that law. Section 22(a) of Article 64A of the Code (1947

Supp.) provides that from and after January 1, 1941, every classified employee shall receive as vacation in each calendar year a leave of absence with pay for 15 working days and that any employee using less than the full vacation leave allowed, beginning January 1, 1942, shall be entitled to have such unused leave accumulate up to 30 working days, and that it shall be available to such employee at any time with the approval of the head of the Department. Section 22(a) makes provision for sick leave also.

Rule 51 of the Rules of the Employment Commissioner provides in part that an employee in the classified service may be granted a leave of absence without pay for a definite period of more than 30 days, but not to exceed one year, or for a definite extension beyond 30 days of a shorter leave allowed by the appointing authority upon the request of an employee and approved by the appointing authority and the Commissioner for any of the following causes: (a) for military service; (b) for temporary physical disability or absence required because of the disability of a member of his immediate family, or other reasons satisfactory to the appointing authority and the Commissioner; (c) for pursuing a course of study or training for the purpose of improving the quality of his services or fitting himself for promotion in the Classified Service; (d) for any other cause satisfactory to the appointing authority and approved by the Commissioner. The Rule provides further that leave of absence without pay for a period greater than 30 days shall in no case be granted within three months after original appointment, or within six months after return from a leave of 30 days or more, except in the case of injury or disability of the employee or a member of his immediate family, or for military service. The granting of a leave of absence without pay for a period of more than 30 days with the approval of the appointing authority and the Commissioner, the rule states, shall not be interpreted to mean that the employee granted the leave will, upon his return, be restored to the position he leaves, or to the service upon expiration of the leave, except as provided under (a) above,

or unless the position is vacant or filled by a temporary employee. The Rule makes provision for placing the name of the employee, where he is not restored to his position, on the re-employment list, and further that the failure of the employee to report for duty or to state in writing his willingness to report within five days after the expiration of his leave, or to give the Commissioner a satisfactory explanation of such failure, shall be considered a resignation from the classified service.

Rule 59 provides in part that an employee who is absent from duty without leave from his superior officer for three consecutive business days without notifying the superior officer of the reason for his absence and his intention to return, or who fails to notify the Commissioner of his readiness to resume his duties within five days after his leave of absence, shall be considered to have resigned.

Thus, from the above summary, it will be seen that leaves of absence, over and above the vacation leave mentioned in Section 22(a), generally are subject to the concurrent approval of the appointing authority and the Employment Commissioner. The approval of a request for a leave under the circumstances mentioned in your letter rests in your sound discretion, and if, in its exercise, you decline to extend your approval, we think the employee will be compelled to elect between continuing to perform his duties and separating himself from the State service.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## MOTOR VEHICLES

MOTOR VEHICLES—TITLING TAX IS BASED ON FAIR MARKET VALUE OF VEHICLE AND THUS INCLUDES, IN DETERMINING THAT VALUE, THE MANUFACTURER'S EXCISE TAXES.

March 9, 1950.

*Hon. Louis L. Goldstein,*
*Prince Frederick, Maryland.*

The Maryland titling tax imposed by Section 25A of Article 66½ of the Code is laid upon the issuance of certificates of title "at the rate of two per centum of the fair market value" of the motor vehicle involved. The tax is imposed upon the value of the car including the federal manufacturers excise tax on the theory which the Court of Appeals of Maryland approved in the case of *Pierce & Hebner Inc. v. State Tax Comm.*, decided January 12, 1950, and found in 71 A. 2d page 6. In that case, the Court held that the federal excise tax on distilled spirits must be included in the value of liquor for assessment purposes. The concluding sentence of the opinion is this: "We are of the opinion that the federal excise tax here in question was an essential element in the 'actual case value' of the liquor assessed." This would seem to be controlling.

Of course, the Sales Tax Act operates on a different theory, taxing the value exclusive of other excise taxes, but this is because the statute does not require a holding such as that required by the express language of Section 25A of Article 66½.

HALL HAMMOND, *Attorney General.*

MOTOR VEHICLES—PERSONS FROM OTHER STATES COMING INTO MARYLAND, WITH THEIR MOTOR VEHICLES, AND REMAINING FOR SEVERAL MONTHS IN CONNECTION WITH CONVERTING GAS BURNERS TO USE NATURAL GAS, ARE SUBJECT TO REQUIREMENTS OF LAW RELATING TO REGISTRATION OF MOTOR VEHICLES.

April 20, 1950.

*Mr. Arthur H. Brice,*
*Commissioner of Motor Vehicles.*

You have forwarded to us a copy of a letter which you received from the Consolidated Gas Electric Light & Power Company, in which you were informed that several hundred out-of-State automobiles will be used in Baltimore by persons engaged in converting gas burners to use natural gas. The work is being done by Conversion and Surveys, Inc. of New York City, and the Gas Company has requested your consideration of a plan under which registration of the vehicles owned by the persons engaged in the work, which will consume several months, will not be required. Three concrete suggestions were enumerated by the Gas Company: (1) a determination by you under the provisions of Section 2(b) of Article 66½ of the Code that the definition of the word "resident" is not applicable because of the temporary and emergency nature of the work and the extraordinary circumstances; (2) the issuance of temporary registration permits under Section 21 of the Motor Vehicle Law; (3) arrangements for temporary registration or authorization by the Governor under his reciprocal agreement powers to permit the temporary use of Maryland highways by the employees.

At the outset it may be stated that all motor vehicles using our highways are subject to the registration requirements unless expressly excluded by law.

Section 21(a) of the Motor Vehicle Law provides in part that:

> "Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this Article . . ."

with certain exceptions therein enumerated. The only exceptions which are at all pertinent here deal with non-residents and vehicles having a "temporary registration permit issued by the Department as hereinafter authorized".

A careful examination of the Motor Vehicle Law fails to disclose that the General Assembly has authorized the issuance of temporary registration permits. Temporary licenses may be granted under certain circumstances under Section 31(c) but we find no provision which authorizes you to grant a temporary registration for a motor vehicle.

While Section 2(b) of Article 66½ provides that,

> "The Department shall have authority, in disputed cases, to determine the extent of the applicability of the definitions herein contained."

we do not believe that you may ignore the plain language of the law by reason of the Section mentioned.

Section 2(a) (43) defines the word "resident" as:

> "Every person is a legal resident of this State and every non-resident (owner, corporation, manufacturer, dealer, used car dealer) owning, maintaining or operating place or places of business in this State and using motor vehicles intra-state in connection with such business in this State, or, any non-resident who maintains a temporary residence in this State and accepts any employment or engages in any trade, profession or occupation in this State, or any non-resident who maintains a temporary residence in this State in excess of ninety days during the registration year."

Section 2(a) (27) defines a "non-resident" as

> "Every person who is not hereinafter defined as a resident of this State."

It is our view that a disputed case, under which you are authorized to determine the applicability of the various definitions, does not arise when the persons fall clearly within the term of a "resident", as defined by law.

Sections 51 and 52 of the Motor Vehicle Law authorize the Governor to enter into reciprocal agreements with other States. Section 52(a) provides that the exemption afforded by Section 51 shall not apply to non-residents of this State who have temporary residences here for periods in excess of three months in any year.

As will be observed from the definition of a "resident" above quoted, that term is applicable to a non-resident who maintains a temporary residence in this State and accepts any employment or engages in any occupation in this State, and to any non-resident who maintains a temporary residence here in excess of 90 days during the registration year. It has always been our view, and that of our predecessors, that under such circumstances registration is required. See our opinion addressed to the Hon. William Preston Lane, Jr., Governor of Maryland, reported in 33 Opinions of the Attorney General, 280. Many prior rulings are referred to there, and it is our conclusion that they are applicable to the persons who are engaging in the gas burner conversion work, provided, of course, those persons remain here for the period prescribed in Section 2(a) (43) and otherwise fall within its description. You have no authority because of the extraordinary nature of that undertaking to depart from the plain requirements of the law. If any special treatment is to be accorded these persons, it must come from the General Assembly.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

MOTOR VEHICLES—PERSON WHO FAILS TO APPEAR FOR TRIAL OF CRIMINAL CHARGE AGAINST HIM MAY BE RE-ARRESTED AND TRIED NOTWITHSTANDING FORFEITURE OF COLLATERAL—FORFEITURE IS EQUIVALENT TO CONVICTION UNDER MOTOR VEHICLE LAW.

April 20, 1950.

*Mr. Arthur H. Brice,*
*Commissioner of Motor Vehicles.*

We have your letter in which you inform us that a resident of the State of New Jersey was arrested in this State and charged with reckless driving and operating a motor vehicle while under the influence of liquor. Thereafter, on November 26, 1948, because of his failure to appear for trial, his collateral was forfeited. In March 1950, at his request, the Magistrate granted him a trial, which resulted in his acquittal. You have asked us whether the Trial Magistrate was authorized to grant a trial after the lapse of more than a year after the collateral had been forfeited.

The forfeiture of collateral does not, in our opinion, prevent the State from re-arresting the offender and actually placing him on trial, because the forfeiture does not serve as a satisfaction of the offense or as a penalty. Hochheimer's Criminal Law, 2nd Edition, Section 80. The Trial Magistrate, in fixing the time for the trial, should, of course, undertake to give ample opportunity to the witnesses to appear and testify and we think this is especially so where there has been a lapse of a long period of time and the witnesses, in the interval, may have moved from the vicinity.

Notwithstanding the acquittal, neither your Department nor the Magistrate is authorized to return the forfeited collateral because Section 48 of Article 41 of the Code (1947 Supp.) provides: "The Governor may remit the whole or any part of any fine or forfeiture." Furthermore, any action

which has been taken by your Department to withdraw the non-resident's driving privilege will not be nullified merely by the acquittal, because paragraph 8 of Section 2(a) of Article 66½ of the Code provides that, for the purpose of that Article, a forfeiture of bail or collateral, deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Our predecessors have ruled that a Justice of the Peace has no authority to strike out a forfeiture. 19 Opinions of the Attorney General, 316. Chapter 570 of the Acts of 1949 has modified the law in that respect by the enactment of Section 37B of Article 52 of the Code, under the provisions of which Justices of the Peace now have discretionary power to strike out a forfeiture "where the defendant can show reasonable grounds for his non-appearance." That Act became effective on June 1, 1949, after the judgment of forfeiture had been entered. Your letter does not indicate that the Magistrate has been requested to act upon this phase of the matter, hence we deem it unnecessary to consider whether the Act of 1949 may be construed to apply to a judgment entered prior to its effective date.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## PAROLE

PAROLE—MEMBERS OF BOARD REQUIRED TO TAKE OATH AND PROBABLY SHOULD RECEIVE COMMISSIONS FROM GOVERNOR — STATUTORY REQUIREMENTS CONCERNING MEETINGS ARE DIRECTORY.

March 31, 1950.

*Mr. F. Murray Benson, Director,*
*Board of Parole and Probation.*

You have asked me as to the status of the Board of Parole and Probation. The Board, of course, is established by Section 75 of Article 41 of the Annotated Code. This Section provides (as to the Division of Parole and Probation):

> "all the powers, duties, and functions of which shall be exercised and performed by a Board of Parole and Probation and the Director of Parole and Probation as herinafter provided for in this subtitle."

The Board, under the provisions of Section 76 of Article 41, is composed of the Director, who is appointed by the Governor and who is made Chairman by the statute, and the Attorney General, the State Superintendent of Prisons, and the Chief Probation Officer of the Supreme Bench of Baltimore City, the last three members serving ex officio. Section 76 further provides:

> "Before entering upon his duties of office, each of the members of the Board of Parole and Probation shall take an oath that he will well and faithfully execute and perform the duties appertaining to his office according to the Laws of the State and rules and regulations adopted in accordance therewith."

It is further provided that during the absence or disability of the statutory Chairman, the Director, the Governor shall designate a member of the Board to act as Chairman.

It is further provided that the Board shall hold formal meetings in the central office of the Division of Parole and Probation at least once each calendar month and three members shall constitute a quorum. The final paragraph of Section 76 provides:

> "It shall be the duty of the Board of Parole and Probation to direct the operation of the Division of Parole and Probation, and to be responsible for the enforcement of all laws relating to the administration of parole. The said Board shall determine such policies and adopt such reasonable rules and regulations as may from time to time appear essential to the efficient administration of the said parole laws."

It is apparent that in order to qualify and act officially, the ex officio members must take the oath prescribed by the statute. Although it is not entirely clear, it would seem that the Governor should issue a commission to the three ex officio members who should then qualify before the Clerk of Court, as provided in Section 7 of Article 70. Compare *Sappington v. Slade,* 91 Md. 640 and *Clark v. Harford Agricultural and Breeding Asso.,* 118 Md. 608.

The next question as to which you asked is whether the Board must meet each month. The duties imposed upon the Board by the statute are general and involve broad policy-making jurisdiction. The actual working duties of the Division of Parole and Probation and the actual determination of the every day questions with which it is concerned are placed upon the Director. The three ex officio members are busy public officials. It is doubtful, despite the apparent mandatory tone of Section 76, whether a court would not construe this language to be directory

only. Certainly, however, the Board should qualify and be available to assist the Director in matters of policy whenever he shall call upon them.

HALL HAMMOND, *Attorney General.*

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PAROLE—REQUIREMENT OF CODE, ARTICLE 27, SECTION 18, THAT WOMEN CONVICTED OF CERTAIN OFFENSES SHALL NOT BE PLACED ON PAROLE OR PROBATION, EXCEPT UNDER WOMEN PROBATION OFFICERS, DOES NOT PREVENT THEIR PAROLE UNDER CHAPTER 406 OF THE ACTS OF 1949 OR REQUIRE THEIR SUPERVISION BY WOMEN.

August 8, 1950.

*Mr. F. Murray Benson, Director,*
*Division of Parole and Probation.*

In your recent letter you asked whether a woman convicted of violating Article 27, Section 16 of the Annotated Code of Maryland, relating to houses of ill fame, and sentenced to serve an indeterminate period of time in the Maryland State Reformatory for Women, may, in view of the provisions of Article 27, Section 18, be released on parole under the provisions of Article 41, Sections 74, et seq.

Section 18 of Article 27 contains the provision that:

> ". . . no girl or woman who shall be convicted under this Act shall be placed on parole or probation in the care or charge of any person, except a woman probation officer designated by law or by the court."

The question arises because there is not a woman probation officer on your staff.

At the time of the enactment of this Section by Chapter 737 of the Acts of 1920, the parole system, as we know it today, did not exist. At that time, a discharge from imprisonment, made after a part of the sentence had been served, was by way of either a full pardon or a conditional pardon by the Governor under the provisions of Sections 46 to 56, both inclusive, of Article 41, as contained in the 1924 Code. The only use of the term "parole" in those Sections, other than referring to the Parole Commissioner and the Advisory Board of Parole, was with reference to parole and probation of convicted persons by the court where the conviction occurred. An example of this appeared in Section 55 of Article 41 (Code of 1924) which required:

> "* * * And whenever the Circuit Court of any County or the Criminal Court of Baltimore shall suspend the sentence of, or parole, any person convicted of crime, and shall direct such person to continue, for a time certain or until otherwise ordered, under the supervision of said Commissioner it shall be the duty of said Commissioner to supervise, as directed by said Court, the life and conduct of such person, and to ascertain and report to said Court whether or not the conditions of such parole or suspension of sentence are being faithfully complied with by said person."

The Legislature did not include conditional pardons within the provisions in Section 18 of Article 27, and it may be assumed that it intended that Section to apply only to releases "on parole or probation" made by the courts at the time of sentence for, in 1920, when that Section became law, no other parole, as such, was known to our law.

A much more comprehensive system of granting discharges from imprisonment was established by Chapter 406 of the Acts of 1939, Article 41, Sections 74 et seq. (1939 Code) and we are asked to decide if Section 18 of Article 27 deprives a person of the benefits of the Act of 1939 by reason of the fact that you do not have a woman

probation officer on your staff. You have informed us that there never has been a woman probation officer employed by your department since Chapter 500 of the Acts of 1914 was enacted. The General Assembly evidently was aware of this fact and accordingly, if we construe Section 18 of Article 27 as limiting your right to recommend paroles and the power of the Governor to grant them, the result is that a person convicted of violating Section 16 of Article 27 is denied all benefits under the parole laws. We do not think this is in keeping with the legislative intent. The parole law itself furnishes its own bounds and limitations and we do not believe that its application may be circumscribed by applying to it the restriction contained in Section 18 of Article 27 because we think that Section relates to the parole and probation of persons by the court where the sentences were pronounced. In Baltimore City there are several women on the staff of the probation department and, of course, the requirement of Section 18 is fulfilled. But, in our view, that Section does not prescribe a limitation upon your right to recommend or the power of the Governor to grant a discharge from imprisonment under the provisions of Article 41, Sections 74 et seq.

Chapter 520 of the Acts of 1945 (Code, Article 27, Sections 761 et seq.) furnishes further evidence of the legislative intent. Under its provisions the Women's Prison became the Maryland State Reformatory for Women and indeterminate sentences were permitted. In Section 761C of Article 27, specific reference is made to the granting of paroles to persons serving indeterminate sentences in said institution and to the supervision of such persons by your Department. Hence it is clear that as to persons serving indeterminate sentences, the general parole laws apply. And for the reasons above set forth, we think they are applicable equally to persons sentenced for terms of fixed duration.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

## POLICE COMMISSIONER

POLICE COMMISSIONER—POWER TO COMMANDEER PRIVATE CITIZENS AND THEIR MOTOR VEHICLE—LIABILITY OF CITIZENS TO THIRD PERSONS FOR DAMAGES RESULTING FROM ENSUING ACCIDENT.

May 31, 1950.

*Colonel Beverly Ober,*
*Police Commissioner of Baltimore City.*

Your letter of May 11th requests our opinion "regarding responsibility of a citizen under the following conditions:

"1. When he is deputized by a police officer to assist him in the performance of duty.

"2. When his privately-owned automobile is commandeered by a police officer and the owner thereof is directed by the officer to pursue a person who has committed a criminal offense.

"3 When the operator of a commandeered vehicle exceeds the legal speed limit and disregards a 'Stop' traffic signal, resulting in a collision with another vehicle, causing personal injuries and property damage,—the citizen contending that operation of his automobile in the manner described was by direction of a police officer."

These are interesting and difficult questions.

It is first necessary to decide whether a Baltimore City policeman has power to "deputize" a private citizen to assist him in the performance of duty or to commandeer a private automobile. In *State v. Mayhew,* 2 Gill 487 at 501

(1845) (a case involving the validity of legislation requiring bank officers to collect taxes payable by individual owners on the capital stock of the bank) the Court of appeals announced this dictum:

> "* * * Every citizen summoned by an executive officer to aid him in the preservation of the public peace, or in the service of civil or criminal process, or in the arrest of a felon, is bound to perform the services required, although it may subject him to danger, as well as 'additional labor, trouble and expense.' "

*Turner v. Holtzman,* 54 Md. 148 (1880) held that the Sheriff of Baltimore County could, in writing, deputize a private citizen to preserve order at a camp meeting with power to appoint special officers to assist him and that the Deputy and one of the appointed assistants could abate a public nuisance in a public highway. It was there said at pp. 159-160:

> "There can be no doubt that the sheriff has the power of keeping the peace within his county, 8 Bacon's Abr. 689, and to raise the *posse comitatus* to aid him, when necessary in executing his office. We think it equally clear that the sheriff or his deputy may abate a public nuisance in a public highway; and that Turner, as deputy sheriff, had the lawful authority to remove the coach of the appellee, when he found it obstructing the public highway and preventing other parties, who had the right to use the same, from traveling upon it, and to remove the appellee with it, if he did not choose to leave his seat, or to arrest him if he should resist him in its removal. He also had the right to call to his assistance the other appellant, Stoddard, and such other persons as he might deem necessary in effecting the abatement of this nuisance thus caused and maintained by the appellee."

These are but expressions of the common law which empowered peace officers (Justices of the Peace, Sheriffs, Coroners, Constables and Watchmen) to demand assistance of others in pursuing or arresting a felon or in quelling a breach of the peace committed in the officer's presence and arresting the offenders. 2 Hale's "Pleas of the Crown" (1st American Ed. 1874) p. 85. If the private person refused, he was guilty of a misdemeanor upon proof that the officer saw the breach of peace committed by two or more persons, that there was reasonable necessity for calling other persons to his assistance, and that the defendant was called and, without physical impossibility or other lawful excuse, refused. I Russell on Crimes (9th American Ed. 1877), p. 419; *Regina v. Brown*, I Carrington & Marshman, 314, 41 E. C. L. R. 175 (1841); *Coyles v. Hurtin*, 10 Johns (N. Y.) 85.

These duties of a private citizen are allied to the duty to join in a hue and cry after a felon, announced in 13 Edward I, Stat. 2, CC. 1 and 4, which are apparently in force in Maryland. I Alexander's British Statutes (Coe's Ed. 1912), pp. 207-208. Of these statutes, Mr. Alexander says at p. 210:

> "Hue and cry then is the pursuit of an offender from town to town till he is taken; which all who are present when a felony is committed, or a dangerous wound given, or who know that a felony has been committed, are bound to raise against the offenders, who do or may escape, under pain of fine and imprisonment. * * *"

Similar is the power of the Sheriff to summon the *posse comitatus*, or power of the county, which was specifically recognized in 17 Richard II, C.8 as amended by 13 Henry IV, C.7 and in 2 Henry V., Stat. 1, C.7. These statutes, too, appear to be in force in Maryland. I Alexander, *supra*, pp. 271, 287 and 292.

Of these, Mr. Alexander says at pp. 272 and 273:

> "The common law requires sheriffs, constables, and other peace officers to do all that in them lies towards the suppression of riots, and they may command others to assist them, *State v. Mayhew*, 2 Gill, 501. * * *
>
> "Stat. 34 E. 3, c. 1, authorizes justices of the peace to restrain and arrest rioters and this has been construed to give a single justice power to arrest persons assembled riotously by raising the power of the county, if necessary, and to authorize others to arrest them by a bare parol command, and the persons so commanded may pursue and arrest the offenders in his absence."

Persons so compelled to assist peace officers were clothed with the same immunities and defenses to suits by the arrestees with which the peace officers were clothed, 2 Hale, *supra*, p. 85; 7 James I, C.5, C. 21; 21 James I, C.12, 2 Alexander, *supra*, pp. 584 and 589. This, of course, does not give the private individual any more immunity than the officer himself would have. Voorhees on Arrest (2d Ed. 1915) Sec. 301.

Though the powers enumerated above seem to have been applied only in cases of felony or breach of the peace, modern text writers have made no distinction resting upon the type of offense involved. Vorhees, *supra*, Sec. 301; Hochheimer, "Criminal Law" (1911) Sec. 115, p. 114. In view of the Court of Appeals' broad statement in *State v. Mayhew* (quoted above) and its application of the doctrine to the abatement of a public nuisance, it seems that Maryland has followed this view. Of course, all agree that there must be reasonable necessity for the peace officer's demand of assistance.

Assuming the Baltimore City police are clothed with these powers, do they also have the power to commandeer a

private automobile? In *Babington v. Yellow Cab Corp.*, 250 N. Y. 14 (1928), Judge Cardozo held that a taxi driver who was commandeered by a police officer and was killed in an ensuing accident, remained in the employ of the Cab Company for purposes of the Workmen's Compensation Law. New York (like many States) has a provision in its penal code requiring assistance to an officer upon his request. But Judge Cardoza said at p. 16:

> "The duty goes back to the days of the hue and cry 'The main rule we think to be this' say the historians of our early law (Pollock & Maitland, History of English Law, vol. 2, p. 580) 'that felons ought to be summarily arrested and put in gaol. All true men ought to take part in this work and are punishable if they neglect it' (cf. Holdsworth, History of English Law, vol. 1, p. 294; vol. 3, p. 599; vol. 4, p. 521; *Coyles v. Hurtin,* 10 Johns. 85). The law did not limit itself in those early days whereby a man was subject to a duty to provide himself with instruments sufficient for the task. A typical illustration is the Statute of Winchester, 13 Edw. 1, enacted in 1285. 'Immediately upon such Robberies & Felonies committed, fresh Suit shall be made from Town to Town, and from Country to Country.' Every man shall 'have in his house Harness for to keep the Peace after the antient Assise.' The amount is to be proportioned to the quantity of lands and goods. * * * We may be sure that the man who failed to use his horse, and who would only go afoot, would have had to answer to the King (Pollock & Maitland, History of English Law, vol. 2, p. 577; Holdsworth, History of English Law, vol. 1, p. 294).
>
> "The horse has yielded to the motor car as an instrument of pursuit and flight. The ancient ordinance abides as an interpreter of present day. Still as in the days of Edward I, the citizenry may be called upon to enforce the justice of the State,

> not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand."

In 12 Opinions of the Attorney General, 51, Attorney General Robinson held that a Deputy Game Warden, who has, with respect to fish and game laws, the powers of "constables at common law" (Code, 1947 Supp., Article 99, Sec. 8), may commandeer a vehicle to transport a prisoner to a committing magistrate, "provided the necessity of the case required it, and in so doing, too great an inconvenience is not imposed upon the owner of the vehicle used." This seems sound. We think that if the police have the power to commandeer the services of a person they have equal power to commandeer whatever useful implement or vehicle the person may have at hand.

It remains to be considered whether the Baltimore City Police have the powers of common law peace officers. The State Police are termed "peace officers" and have the same powers with respect to criminal matters "as sheriffs, constables, police officers and peace officers have in their respective jurisdictions." Acts of 1935, Chapter 303. In 20 Opinions of the Attorney General, 515, 517, it was held that "this language undoubtedly grants authority for deputizing a private citizen in an emergency, such as *posse comitatus*." Special police appointed by the Governor to protect and preserve order upon the property of certain types of industrial corporations have "all the authority and powers held and exercised by constables at common law." Code (1947 Supp.) Article 23, Sec. 339. Tidewater Fisheries Inspectors have the powers of "police officers and constables of this State." Code (1947 Supp.) Art. 19A, Sec. 7. Forest Wardens have in the field of forestry "all the authority and power held and exercised by constables at common law" (Code, 1939 Ed., Article 39A, Sec. 5), and as shown above the same is true of Deputy Game Wardens.

We think similar powers, though not similarly expressed, are necessarily vested in the Police Commissioner of Baltimore City. Section 530 of the Charter and Public Local Laws of Baltimore City (1949 Ed.) defines his duties in part as follows:

> "He shall at all times of the day and night, within the boundaries of the City of Baltimore, as well on the water as on the land, preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property, guard the public health, preserve order at primary meetings and elections, and at all public meetings and conventions and on all public occasions and places, prevent and remove nuisances in all the streets and highways, waters and water-courses, and all other places, provide a proper police force at every fire for the protection of firemen and property, protect strangers, emigrants and travelers at all steamboat, ferry-boat and ship landings and railway stations, see that all laws relating to elections and to the observance of Sunday, and regarding pawnbrokers, gambling, intemperance, lotteries and lottery policies, vagrants, disorderly persons and the public health are enforced, and also to enforce all laws, ordinances of the Mayor and City Council of Baltimore, not inconsistent with the provisions of this sub-division of this Article, or of any law of the State which may be properly enforceable by a police force; and in case the Police Commissioner shall have reason to believe that any person within the limits of the City of Baltimore intends leaving the city for the purpose of committing any breach of the peace, or of violating any law of the State beyond the limits of the city, upon the Chesapeake Bay or on any river, creek, inlet, water-course, or at any other place on land or water within the State of Maryland, it shall be the duty of the said Police Commissioner

> to cause such person to be followed, and to take the most effectual means for the suppression and prevention of such outrage, when any such shall be attempted, and to cause the arrest of all such offenders; * * *"

These are onerous duties and generally co-extensive with, if not greater than, those of a common law peace officer. The latter were empowered to enlist the aid of private persons on the theory that they were required to preserve the peace and were thus bound to use all reasonable means available to accomplish the results. I Russell, *supra,* p. 419. The reason seems equally applicable to the Commissioner.

The Commissioner has power to increase the force at any time if, in his opinion, the public peace requires it (Sec. 532(b)) and to appoint special police (Sec. 558). Under Section 550, the Sheriff of Baltimore City is required, whenever called on for that purpose by the Commissioner, to act under his control for the preservation of the public peace and, if ordered by the Commissioner to do so, to summon and employ the *posse comitatus* subject to the Commissioner's discretion. The Commissioner has substantially the same powers with respect to the City's military forces. He may, in his discretion, assume command of "all conservators of the peace in the City of Baltimore whether sheriffs, constables, police or others." Presumably included are special industrial police appointed by the Governor, who, as shown above, have the power of common law constables. It would be an unreasonable construction of the legislative intent to hold that the Commissioner may command others whose powers exceed his. It would be equally unreasonable to hold that one burdened with the duty of keeping the peace in a large city is denied the means enjoyed by factory guards, forest and game wardens and fisheries inspectors. We think the Police Commissioner has the power of a common law peace officer to commandeer and deputize individuals in a proper case. If so, there is little doubt that he may delegate this power to his sub-

ordinates. See *Mitchell v. Lemon,* 34 Md. 176 (1871); *Roddy v. Finnegan,* 43 Md. 490, 504, 505 (1876); *Police Commr's v. Wagner,* 93 Md. 182 (1901); *Downs v. Swann,* 111 Md. 53, 61 (1909); *Bush v. Carter,* 98 Md. 445 (1904).

Your final question deals with the civil liability of the operator of a commandeered vehicle to third persons injured as a result of violations of the Rules of the Road. Section 2(a)(1) of Article 66½ of the Code (1947 Supp.), as amended by Chapter 265 of the Acts of 1949, defines "Authorized Emergency Vehicles" 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." (Emphasis added.)

Section 133 is as follows:

"(Public Officers and Employees to Obey Article—Exceptions.) (a) The provisions of this Article applicable to the drivers of vehicles upon the highways *shall apply to the drivers of all vehicles owned or operated by* the United States, *this State or any county, city, town,* district, or any other political sub-division of the State, subject to such specific exceptions as are set forth in this Article with reference to authorized emergency vehicles.

"(b) The driver of any authorized emergency vehicle *when responding to an emergency call* upon approaching a red or stop signal or any stop sign *shall slow down as necessary for safety but may proceed cautiously past such red or stop signal or stop sign.* At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal.

"(c) No driver of any authorized emergency vehicle shall assume any special privileges under this Article except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law." (Emphasis added.)

Section 180 controls the operation of vehicles and street cars on the approach of authorized emergency vehicles. It is as follows:

"(a) Upon the immediate approach of an authorized emergency vehicle, *when the driver is giving audible signal by siren, exhaust whistle, or bell,* the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

"(b) Upon the approach of an authorized emergency vehicle, as above stated, the operator of every street car or trackless trolley shall immediately stop such car clear of any intersection and keep it in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

"(c) *This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.*" (Emphasis added.)

Section 159 is as follows:

"The prima facie speed limitations and provisions relative to right-of-way, stopping at through

> highways, rules of the road, traffic control devices and signals set forth in this Article shall not apply to authorized emergency vehicles when responding to emergency calls *and the drivers thereof sound audible signal by bell, siren, or exhaust whistle. This provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard for the safety of others.*" (Emphasis added.)

Thus an authorized emergency vehicle is favored above other vehicles only when responding to an emergency or in the immediate pursuit of an actual or suspected violator of the law and when giving audible signal by siren, exhaust whistle or bell. In spite of this favored position, an authorized emergency vehicle must slow down and proceed cautiously past red or stop signals or stop signs and the driver always has the duty to drive with due regard for the safety of others. *Baltimore Transit Co. v. Young,* 56 A 2d 40. These provisions apply to a policeman in a clearly marked police car with a siren. *A fortiori,* they apply to the driver of a commandeered civilian car even if it can be termed an authorized emergency vehicle.

In the recent case of *Yellow Cab Co. v. Benjamin Delgado* in the Superior Court of Baltimore City, a private automobile was commandeered by a policeman to pursue a person whom the policeman was attempting to arrest. The commandeered car, driven by its owner, went through a red light and a collision with a Yellow Cab resulted. The latter sued the owner of the commandeered car for damages. The evidence was apparently conflicting as to whether the policeman had instructed the defendant to proceed through the red light. At any rate, the defendant was giving no signal "by siren, exhaust whistle or bell," nor was he even sounding his horn. Judge Warnken instructed the jury in

effect that the defendant was guilty of negligence as a matter of law and that the only question for consideration was whether the plaintiff was guilty of contributory negligence. The jury were told to disregard the fact that the defendant had been commandeered even if the police had specifically instructed him to go through the red light. The reason is obvious. Even if the defendant's car could have been termed a police vehicle and thus within the definition of "authorized emergency vehicle," it was not giving any signal by "siren, exhaust whistle or bell"—or even by horn—as the plaintiff under Sections 159 and 180 had a right to expect. Judge Warnken's ruling would have been equally applicable if the policeman himself had been the driver and defendant. And if the policeman ordered the defendant to go through the red light without sounding a "siren, exhaust whistle or bell" (with which the car was undoubtedly not equipped), it was not only the defendant's right but his duty to disregard the order.

It may be argued that Section 140(a) ought to have absolved the defendant in the Delgado case. That Section requires that no driver disobey the instructions of any official traffic control device "unless at the time otherwise directed by a peace officer." But we think the Section has reference to a peace officer who is directing traffic—visible to all—and not one hidden in a moving civilian automobile whose order could be known only to its driver. Nor do we think a peace officer may under this Section lawfully direct one to do what he could not do himself.

Our conclusion is that the Baltimore City police may, if so authorized by you, command the assistance of private citizens and their automobiles in emergencies where such assistance is necessary to preserve the peace, abate a public nuisance or effect a lawful arrest, and where the citizen is able to give the assistance and has no lawful excuse for refusing. Upon giving such assistance, the private individual is clothed with the same immunities as the police officer, but he cannot exceed the authority of the police

officer and is subject to the same rules of caution and liabilities for his negligence as the officer would be under like circumstances.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

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POLICE COMMISSIONER OF BALTIMORE CITY—EMPLOYEES—RIGHTS OF SUCH EMPLOYEES IF THEY ENLIST OR ARE ORDERED INTO MILITARY OR NAVAL SERVICE.

July 25, 1950.

*Colonel Beverly Ober,*
*Police Commissioner of Baltimore City.*

Mr. Thomas L. Miller, Chief Personnel Officer of the Police Department has written for an opinion as to the rights of an employee of your Department in the event that he is drafted under the Selective Service Act or, being in the reserves, receives orders to report for active duty or enlists in the armed services of the United States.

Under the Charter and Public Local Laws of Baltimore City (1949), Section 531, it is provided that:

> "The Police Commissioner shall have power, in his discretion, to reinstate in their former rank or grade all members of the Police Department who may leave or have left therefrom for the purpose of entering the military or naval service of the United States upon their return from such service provided that those persons so returning shall pass a satisfactory physical examination."

It is clear that, under this Section, you have the right to reinstate any officer who may leave the employ of the Police Department for any one of the reasons set forth above. However, in view of the present emergency and in order to protect the employees of your Department as fully as possible, it is suggested that you should adopt and promulgate the attached regulation concerning leaves without pay. In the event that any employee of your Department leaves for any one of the reasons set forth above, you should direct him to apply for leave without pay under said regulation for a period not exceeding one year. Under the suggested procedure, any such employee's right to reemployment in your Department would be protected until the General Assembly convenes for its 1951 session.

Under the provisions of the Laws of 1949, Chapter 238, seniority and retirement rights of any such person are no longer protected. That Chapter, which amended the Annotated Code of Maryland (1947 Supplement), Article 65, Section 96, provided December 31, 1945, as the cut-off date after which such rights were no longer protected. However, your attention is called to the fact that this Act, as originally enacted, prior to World War II by the General Assembly of Maryland, was passed for the purpose of protecting employees of the State or any agency thereof in their retirement and seniority rights and said Act was made retroactive. It seems likely that, if the present emergency continues, the 1951 session of the General Assembly will take similar steps.

HALL HAMMOND, *Attorney General.*

KENNETH C. PROCTOR, *Asst. Attorney General.*

POLICE DEPARTMENT OF BALTIMORE CITY
REGULATION NO.——
LEAVES WITHOUT PAY

In view of the present national emergency and of the fact that the General Assembly of the State of Maryland will not have an opportunity to take steps to protect the reemployment rights of employees of this Department until the Session which will convene in January, 1951, it is this —— day of July, 1950,

ORDERED that each employee of this Department who is drafted for service in the armed forces of the United States under the Selective Service Act or who, being a member of a reserve component of the armed forces of the United States, is called for active duty or who enlists in the armed forces of the United States shall immediately make application to the Police Commissioner of Baltimore City for leave without pay for a period of not exceeding one year from the date of such application. Such application, in any of such events, will be approved by the Police Commissioner of Baltimore City.

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POLICE COMMISSIONER—HALL OF RECORDS—RECORDS REQUIRED BY LAW TO BE MAINTAINED PERMANENTLY MAY NOT BE DESTROYED.

October 30, 1950.

*Colonel Beverly Ober, Commissioner,*
*Baltimore City Police Department.*

You have asked whether, under the law, you may microfilm all of your official records which are at any time more

than five years old and destroy the original. Section 553 of the Charter and Public Local Laws of Baltimore City (1949 Ed.) is in part as follows:

> "The Police Commissioner shall cause to be kept by his secretary a full report of his proceedings, and also cause all his receipts and disbursements of money to be faithfully entered in books to be provided for that purpose; and said books, journals and all other documents in the possession of said Commissioner, shall always be open to inspection by the General Assembly, or any committee appointed by it for that purpose; and * * * shall at all times be open to the inspection of the Mayor and City Treasurer, or either of them * * *."

This provision has been in effect since 1860 and has not been amended since Chapter 123 of the Acts of 1898.

Section 127 of Article 41 of the Code (1947 Supp.), first enacted by Chapter 18 of the Acts of 1935 (Sec. 87E) and amended by Chapter 896 of the Acts of 1945, dealing with the Hall of Records Commission, is in part as follows:

> "Every State, county, city, town, or other public official in the State in custody of public records or documents is hereby authorized and empowered, in his discretion, to turn over to the Commission and deposit for preservation, any original papers, official books, records, documents, files, newspapers, printed books, or portraits, not in current use in his office, and when so surrendered, and accepted by the Commission, copies may be made and certified under the seal of the Commission upon application of any person, which certification shall have the same force and effect as if made by the officer originally in charge of same, * * *"

Section 553 of the Baltimore City Charter requires you to have your records always open to inspection by the General Assembly or any committee thereof and by the Mayor and City Treasurer of Baltimore. When first enacted this language undoubtedly meant the original records. However, we believe authority to deviate somewhat from this requirement has been conferred by Section 127 of Article 41 of the Code of Public General Laws. As you are a "public official in the State", and, as the records referred to in Section 553 of the City Charter are "public records or documents", we believe you are authorized to turn over your original records to the Hall of Records Commission. The spirit of Section 553 of the City Charter will be fulfilled by keeping in your possession microfilm copies for inspection and by the fact that the original records may be inspected in the hands of the Commission.

Under Section 127A of Chapter 755 of the Acts of 1949, the Hall of Records Commission may decline to accept your records. If they do decline, we believe you have no authority to destroy them. The provision in Section 127A authorizing the destruction of records which the Hall of Records Commission declines to accept, does not include your records required to be kept under Section 553 of the City Charter. Excepted from the authority to destroy are "public records required by statute to be maintained permanently" and "permanent books of account".

We do not believe the opinions of this office reported in 31 Opinions of the Attorney General, 124, and 24 Opinions of the Attorney General, 188, are controlling here, because of the difference in the basic statutory provisions involved.

Nor do we think Chapter 518 of the Acts of 1949 affects the situation. This Act (approved before Chapter 755 and effective the same date) purports to add a new Section to Article 41, to be known as Section 127B and to follow Section 127A. Chapter 755 also adds to this Article a new Section to be known as Section 127B which follows Section

127A as amended therein. Obviously a mistake was made in the intended numerical designations of the Sections; but as they are not inconsistent, and as neither purports to repeal the other, we believe both of them are in effect. Section 127B of Chapter 518 provides in substance (a) that whenever any agency photographs, etc., any of its records in accordance with Hall of Records standards and makes provision for preservation and examination of the photographs, etc., in a manner approved by the Hall of Records, the head of such agency, with the approval of the Archivist of the Hall of Records under Section 127A, may "cause the original records * * * to be disposed of as the law provides"; and (b) that such photographs, etc., shall be admissible in evidence to the same extent as the originals. Nothing therein authorizes destruction of the originals in contravention of the express language of Section 127A, quoted above.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

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POLICE COMMISSIONER—GAMING—NO CONFLICT BETWEEN CHAPTER 708 OF THE ACTS OF 1949 AND BALTIMORE CITY BUILDING CODE.

November 24, 1950.

*Colonel Beverly Ober,*
*Police Commissioner of Baltimore City.*

In your letter of November 15th you ask whether there is any conflict between Chapter 29, Section 291 of the Baltimore City Building Code (Ordinance No. 1263, approved June 20, 1950) and Chapter 708 of the Acts of 1949, recently approved by the voters of Baltimore City and Baltimore County.

The Section of the Building Code applies to the use of "public or private land, streets, lanes or alleys for

fetes, bazaars, circuses, street carnivals, carnivals, feats of horsemanship, acrobatic stunts, trained animal acts, clowning and other similar performances, mechanical rides or other devices to which the public is admitted," including "temporary stands or facilities for selling or dispensing products for human consumption in connection with the foregoing." All of these activities are defined in Par. 2910 as "circuses" and "carnivals."

Par. 2911 requires that application for a permit to hold a circus or carnival be made to the Building Commissioner, who shall forthwith refer the application to the Police Commissioner, the Highways Engineer, the Chief Engineer of the Fire Department, and the Commissioner of Health for their recommendations. Upon disapproval by the Police Commissioner, the application is not to be granted. If the Police Commissioner approves, the Building Commissioner issues the permit subject to recommendations of the other named officials. The Police Commissioner is required to keep close watch upon any such circus or carnival. The Building Commissioner must require applicants to give detailed information concerning mechanical rides or devices, insurance, financial responsibility, etc.

Par. 2912 contains detailed requirements for the lay-out of a circus or carnival; Par. 2913 relates to structures; Par. 2917, to electrical work; Par. 2919, to maintenance and operation.

Chapter 708 of the Acts of 1949 adds a new Section (302½) to Article 27 of the Md. Code of General Laws, title "Crimes and Punishments," sub-title "Gaming." It provides that nothing in said sub-title shall be construed to make it unlawful for any "bona fide religious, fraternal, civic, war veterans', hospital, amateur athletic organization in which all playing members are less than eighteen years of age, or charitable organization or corporation * * * to conduct or hold a carnival, bazaar or raffle" for its own benefit, provided no individual shall benefit financially therefrom. Limits are placed upon the value of the prizes

which may be offered, and there are other qualifications. An organization desiring to hold such a carnival, bazaar or raffle must obtain a permit from the Police Commissioner. Before he issues the permit, he must ascertain the character of the organization on whose behalf the application is made to determine if the application comes within the requirements of the statute. Criminal penalties are specified "for knowingly operating or attempting to operate a bazaar or raffle" in violation of the Section.

Though the 1949 Act, in terms, speaks of "a carnival, bazaar or raffle," its obvious intent is to legalize and regulate certain types of gambling otherwise forbidden by Article 27. We do not think it is intended to affect in any way carnivals or bazaars at which no gambling of any sort is carried on. See *State v. Petrushansky*, 183 Md. 67. The Police Commissioner's sole job under the Act is to determine whether the organization seeking to carry on such gambling is qualified under the Section.

We do not see that this conflicts in any way with Section 291 of the Baltimore City Building Code, whose primary purpose is physical safety.

The result, in our opinion, is that any application to hold a circus or carnival under Section 291 of the Building Code must be made and approved in accordance with the provisions thereof, regardless of whether or not the gambling permitted by the 1949 Act is intended to be held. If such gambling is intended to be held, further application must be made to the Police Commissioner under Chapter 708 of the Acts of 1949. And if the gambling contemplated in the 1949 Act is proposed to be held, but not at a carnival or circus as defined in Section 291 of the Building Code, application need not be made to the Building Commissioner, but application still must be made to the Police Commissioner under the 1949 Act.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

## RACING COMMISSION

RACING COMMISSION—COMMISSION MAY NOT AUTHORIZE REIMBURSEMENT FROM RACING FUND WHERE PRIOR WRITTEN AND EXPRESS PERMISSION OF THE COMMISSION WAS NOT OBTAINED BEFORE EXPENDITURES WERE MADE.

May 17, 1950.

*Mr. H. C. Jenifer, Chairman,*
*Maryland Racing Commission.*

You present to us an application of the Maryland Jockey Club to be reimbursed from the Racing Fund for expenditures totaling $340,763.52, made, without prior approval, since 1944. You ask us, in view of the provisions of Section 12 of Article 78B of the Code, whether the sums so spent, may now be repaid the Jockey Club from the Racing Fund.

In 1938, the Racing Commission permitted the race tracks to take an additional 1% of the mutuel pool for the purposes set forth in a Resolution of the Commission of July 5th of that year. Mr. Jervis Spencer, the then Chairman of the Commission, wrote the tracks in connection with the Resolution, as follows:

> "This increase in funds is desirable provided it is used in improving the quality of racing the tracks offer the public, and in improving facilities for the comfort and convenience of the general public, the working force employed on the tracks and the horsemen who contribute so much to the success of any meeting . . .
>
> "In the matter of improvements, much remains to be done in providing lighting and other con-

veniences for horsemen about the stables; and, generally in doing many of the things that the Commission has desired, and in some instances asked to have done in the past, but the doing of which has been postponed because of the lack of available funds . . .

"With this understanding—improved racing, needed plant improvements, and aid to agriculture, —the Commission approves the petition as presented; that is, an increase of one per cent . . ."

From 1938 to 1944, no accounting was required of the tracks by the Commission as to the spending of the extra 1% which had been granted, although informal, general approval was given from time to time. In the spring of 1944, one member of the Commission in particular questioned the continuance of the allowance of the additional 1% which had been granted in 1938, charging that it had been in many instances improperly spent. The majority of the Commission decided otherwise, but as a result of the charges and the investigations and hearings which followed, the Commission, on April 12, 1944, passed a Resolution which is set forth in full and ratified by Chapter 962 of the Acts of 1945. Substantially it provided as follows:

One-half of 1% of the mutuel pool was allowed the tracks, provided all of it was used towards the increase in the average daily purses over and above the amount of the average paid by each track respectively in 1937. Another one-half of 1% of the mutuel pool was to be collected by each track as agent for the Commission and deposited to its order in designated banks. It was further resolved that the one-half per cent., so collected as agent, would be held by the Commission until the 1945 Session of the General Assembly should authorize its disposition under the supervision of the Commission. In connection with passage of the Resolutions, the Commission announced that one-half per cent. so collected as agent would, in the future, if the

Legislature approved, be restricted so that "no expenditures from the separate funds shall be permitted without the prior approval of the State Racing Commission." Two further announcements were made, First that the expenditures would be permitted only for permanent physical improvements; and Second, that, "The length of time to be allowed the tracks for the expenditure of these separate funds will, to some extent, depend upon the availability of building materials and other circumstances growing out of the war, but it is contemplated that at least part of these funds will be utilized for physical improvements even under war conditions."

The Acting Commissioner of Internal Revenues, in July 1944, considered the Resolutions to which we have referred and advised the Commission, through this office, that the amounts collected as agent for the Commission, did not constitute taxable income to the various Racing Associations, since they did not collect it in their own capacity, but merely on behalf of an agency of the State. When, however, any part of the fund was released by the Commission to the track, it might be taxable income. If it reverted to the State, it never became subject to Federal Income Tax.

By Chapter 961 of the Acts of 1945, there was enacted Section 11A (now Section 12) of Article 78B of the Code. It authorized the deduction as the Commission should determine of up to 1% by the tracks as agent for the Commission, all such deductions to be held in and comprise a fund to be known as the "Racing Fund." It then provided, as follows:

> "The amount of the Racing Fund on hand at any time, representing the deductions made by any particular licensee from the mutuel pool, previously collected by such licensee, as agent of the Commission, may, with the prior written and express permission of the Commission, upon such terms and conditions as it may prescribe, be expended by

> that particular licensee for any substantial alterations, additions, changes, improvements or repairs to or upon the property owned or leased by such licensee, and by it used for the conduct of racing. In determining whether to permit the use of any of the Racing Fund, the Commission shall give due consideration to whether its expenditure in each instance will promote the safety, convenience and comfort of the racing public and of horse owners and, generally, whether it will tend towards the improvement of racing in the State. . . "

The statute then goes on to say that if the deductions "shall neither have been spent nor binding commitments have been entered into for their expenditure, with the approval of the Commission, within three (3) years from the last day of the year of collection, the unspent portion of such year's deduction shall revert to the State as part of its general funds, . . ." There was added an escape clause which provided that if war conditions prevent expenditures sooner, both the 1944 and 1945 collections could be expended up to December 31, 1949. By Chapter 502 of the Acts of 1947, the 1944, 1945 and 1946 collections could be expended at any time prior to December 31, 1950. At that date, however, the unspent portion of each year's collections must be paid to the State.

The quoted language, now codified as Section 12 of Article 78B of the 1947 Supplement, is in form plainly mandatory and plainly prospective in that expenditures from the collections made as agent for the Commission may, in so many words, be expended only "with the prior written and express permission of the Commission." It is provided that, in determining whether "to permit" the use of the Fund the Commission shall give due consideration to whether its expenditure "will promote the safety, convenience and comfort of the racing public and of horse owners and, generally, whether it will tend towards the improvement of racing in the State." It is argued, however,

by the Maryland Jockey Club that the expenditures for which it seeks reimbursement now, and which it spent in the years from 1944 on, without obtaining approval of the Commission, meet the tests set down by the statute, in that they did contribute to the safety, convenience and comfort of the racing public and of horse owners, so that the spirit and purpose of the statute are met, and no harm will be done if *nunc pro tunc* approval is now given, particularly since similar expenditures have been approved for payment from the Racing Fund in the case of other licensees, upon timely application.

The Courts have pointed out that whether a statute is mandatory or directory does not depend alone upon its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire Act, its nature, its object, and the consequences that would result from construing it one way or the other. If Section 12 is construed in the setting thus prescribed by the law, there seems no doubt that its restrictions are mandatory. It is manifest from the history of events which produced the Act that it was designed to accomplish at least these things: First, there was to be a fund accumulated which would not be taxable, if at all, until it was spent; Second, the fund so accumulated was to be spent only for clearly defined works or additions or improvements of permanent benefit to racing. Lest any question arise as to whether a particular undertaking met the tests of the statute and, to obviate the wrangle, the discord and the futility which would attend any attempt to discover, long after the events had taken place, whether the funds authorized in 1938 had been properly spent or not, expenditures from the Racing Fund were to be made only "with the prior written and express permission of the Commission." Third, the money collected and held in the Racing Fund was not the property of the Racing Association which collected it as agent. If the money was not spent in accordance with the terms, provisions and restrictions of the statute, it reverted to the State, never having become the property of the Racing Association. The

term "revert" is significant in this connection, because that is the word used in the return to general funds of appropriations which the State has made and which are unexpended.

Considering the tests as to whether a statute is mandatory in inverse order, it is clear that if the Commission *nunc pro tunc* permits reimbursement to the Jockey Club for expenditures made years ago without approval, it is either varying the terms of what is, in effect, a legislative appropriation, or it is itself making an appropriation both of which, it is needless to say, it utterly lacks power to do. Also the result of granting approval now for past expenditures might be that the income accruing to the track in 1950 would be taxable (if it is taxable) at rates now in effect, although the work was done in years when the rates were much higher. This would produce a result which was different from that upon which the opinion of the Internal Revenue Department was obtained, and might result in tax complications or claims against the Jockey Club. Next, if the purpose and nature of the legislation are considered, it is clear that a non-mandatory construction would permit the very evil which the Racing Commission and the Legislature sought to cure by the passage of the law. It was to avoid the uncertainty and difficulty attendant upon giving blanket approval of expenditures and then attempting, after they were made, to decide whether they were proper or not, that the requirement of "prior written and express" approval was inserted.

For the reasons we have stated, it is our clear opinion that you cannot legally approve the application of the Jockey Club.

HALL HAMMOND, *Attorney General.*

## Racing Commission—Payment of Portion of "Racing Fund" to Maryland Jockey Club Approved.

December 5, 1950.

*Mr. H. Courtenay Jenifer, Chairman,*
*Maryland Racing Commission.*

This will confirm the oral advice which I have heretofore given you concerning the request of The Maryland Jockey Club of Baltimore City for the payment on or before November 30, 1950, of that portion of the Racing Fund attributable to its operations in the total amount of $717,488.88.

I have examined the proposal as contained in the certified copy of the minutes of a special meeting of the Board of Directors of the Jockey Club held on November 22, 1950, and the irrevocable commitment of the Voting Trustees for the owners and holders of shares of capital stock of the Jockey Club with respect to the action taken by the Board on that date. I have also examined the certificate of Mr. L. McLane Fisher, a member of the firm of architects retained by the Jockey Club, and the form of bond which the Jockey Club, as principal, and the United States Fidelity and Guarantee Company, as surety, has proposed to give to the Racing Commission, individually and as a Commission and/ or the State of Maryland.

It is my opinion that the Racing Commission may properly authorize the payment to the Jockey Club of the sum of $717,488.88 upon the delivery of a duly executed corporate bond in form submitted to me, and that such authorization will be in full accord with the terms, provisions and limitations contained in Section 12 of Article 78B of the Annotated Code of Maryland (1947 Supp.).

Hall Hammond, *Attorney General.*

RACING—ALLOCATION OF REVENUE TO POLITICAL SUBDIVISIONS—RIGHT OF MUNICIPAL CORPORATION TO SHARE OF RACING REVENUE IS NOT DEPENDENT UPON ITS MAKING DEMAND THEREFOR.

April 27, 1950.

*Mr. Fred C. Herrmann, Mayor of North Beach,*
*North Beach, Maryland.*

In your recent letter you ask as to the proper interpretation of paragraph 4 of Section 17 of Article 78B of the Annotated Code of Maryland (1947 Supplement), as enacted by Chapter 502 of the Acts of 1947, relating to the distribution of racing revenues allocated to the Counties and the municipalities.

In 32 Opinions of the Attorney General, 205, we ruled that Chapter 502 rather than Chapter 856 of the Acts of 1947, both of which dealt with the same subject matter, controlled and was in effect, and any question of that subject was put at rest by the re-enactment of the language with which we are immediately concerned by Chapter 246 of the Acts of 1949.

The town of North Beach, as of January 10, 1950, had never received any monies from County allocated racing funds. The Mayor and Town Council made inquiry of the County Commissioners of Calvert County as to the reason. They were advised by the Clerk of the County Commissioners of Calvert County that a check for the 1949 allocation was being forwarded, but that "I am sorry that we cannot pay for 1948, but according to our counsel, money that was not requested or matched during the current year automatically went in the general fund." You wish our opinion as to the correctness of this advice as to 1948 funds.

In the first place, under the provisions of the law, any money becoming the property of Calvert County because it was not payable to a municipality would not go into general funds. It would go into funds to be used 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." Next, the distribution to be made by the County to the municipality is not conditioned upon a request or demand for the money. The two conditions which must be met by the municipality to entitle it to a proportionate share of the racing funds are (1) that such funds be used "for the construction or maintenance of streets, or sewage facilities, or water systems, or garbage collection and disposal within the town," and (2) "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 condition of retention by the County is that the incorporated town fails "to comply with the provisions of this Section."

It is apparent from the correspondence which has been submitted to us that in 1948 the town of North Beach spent over $6,000 for the maintenance of streets and $2,400 for garbage collection and disposal. It is to be assumed that this money was raised by taxation by the town. These facts must certainly have been known to the County Commissioners and, in the absence of clear evidence that the town of North Beach would not apply the funds to which it was entitled in 1948 to the purposes specified in the law, we feel that the positive duty is on the County Commissioners to make the allocation required by the statute. As we see it, the obligation is on the County to act. The affirmation of the statute is directed to it. It is not meant to suggest by this that the incorporated town should not cooperate by making known the purposes to which the money to be received is to be used and the matching of the funds. It is to say that, as a legal matter, if facts do exist which entitle the town to the money, it is not to be retained by the County Commissioners merely because the town does not ask for it. It is our view that the town of North Beach is entitled to its proportionate share of the 1948 racing revenues.

HALL HAMMOND, *Attorney General.*

## STATE SEAL

STATE SEAL—USE FOR COMMERCIAL PURPOSES PROHIBITED —USE ON SIGN ADVERTISING NEWSPAPERS WITHIN PROHIBITION.

December 5, 1950.

*Mr. James P. Brock,*
*Administrative Assistant,*
*Office of the Secretary of State.*

You have presented to us the request of Capital-Gazette Press, Inc., to use the State Seal on a colonial sign which it plans to erect over its old building at 3 Church Circle, Annapolis, Maryland, which is now being converted into an office building. Briefly, the sign will read "3 Church Circle—Former Offices of America's Oldest Newspaper—The Maryland Gazette—Founded 1727—(here will be depicted the Great Seal of the State of Maryland)—Evening Capital—Daily Since 1884."

The request involves a construction of Section 83 of Article 27 of the Annotated Code of Maryland (1939 Edition). This Section provides, *inter alia,* by sub-section (b) thereof that no person shall in any manner for exhibition or display expose to public view the Great Seal of the State, upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any advertisement. The various subsections of Section 83 have been considered by this office on a number of occasions. It has been consistently held that the purpose of Section 83 has been to prohibit reproduction of the Great Seal of this State in any connection where such reproduction is for commercial purposes. See for example the two latest opinions of this office reported in 24 Opinions of the Attorney General, 666 (1939), and 25 Opinions of the Attorney General 458 (1940).

The use of the Great Seal by Capital-Gazette Press, Inc., in the manner set forth above seems to us to be clearly for a commercial purpose. Both the Maryland Gazette and Evening Capital are newspapers which are still being published. They will neither be published nor will the office of the publishing company be maintained at 3 Church Circle at the time that the sign is proposed to be erected. Accordingly, it would seem that the only purpose of carrying the names of the two newspapers on the sign showing the address of the building would be to advertise the newspapers for commercial purposes. Section 83(b) prohibits the use of the Great Seal under such circumstances.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## STATE POLICE

STATE POLICE—DISPOSITION OF PROPERTY AND MONEY COMING INTO POSSESSION OF THE DEPARTMENT IN PRINCE GEORGE'S COUNTY—SALES OF ARMS AND GAMBLING PARAPHERNALIA COMING INTO POSSESSION OF DEPARTMENT—RETURNING GUNS AND GAMBLING PARAPHERNALIA TO LAW ENFORCEMENT OFFICERS AS SOUVENIRS.

April 18, 1950.

*Colonel Carey Jarman, Superintendent,*
*Department of Maryland State Police.*

You have asked us for our comments on the various problems which arise relating to personal property and money coming into the possession of the Department of Maryland State Police.

First, you ask us what should be the disposition of personal property and money, ordinarily disposed of in accordance with the provisions of Section 18A of Article 88B of the Annotated Code of Maryland (1947 Supp.), when such personal property and money come into the possession of the Department in Prince George's County, in view of the provisions of Section 393A of the Prince George's County Code (1943 Ed.). This Section establishes the office of Property Clerk and specifies that within 48 hours after coming into possession of all property and money " . . . the County police force, the Sheriff and all deputies, the County Medical Examiner, and all other law enforcement officers and public officials shall . . . deliver to the Property Clerk" —such property and money. In view of this provision, you ask us whether your standard procedure of providing for the safekeeping of property and money seized in Prince George's County by your Property Custodian at State Police Headquarters should be followed.

We had occasion to consider the effect of the local law in Prince George's County in 30 Opinions of the Attorney General, 110 (1945), and there we concluded that the Prince George's County statute operated as an implied repeal of the Post Mortem Examiners Law, which directed that property of value found on the person of a deceased at an investigation, under that law, should be delivered to the Police Department in Baltimore City or the Sheriff of the County, as the case may be. The reason which required that result, namely statutory repeal by implication, seems equally applicable to the law under which you retain money and property and forward it to the Property Custodian at Headquarters. In other words, we believe that in Prince George's County, you will be obliged to depart from your standard procedure and to transmit money and property coming into the possession of anyone in the Department to the Property Clerk for Prince George's County. You will note, however, that there is no provision in the Prince George's County law for the disposition of property after received by the Property Clerk if the proper owner does not claim it. Obviously, there can be no inconsistency in this respect between the Prince George's County law and Section 18A of Article 88B of the Annotated Code of Maryland (1947 Supp.), which, as you know, authorizes you to sell such property and apply the proceeds to the benefit of the State Police Retirement and Pension System. However, we do believe that custody of property and money seized in Prince George's County must be retained by the Property Clerk of Prince George's County, rather than the Property Custodian of your Department.

You have outlined in detail the procedure for disposition of personal property and money coming into possession of your Department. The procedure seems entirely adequate but it has given rise to a number of problems.

As you point out, the owner or person entitled to possession of personal property is entitled to return of the property if proper claim is made before the expiration of one

year and to the proceeds of sale of such property if proper claim is made within three years from the date on which it came into custody of the Department. Under these circumstances, you ask whether it would be better policy for you not to sell any such personal property until the expiration of three years notwithstanding that, under the statute you are authorized to conduct such a sale after the expiration of one year. This question is difficult to answer because it presents a question of policy as distinguished from a question of law. Certainly under Section 17A of Article 88B, you are authorized to sell such property after the expiration of one year from the date in which it came into the custody of your Department. If storage facilities are available, there is certainly no objection to your postponing the holding of a sale until after the expiration of three years, that is the date on which the true owner is foreclosed from claiming any part of the proceeds of the sale. Under the law, either course is acceptable but the determination of which course to follow depends upon practical considerations which we deem ourselves not competent to weigh.

You ask also what should be the disposition of firearms, gambling paraphernalia, slot machines, etc., obtained as a result of raids and other police actions. You state that you have never sold any firearms and do not consider it a good policy to do so. Quite properly, you indicate a reluctance to sell gambling paraphernalia. Consequently you ask whether or not firearms could be used as equipment for the Department and whether you can sell gambling paraphernalia at private sale to private buyers in jurisdictions where the use thereof is lawful.

Section 18A directs that disposition of personal property coming into the custody of the Department shall be made by *public* sale on terms fixed in the discretion of the Superintendent. We do not construe this direction, however, to mean that all property coming into your possession, such as firearms and gambling paraphernalia, must be sold. In short, we believe that the direction to sell must be read with

due regard to a rule of reason so that, for practical purposes, the language may be construed as a direction to sell what is lawful to sell. With this principle in mind, it appears that firearms may properly be sold at public sale. While there are regulations on transfers of firearms in this State, possession of them is not fundamentally unlawful (see the Second Amendment of the Federal Constitution). We believe, therefore, that you could properly conduct a public sale of firearms under conditions fixed by you to ascertain that the purchasers thereof are properly qualified to possess them.

At the same time the dangers incident to a public sale of firearms and the impossibility of fixing conditions to insure that purchasers are properly qualified to possess them may well be sufficient to excuse you from the necessity of conducting a public sale of the same. The existence of such dangers is, of course, a factual matter which we cannot ascertain on the basis of the information which you have furnished us. If you believe that there is sufficient factual basis upon which it can be said that it would be poor policy for the State to sell firearms at a public sale, we believe that you would be fully authorized to permit the use of the firearms coming into the custody of your Department by members of your Department in the performance of official duties, training or the like, or order the destruction of the same.

We do not believe that you are authorized to sell gambling paraphernalia at private sale. By the use of your discretionary power to impose conditions on public sales, it may be possible to sell such gambling paraphernalia and limit prospective purchasers to those who reside in a jurisdiction where use of the paraphernalia is not unlawful, and who can demonstrate that the gambling paraphernalia will not be used in violation of the laws of Maryland. However, should this course seem impracticable, we believe that you are fully authorized to order the destruction of the paraphernalia.

As a last problem, you ask our advice with respect to requests from various State's Attorneys and other persons taking part in enforcement of the law that you turn over to them certain firearms and gambling paraphernalia, seized as the result of a raid, for souvenir purposes.

We had occasion to consider this problem in a letter addressed to Captain Davidson of your Department under date of March 18, 1949. There we were concerned with a request of a State's Attorney to have delivered to him certain firearms and gambling paraphernalia seized as a result of a raid. In view of the mandatory provisions of Section 18A of Article 88B, which relates to the disposition of personal property coming into your custody, we stated that you had no authority to honor the request. Further consideration of this problem only serves to reinforce our views. We do not believe that you are authorized to release firearms, gambling equipment or any other personal property in your possession to State's Attorneys or law enforcement officers for souvenir purposes.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

## STATE PROPERTY

STATE PROPERTY—NOT SUBJECT TO BALTIMORE CITY ZONING.

June 20, 1950.

*Mr. John B. Funk,*
*Chief Engineer of Maryland,*
*State Department of Public Improvements.*

You have asked for an opinion as to whether the State, in building upon its own property within the limits of Baltimore City, is bound by the City's zoning regulations. Your letters seek a general principle but are specifically directed to buildings proposed for Morgan State College and the State Roads Commission.

The basic zoning law applicable to Baltimore City was enacted by Chapter 705 of the Acts of 1927 and is contained in Sections 1 through 9 of Article 66B of the Code of General Laws (1939 Ed.). Section 1 thereof contains the "grant of power" and is as follows:

> "For the purpose of promoting the health, security, general welfare and morals of the community, the Mayor and City Council of Baltimore City and the legislative bodies of cities and incorporated towns of the State containing more than 10,000 inhabitants 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."

Section 2 authorizes a division of the City into use districts, and Section 3 states the purposes of zoning.

There is no expression in these Sections, or in any other part of the enabling Act, which indicates that the State is, or is not, to be subject to City zoning. On this, the language itself is neutral.

We have found no controlling Maryland decisions. In *Kentucky Institution v. Louisville,* 123 Ky. 767, 97 S.W. 402, a valid local ordinance requiring fire escapes was held inapplicable to a State institution for the blind.

"The State", said the Court, "will not be presumed to have waived its right to regulate its own property by ceding to the City the right generally to pass ordinances of a police nature regulating property within its bounds." Similarly *Milwaukee v. McGregor,* 140 Wis. 35, 121 N.W. 642, held a municipal building code inapplicable to the construction of public school buildings by the school board, a State agency. The Court there held that general legislation will not be deemed to restrict the sovereignty of the State, in the absence of express language to the contrary, and likened this rule to the immunity of the State from suit without its consent (*State v B. & O. R. R. Co.*, 34 Md. 344, 374) and to the State's exemption from the statute of limitations (*Booth v. United States,* 11 G. & J. 373).

Similar results have been reached in the attempted application of muncipal zoning to state agencies invested with the power of eminent domain. *State v. County Commissioners of Cuyahoga County,* 79 N.E. (2) 698, aff'd 78 N.E. (2) 694 (Ohio); *Decatur Park District v. Becker,* 368 Ill. 442, 14 N.E. (2) 490.

It has been held on similar principles that agencies of the Federal Government are not subject to local zoning and building regulations in the absence of statutory language indicating the opposite Congressional intent. *U. S. v.*

*City of Chester*, 144 F(2) 415; (C.C.A.3d); *Curtis v. Toledo Housing Authority*, 78 N.E.(2)676 (Ohio); 171 A.L.R. 325 and cases there cited. (In *Baltimore v. Linthicum*, 170 Md. 245, this question was argued, but the Court found it unnecessary to decide it.)

In 19 Opinions of the Attorney General, 134, this office held that a contractor engaged in construction work for Rosewood State Training School was not required to obtain a Baltimore County Building Permit. In 23 Opinions of the Attorney General, 399, it was held that an Anne Arundel County plumbing permit is necessary to install new plumbing in a State institution, but that the plumbing work is not subject to inspection and approval by the local Plumbing Commission after the permit has been issued. That opinion, as explained in 23 Opinions of the Attorney General, 400, was based upon the construction of the applicable local law and does not represent a general principle. The last-cited opinion held that a Baltimore County plumbing permit is not necessary for work at Rosewood State Training School. See also 30 Opinions of the Attorney General, 134.

Though there is no unanimity on the question among the courts of other States (see 31 A.L.R. 450, 171 A.L.R. 325), we believe the principles of State sovereignty expressed in the Kentucky, Wisconsin and Ohio cases (cited above) are sound. It is accordingly our opinion that the Baltimore City zoning regulations do not apply to State construction, in the absence of a contrary intent expressed in legislation dealing with the particular State agency involved. No such intent is found in the statutes dealing with Morgan State College (Code, Article 65A), nor in those dealing with the Board of Public Works (Code, Art. 78A) which holds title to Morgan's property and controls its funds (Code, Art. 65A, Sections 4 and 13) nor in the statutes dealing with the State Roads Commission (Code, Art. 89B).

We express no opinion as to the applicability to State construction of a "master plan" duly promulgated by the Baltimore City Planning Commission under Section 110 of the Charter and Public Local Laws of Baltimore City (1949 Ed.), or by Planning Commissions of other municipalities under Section 18 of Article 66B of the Code of General Laws (1939 Ed.).

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

## STATE ROADS

STATE ROADS—CHESAPEAKE BAY BRIDGE—EXISTING FEDERAL AND STATE LAWS ARE ADEQUATE TO PERMIT CONSTRUCTION OF A CROSSING OF THE BALTIMORE HARBOR.

February 23, 1950.

*Hon. Wm. Preston Lane, Jr.,*
*Governor of Maryland.*

The City Council of Baltimore has passed and forwarded to you Resolution No. 1870 requesting you and the Mayor of Baltimore City to take immediate steps to amend the enabling acts and bond indentures so as to permit immediate construction of a tunnel crossing under Baltimore Harbor. You have asked for my comments.

The Federal and Maryland statutes under which the Chesapeake Bay Bridge is being constructed are entirely adequate to permit construction of a harbor crossing at any time and are also adequate to permit the pledging of tolls on the Susquehanna River and the Potomac River Bridges with those arising from the bay crossing and the harbor crossing. I refer to the Act of Congress approved June 16, 1948, Public No. 654—80th Congress, and Chapter 561 of the Acts of the 1947 Maryland Legislature, as amended.

Pursuant to the authority of the Federal and State statutes, the State Roads Commission, by resolution duly adopted on October 15, 1948, determined to construct, maintain and operate a Chesapeake Bay Bridge, to unite the existing bridges (Susquehanna and Morgantown Bridges) with the Bay Bridge, as a single project for financing purposes, and to issue revenue bonds of the State, payable solely from revenues from the existing bridges and the Bay Bridge to refund outstanding bonds and to pay the cost of

the Bay Bridge. The Trust Agreement, dated October 1, 1948, was executed under the authority of the Federal and State statutes and the Resolution of the State Roads Commission, dated October 15, 1948. By its terms, it constitutes a contract between the State of Maryland and the bondholders, which is irrevocable except to the extent that it may be changed according to the terms of the Indenture itself.

Section 210 of the Indenture, which is found on pages 32 to 38 of the printed version provides as follows:

> "In addition to the bonds issued under the provisions of Sections 208 and 209 of this Article, revenue bonds may be issued under and secured by this Agreement, subject to the conditions hereinafter provided in this Section, *at any time or times after the expiration of twelve* (12) *complete calendar months following the opening for traffic of the Bay Bridge,* for the purpose of paying the cost of the Patapsco Crossing if its construction shall be financed under the provisions of this Agreement." (emphasis supplied)

Before the Patapsco crossing can be constructed—and this would have to be not earlier than twelve months after the opening of the Bay Bridge—it would have to be determined that the average amount of the annual revenues from all the bridges, including the Patapsco crossing, in relation to the amount of the average annual principal and interest requirements on all bonds, including those to be issued on the Patapsco crossing, for a five year period immediately following the opening of the Patapsco crossing, was 160%. See Section 210, pages 34 and 35.

Section 1102 of the Indenture, found on pages 105 to 107 of the printed volume, provides that:

> "Subject to the terms and provisions contained in this Section, and not otherwise, the holders of

> not less than two-thirds (2/3) in aggregate principal amount of the bonds then outstanding shall have the right, from time to time, anything contained in this Agreement to the contrary notwithstanding, to consent to and approve the execution by the Commission and the Trustee of such agreement or agreements supplemental hereto as shall be deemed necessary or desirable by the Commission for the purpose of modifying, altering, amending, adding to or rescinding, in any particular, any of the terms or provisions contained in this Agreement or in any supplemental agreement; provided, however, that nothing herein contained shall permit, or be construed as permitting, (a) an extension of the maturity of any bond issued hereunder, or (b) a reduction in the principal amount of any bond or the redemption premium or the rate of interest thereon, or (c) the creation of a lien upon or a pledge of revenues ranking prior to or on a parity with the lien or pledge created by this agreement, or (d) a preference or priority of any bond or bonds over any other bond or bonds, or (e) a reduction in the aggregate principal amount of the bonds required for consent to such supplemental agreement."

It is obvious, therefore, that in any event, the consent of two-thirds of the holders of outstanding bonds would be required to permit the immediate construction of the Patapsco crossing. As a practical matter, the obtaining of such consents would, in all likelihood, be an impossibility. Secondly, it is very doubtful whether the existing bondholders would permit the dilution of their security by spreading the revenues now pledged to their bonds over an additional amount, and particularly since, in view of the present total of the outstanding bonds, the coverage might not meet the requirements of the Indenture or of what was considered adequate by prudent investors.

There is a further possibility that, according to the terms of Sections 1102, the immediate issuance of bonds on the Patapsco crossing would violate the provisions of paragraph (c) of that Section, in that it would create a lien upon our pledge of revenues "ranking prior to or on a parity with the lien or pledge created by this agreement." This possibility may be remote, although I am of the personal opinion that it is not. If it were a valid point, it could be raised by any bondholder. If it were a valid point, agreement of all bondholders would be required to accelerate the Patapsco project.

The obvious purpose of the twelve month delay after opening of the Bay Bridge was to furnish actual experience of traffic performance over the new crossing as a basis for projecting the feasibility of additional construction. It was felt necessary as it has been on so many other similar projects, by the engineers and bankers to permit a desirable sale of the bonds. It is hardly necessary to point out that the covenant not to construct the crossing sooner than permitted is a valid and effective contract upon the State Roads Commission and the bondholders. It is certainly unnecessary to labor the point that the contract cannot be broken and, under the Federal and State Constitutions, such a breaking would be an impairment of contractual rights or the taking of property without due process of law.

Of course, if the Patapsco crossing can stand on its own feet as a revenue project so that bonds can be issued without reference to the Indenture or to the other bridges, then no legal objection to its immediate financing and construction exists.

HALL HAMMOND, *Attorney General.*

## State Roads Commission — Trial Magistrates Have Original Jurisdiction In Weight Violation Cases.

October 2, 1950.

*Mr. George N. Lewis, Jr.*
*Director of Traffic Division.*

This is in reply to your letter of September 21, 1950, in which you requested this department to advise you whether it is permissible for a trial magistrate to send weight violation cases to the Circuit Court without having tried the same and without an appeal being taken from a conviction.

Section 264 of Article 66½ states "In all complaints of the violation of any of the provisions of the Article, the Justice of the Peace, Trial Magistrate, . . . before whom the alleged offender is taken as aforesaid shall have jurisdiction to hear and determine such complaint and impose the fine or sentence herein provided but any person so convicted of any offense under this Article shall have the right to appeal from the Judgment * * *"

The above section indicated that the Trial Magistrate must try the case. The appeal can be taken only after a determination by the Trial Magistrate. This means that the Circuit Court gets its jurisdiction only on the basis of the appeal. See 7 Opinions, Attorney General 93. *Robb v. State,* 190 Md. 641, 60 A.2d 211.

In addition to the above, I would like to call your attention to the fact that either party may appeal from the Trial Magistrate's decision, that is, conviction or acquittal (Sec. 13 (B) Art. 52) *Robb v. State,* 190 Md. 641, 60 A.2d 211.

CLARKE MURPHY, JR., *Special Attorney.*

STATE ROADS COMMISSION—GASOLINE AND MOTOR VEHICLE REVENUES MAY NOT BE USED FOR THE ERECTING AND MAINTAINING OF STREET LIGHTS ON COUNTY ROADS.

December 14, 1950.

*Mr. P. A. Morison,*
*Asst. Chief Engineer.*

This is in reply to your letter of December 5, 1950, asking whether funds allocated to Cecil County from Gasoline and Motor Vehicle Revenues may be used for erecting and maintaining street lights on county roads. We observe also that the State Roads Commission maintains the county roads for the County Commissioners under Article 89B, Sec. 156, Flack's Annotated Code, 1947 Supplement.

There are two questions involved: first, assuming the proposed improvement is a proper use of Gasoline and Motor Vehicle Revenues, is it proper for the County to make the expenditure and; secondly, is the erection and maintenance of street lights a proper use for these funds.

To answer the first question involved, I think we need look no further than opinion written by Mr. Thomas Jenifer and reported in 23 Opinions of the Attorney General 446 in which it was ruled that a county could not purchase equipment and materials for county roads from its share of the Lateral Gasoline Tax where the county roads were being maintained by the State Roads Commission. In such case the Commission must purchase the equipment and materials and the use of the same charged to the County. Thus assuming the erection and maintenance of street lights to be a proper use for these revenues, they must be so used by the State Roads Commission and not by the County. As Mr. Jenifer summed it up "The funds which are allocated to the various counties from the One and one-half Cent Tax must be expended for the express purpose set forth in the Act and under the direct supervision and

control of the Commission." See also Sections 156 and 157 of Article 89B, 1947 Supplement.

This brings us to the second aspect of the question, that is, whether or not the erection and maintenance of street lights is as a matter of law, a proper use of the county's share of the Gasoline and Motor Vehicle Revenues even if expended under the direct supervision and control of the Commission.

This question must also be answered in the negative.

Article 89B, Sec. 13 (d)—(1) requires that the County's share of the Gasoline Tax first be applied to debt service outstanding 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. (2) That the remainder of the County's share "*shall be used solely for the construction, or maintenance of county roads*" or for debt service, hereafter entailed *for such construction, reconstruction or maintenance.*

Article 89B, Section 16 as amended by Chapter 42 of the Laws of Maryland, Special Session of 1948 provides—(3) Twenty per cent of the Motor Vehicle Revenue Fund shall be added to the portion of the Gasoline Tax Fund allocated for the benefit of the counties and municipalities of the State (except Baltimore City) under Section 13 of this Article and *shall be disbursed and used as therein provided.*

Again we refer to Mr. Jenifer's statement in 23 Opinions of the Attorney General 446 concerning the expenditure of the Lateral Gasoline Tax: "The funds which are allocated to the various counties from the One and one-half Cent Tax must be expended for the *express purpose set forth in the Act* and under the direct supervision and control of the Commission."

We feel that the same construction must be placed upon the present statutes dealing with the expenditure of the Gasoline and Motor Vehicle Revenue Fund. The erection and maintenance of a lighting system for county roads would be at best only remotely related to the expressed uses authorized for such funds, namely, for the construction, reconstruction or maintenance of roads or streets."

Unquestionably, the County may accomplish such improvement by direct levy for that purpose but it is our opinion that it may not be accomplished either by the County or by the Commission using funds allocated to the County from the Gasoline and Motor Vehicle Revenue Fund.

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

CLARKE MURPHY, JR., *Special Attorney.*

## TAXATION

TAXATION—SALES TAX—"SALE FOR RESALE"—GOVERNMENTAL IMMUNITY.

January 4, 1950.

*Mr. Edward F. Engelbert,*
*Retail Sales Tax Division,*
*Office of State Comptroller.*

This opinion deals with Sales and Use Taxes upon sales of personal property to contractors performing research and development work for the United States Navy. We have discussed the matter at length personally and by correspondence with Lt. Commander Albert L. O'Bannon, Chief Tax Officer under the Judge Advocate General, who has submitted to us a memorandum presenting the Navy's position.

It seems that the Kellex Corporation (admittedly an independent contractor as distinct from an agent) is under contract with the Navy to conduct research and development in connection with ordnance equipment. This work is done under Navy supervision in a plant at Silver Spring, Maryland, owned by the United States and leased to Kellex. Kellex buys all of the materials in its own name and is reimbursed for their cost by the Government. Most of the materials are consumed in the research and development process.

The contract provides:

> "Article 4. Title and Identification of Material.
>
> "(a). The title to all materials, parts, assemblies, sub-assemblies, supplies, equipment and other property for the cost of which the Contrac-

tor is entitled to be reimbursed hereunder shall automatically pass to and vest in the Government upon delivery to the Contractor or upon the happening of any other event by which title passes from the vendor or supplier thereof, in the case of any such property which is purchased for the performance of this contract, or, in the case of property not so purchased, upon the allocation thereof to the contract by the commencement of processing or use thereof or otherwise. Such passage and vesting of title shall not impair any right which the Government might otherwise have under this contract, and shall not relieve the Contractor of any of its obligations under this contract."

Under *Alabama v. King & Boozer,* 314 U.S. 1 (1941), there is no question of the State's power to impose the tax on the sales in question. The Federal Government's real contention is based upon construction of the Maryland Sales and Use Tax Acts.

It argues that as title to the goods passes to the Government immediately upon its passage to Kellex, the sales involved are sales "in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be received by him" within the meaning of Section 259(f) of Article 81 of the Code of Public General Laws. He points out that Section 259(d) defines "sale" and "selling" to mean "any transaction whereby title or possession, or both, . . . is to be transferred by any means whatsoever for a consideration by a vendor to a purchaser."

Conceding for the sake of argument that the purchaser (Kellex) does "resell the property so transferred in the form in which the same is, or is to be received by him", is this "the purpose" of Kellex within the meaning of Section 259(f)?

The dominant purpose of the contract is research and development, which imply the employment of special knowledge and skills, experimentation, trial and error. It is primarily a contract for services. In the process, materials are necessarily purchased, combined, reworked, consumed and discarded. The passage of title to these materials to the Navy appears to be merely an incident to the main object of the contract. *A* purpose of the contract, such passage of title may be; but it is not *the main* purpose. And as applied to such a mixed transaction, if they have any meaning at all, the words: "the purpose of the purchaser" (as used in Section 259(f)) must mean the dominant purpose. We think the exception is intended to apply to wholesalers, retailers and manufacturers in the ordinary sense—not to an ultimate consumer. Though the contract in question incidentally provides for immediate passage of title to the Government, Kellex is in reality (certainly as to most of the material purchased), and within the purpose of the contract, the ultimate consumer.

For these reasons, we think sales to Kellex for use under its contract with the Navy are not exempt from the Maryland Sales and Use Taxes.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

TAXATION—POWER TO ABATE STATE AND LOCAL TAXES—NO NECESSITY FOR APPROVAL OF BOARD OF PUBLIC WORKS TO EXCUSE TREASURERS' BONDS FOR ABATEMENT OF STATE AND LOCAL TAXES

January 6, 1950.

*Mr. Albert W. Ward, Secretary,*
*State Tax Commission.*

You have asked us to advise you concerning Section 69 of Article 81 of the Annotated Code of Maryland, as amended by Chapter 732 of the Acts of 1949. We understand that your request arises because of a difference of opinion between the State Tax Commission and the office of the State Auditor as to the meaning and effect of that Section.

The Section, insofar as pertinent, provides:

> "The County Commissioners in each county and the Bureau of Assessment in Baltimore City, as to local taxes, and the Comptroller upon certificates of the County Commissioners or Bureau of Assessment in Baltimore City, as to State taxes, shall make all just allowances to the respective collectors for insolvencies and removals and for refunds of taxes made in accordance with the provisions of law * * *."

Specifically, you ask us whether in the case of State taxes assessed by the State Tax Commission in the exercise of its original jurisdiction, abatement of such taxes for insolvencies must be approved by the Board of Public Works or whether the County Commissioners are authorized to act without such approval.

The quoted provisions of Section 69 seem unmistakably clear. The County Commissioners and, in Baltimore City,

the Bureau of Assessment, as to local taxes, are certainly authorized to make abatements for insolvencies. The procedure for abating State taxes, including those assessed by the State Tax Commission in the exercise of its original jurisdiction, seems equally clear. The Section authorizes, in such cases, the Comptroller to make allowances upon the certificate of the County Commissioners or the Bureau of Assessment in Baltimore City, as the case may be. The initial authority to make the allowance thus rests with the County Commissioners and the Bureau of Assessment, as the case may be, and the Comptroller is authorized to act upon certification of such allowance without any reference to the Board of Public Works.

It is our opinion, therefore, that as to State taxes, including those assessed by the State Tax Commission in the exercise of its original jurisdiction, allowance for the same may be made for insolvencies, removals and refunds by the County Commissioners in each County and the Bureau of Assessment in Baltimore City, as the case may be, without approval of the Board of Public Works. In regard to your second question; namely, whether the bonds of the treasurers of the respective taxing units can be relieved of liability in the case of the allowances above discussed without approval of the Board of Public Works, it seems necessarily to follow that the answer must be in the affirmative.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

TAXATION—SALES TAX EXEMPTION OF RELIGIOUS INSTITUTION OR ORGANIZATION—CORPORATION FORMED TO ADMINISTER AND PAY PENSIONS TO RETIRED MINISTERS AND THEIR WIDOWS EXEMPT.

January 13, 1950.

*Mr. Frank A. Shallenberger,*
*Assistant to the Comptroller,*
*Retail Sales Tax Division.*

You ask us to advise you whether or not The Conference Claimants Endowment Fund, Inc. is exempted under Section 261(i) of Article 81 of the Annotated Code of Maryland (1947 Supp.), which exempts sales of tangible personal property from the retail sales tax to "any person operating a non-profit religious . . . institution or organization situated in this State when such tangible personal property is purchased for use in carrying on the work of such institution or organization." The Conference Claimants Endowment Fund, Inc. is the successor corporation to the Methodist Preachers Aid Society of Baltimore and the agent which performs certain functions which, prior to 1942, were performed by the Baltimore Conference of the Methodist Church. In short, its functions are to establish and administer a permanent endowment fund for the purpose of paying pensions and annuities to retired Methodist ministers and their widows. Its funds are derived from several sources, namely, contributions of individual ministers, contributions by individual churches computed upon a percentage of the salary of the pastor of each church, and gifts, devises and bequests from individuals. We are advised that the corporation operates upon a non-profit basis. It invests the funds which it receives, administers the investments, and administers the pensions and annuities paid to retired ministers and their widows.

The answer to your question depends upon a determination of whether or not this organization may be treated as a religious institution or organization. We start with the

proposition that if the Baltimore Annual Conference of the Methodist Church, or any individual church which is a member of that Conference, purchased tangible personal property for its own use, no tax would apply because clearly the Baltimore Annual Conference of the Methodist Church, and each individual church, are religious institutions or organizations. We do not believe that The Conference Claimants Endowment Fund Inc. should be treated any differently. As before stated, it purports to be an incorporated agency of the Baltimore Annual Conference of the Methodist Church, and it carries on certain functions which have theretofore been performed by that Conference and its predecessors. There is every reason for those functions to be performed by a separate corporate entity in order to facilitate the making of investments, the administration thereof, and the administration of pension and annuity payments. The effect of the performance of the functions certainly is one to further religious activities since a member of the Methodist ministry is obliged to devote himself wholly to the work of the ministry and it is therefore necessary to make provision for his support and maintenance upon retirement, or provision for his widow upon his death. Thus, the granting of pensions necessarily enables those admitted to the Methodist ministry to undertake the work, because it offers them financial security, the lack of which in some cases might constitute a bar to the exclusively religious activities which must be performed.

We conclude that The Conference Claimants Endowment Fund, Inc. operates as an agency of the Methodist Church. In so doing, it performs a very necessary and many times overlooked religious activity, namely adequate support of the ministry. You are advised, therefore, that The Conference Claimants Endowment Fund, Inc. is a religious institution or organization, and as such, should be afforded exemption from the retail sales tax on the purchase of tangible personal property used for its activities.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—TAX ON COMMISSIONS—INTANGIBLE PERSONAL PROPERTY OF NON-RESIDENT ALIEN DECEDENT—CONDITIONS OF RECIPROCAL EXEMPTION STATUTE NOT MET.

January 17, 1950.

*Mr. Thomas F. Cadwalader,*
*Baltimore, Maryland.*

We have your letter enclosing a copy of a memorandum on Austrian inheritance taxes, prepared by Dr. Karpf of the Library of Congress. From prior correspondence and subsequent conversations with you, it appears that the decedent, a citizen and resident of Austria, died there in 1943 leaving by will his estate to his two children and a friend, who are likewise citizens and residents of Austria.

At the time of death, A, a citizen and resident of Maryland, held as agent for the decedent securities of New York and Pennsylvania corporations (some negotiable and some registered in decedent's name), which were physically kept in Philadelphia, and cash in a Philadelphia bank in A's name as attorney in fact for the decedent. After decedent's death, A brought these securities and cash to Baltimore. He was granted letters of administration, c.t.a., by the Orphans' Court of Baltimore City and has administered the property under that Court's jurisdiction. The questions presented to us concern liability for inheritance tax and tax on commissions to the State of Maryland.

We think it is now clear that Maryland may constitutionally impose death taxes in this situation. *State Tax Commission v. Aldrich,* 316 U.S. 174; *Curry v. McCanless,* 307 U.S. 357; *Graves v. Elliott,* 307 U.S. 383. A Maryland court has been employed to supervise the distribution of the property. The Maryland inheritance tax is imposed upon receipt by the distributee. *Hart v. Mercantile Trust Co.,* 180 Md. 218. The tax on commissions is upon the privi-

lege of administering, which was granted by the Maryland court. *Williams v. State,* 144 Md. 17; 34 Opinions of Attorney General, 273. In the *Aldrich* case, *supra,* the Supreme Court said (316 U.S. at 181-182):

> "Another State which has extended benefits or protection or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares (Blackstone v. Miller, 188 US p. 205, 47 L ed 444, 23 S Ct 277) may likewise constitutionally make its exaction."

Even before these decisions, this office ruled in a similar situation that a non-resident alien was not protected by any constitutional immunity. 22 Opinions of the Attorney General 691.

Sections 109 and 110 of Article 81 tax all property "having a taxable situs" in Maryland; subject to the exemptions provided in Section 137. Assuming Section 137 does not apply, does the property in A's hands have a taxable situs in Maryland within the meaning of Sections 109 and 110? We think it does. Prior to Chapter 124 of the Special Session of 1936, these Sections taxed only property "being in this State." We think the purpose of the amendment was to make the tax coextensive with the State's constitutional power. See 29 Opinions of the Attorney General 238, 24 Opinions of the Attorney General 876.

Section 137, however, exempts intangible personal property from inheritance taxes and tax on commissions under either of two conditions:

> "* * * (a) if the decedent at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of the distribution, transfer or other disposition of such personal property of such decedent in Maryland did not impose a transfer tax

or death tax of any character in respect of personal property of residents of this State (except tangible personal property having an actual *situs* in such state or territory or foreign country), or (b) if the laws of the State, territory or country of residence of the decedent at the time of such distribution, transfer or other disposition contained a reciprocal exemption provision under which residents of Maryland are exempted from transfer taxes or death taxes of every character in respect of personal property (excepting tangible personal property having an actual *situs* in such state or territory or foreign country), provided the State of Maryland allows a similar exemption to residents of the state, territory or country of residence of such decedent."

The memorandum on Austrian inheritance taxes submitted by you shows that Austria at the time of the decedent's death did impose death taxes if either the decedent or the heir (presumably meaning distributee) at the time of assessment was a resident of Germany (Austria). If neither was a resident, only certain property was subject to tax. Such property is stated to be domestic agricultural, forest and garden properties, domestic business property or domestic real property, usufruct in such property, "or such rights whose transfer is dependent upon registration in domestic public records." Apparently, there is no such reciprocal exemption provision as is contained in our law. Therefore, if the exemption is to be allowed, it must be based upon condition (a) of Section 137 quoted above. It seems to us that condition (a) is not met. Intangible personal property of a non-resident decedent would be taxed in Austria if the distributee were a resident. Furthermore, even if neither party were a resident, Austria would tax rights whose transfer is dependent upon registration in domestic public records. It does not appear what kind of property is included within this phraseology. It could mean registered stock in a domestic corporation. In any

event, we wrote to Mr. Bouse on May 19, 1949, the burden of proof of exemption is upon the taxpayer.

Furthermore, the memorandum shows that the Austrian definition of "resident" is far broader than ours. It includes all German citizens unless they are abroad for more than two years without having maintained a residence in the country. It includes foreign citizens who have their residence within the country or remain there for a prolonged stay. It includes persons who have renounced German citizenship after March 31, 1931, and have no residence or usual place of stay within the country if the tax obligation orignated within two years after loss of citizenship. No citation is required to show that a person could be a resident of Austria within the Austrian law but a non-resident under Anglo Saxon law, in the light of which Section 137 must be construed. Regardless of residence apparently, according to the memorandum, if a person remains in Germany for a longer period than six months, he becomes subject to the tax.

For all these reasons, it seems clear that condition (a) of Section 137 quoted above is not in this case met. We think both the inheritance tax and tax on commissions are payable.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

TAXATION — INHERITANCE TAX — TAX NOT PAYABLE ON UNITED STATES BONDS REGISTERED IN NAMES OF HUSBAND "AND" WIFE AND HUSBAND "OR" WIFE UPON THE PASSING OF THE BONDS TO THE SURVIVING SPOUSE.

January 25, 1950.

*Mr. J. Asbury Holloway,*
*Register of Wills for Wicomico County.*

We have your letter of January 16th in which you inform us that an estate which is now in process of administration consists of a large amount of United States Bonds, some of which are payable to husband "and" wife and others which are payable to husband "or" wife. You ask whether they are subject to be taxed at the rate of 1% on the full value thereof, 1% on one-half the value thereof, or whether they are taxable at all.

We have ruled that United States Savings Bonds standing in the name of husband or wife were taxable to the extent of one-half the value thereof, upon the death of one spouse. 24 Opinions of the Attorney General, 887; 27 Opinions of the Attorney General, 401.

By Chapter 742 of the Acts of 1945, Section 111 of Article 81 of the Code was amended to exempt from the provisions of the inheritance tax law "any registered bond of the United States in the names of husband and wife passing to such surviving spouse." In view of the Act of 1945, it is our opinion that the bonds mentioned in your letter, some of which are registered in the names of husband "and" wife and others in the names of husband "or" wife, are not subject to inheritance taxes.

HALL HAMMOND, *Attorney General.*

TAXATION — INHERITANCE TAX — TAX IS PAYABLE UPON ESTATE PASSING TO REMAINDERMAN AFTER DEATH OF LIFE TENANTS TO WHOM WAS RESERVED FULL DOMINION OF PROPERTY.

January 27, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

I have given full consideration to the letter forwarded by you from Mr. J. Henry Ditto requesting an opinion as to whether or not taxes are due upon a deed from Allan H. Fisher and wife to Clarence C. Kable and wife, with remainder after the death of the survivor to Mary Helen Evans. The deed was recorded in 1929. It is suggested, that despite the power of the life tenants to sell, lease, mortgage or otherwise dispose of the property at any time during their joint lives or that of the survivor, that the remainder was vested prior to the effective date of the 1935-1936 inheritance tax law changes, and so cannot be taxed.

To use the terse, if somewhat stodgy, language of the Supreme Court in handling per curiam opinions, the contention of Mr. Ditto is overruled and the taxability of the remainder is affirmed upon the strength of 33 Opinions of the Attorney General 400 and *Mylander v. Connor*, 172 Md. 329.

HALL HAMMOND, *Attorney General.*

TAXATION—RECORDATION TAX—NOT PAYABLE ON DEEDS TO LEXINGTON MARKET AUTHORITY.

February 15. 1950.

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

Mr. J. Cookman Boyd, Jr's. letter to you of December 30th raises the question whether deeds to the Lexington Market Authority of property acquired by it in the performance of its functions are subject to the State Recordation Tax imposed by Sections 220-221 of Article 81 of the Annotated Code of Maryland (1947 Supp.), as amended by Chapter 662 of the Acts of 1949.

The Authority was created by Chapter 863 of the Acts of 1945 as a "body corporate and politic—which shall be deemed an instrumentality of the Mayor and City Council of Baltimore and a public corporation." Its main purpose is to build and operate a new Lexington Market and, pending completion, to operate the old one. To this end, the Authority has power to purchase from the City the existing market; to acquire other lands by purchase or condemnation, and to issue revenue bonds which will not pledge the City's credit. Upon retirement of the bonds, the Authority ceases and all of its property reverts to the City. Section 13 of the Act creating the Authority is as follows:

> "(Tax Exemption.) It is hereby found, determined and declared that the establishment of the Market under the provisions of this Act is in all respects for the benefit of the inhabitants of the City and is a public purpose, and that the City and the Authority will be performing an essential governmental function in the exercise of the powers conferred by this Act, and the Authority shall not be required to pay any taxes or assessments upon the Market or any part thereof or upon its activi-

ties in the operation and maintenance of the Market or upon any revenues therefrom, and the Market and the bonds of the Authority and the interest thereon shall be and remain forever exempt from all state, municipal and local taxation; provided, however, that the Authority may pay to the City within three months after the close of each fiscal year of the Authority, the amount determined by any contract entered into by and between the Authority and the City as the amount to be paid to the City in lieu of taxes; provided, further, the amount so to be paid pursuant to any such contract shall not be in excess of the amount of the annual ad valorem property tax which shall have been levied by the City upon any part of the Market property in the last tax levy prior to the acquisition thereof by the Authority, such payments, however, to be made only from the net revenues, if any, of the Authority for each such fiscal years which remain after (a) paying all expenses of maintaining, repairing and operating the Market, (b) making all required payments or transfers of moneys to the credit of the Sinking Fund for the bonds issued under the provisions of this Act and then outstanding, (c) setting aside reserves for such purposes and (d) setting aside reserves for depreciation, improvements and extensions of the Market, all as may be required by any such contract or by the resolution authorizing such revenue bonds or by the trust indenture securing the same."

Section 220(a) of the Recordation Tax Statute contains this exemption:

". . . provided that conveyances to the State or any agency thereof or any political sub-division of the State shall not be subject to the tax or charge imposed by this section."

Though the recording of deeds is perhaps not strictly an activity of the Authority "in the operation and maintenance of the Market" within Section 13 of the Act of 1945, we think the proviso of Section 220(a) of Article 81 applies. The Legislature has created the Authority as an "instrumentality" of the City and has declared that it "will be performing an essential governmental function in the exercise of the powers conferred" upon it. It is an agency of a political sub-division of the State set up expressly to perform a governmental function of that sub-division. As such, it seems clearly to come within the intent of the exemption.

*Pittman v. Housing Authority,* 180 Md. 457, held that deeds offered for record by the Housing Authority of Baltimore were subject to the tax. See also 24 Opinions of the Attorney General, 971, 25 Opinions of the Attorney General, 607. But the tax-exemption provision of the Housing Authorities Act (Section 21, Chapter 516, Acts of 1937) applies only to property taxes and is generally narrower than Section 13 of the Market Authority Act. Further, the *Pittman* case, *supra,* and the above-cited opinions antedated the exemption contained in Section 220(a) of Article 81, which was first enacted by Chapter 253 of the Acts of 1945.

We conclude, therefore, that the deeds in question are recordable free of the Recordation Tax.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

TAXATION—INHERITANCE TAXES—TAX IS PAYABLE UPON DEATH OF OWNER OF LEASEHOLD PROPERTY WHERE SUCH OWNER CONVEYED IT DURING HER LIFETIME, RESERVING THEREIN A LIFE ESTATE AND THE RIGHT TO THE INCOME THEREFROM.

February 17, 1950.

*Mr. John H. Bouse,*
*Register of Wills of Baltimore City.*

You put to us the following question: By deed dated May 4, 1943, Jennie Naviasky conveyed the leasehold interest in certain property in Baltimore to Henry and Louis Naviasky, reserving unto herself for life an estate in the property with the right to collect rents and profits therefrom and to use the same for her own benefit.

Jennie Naviasky died July 13, 1947 and there was no administration and no inheritance tax was paid. You ask if such taxes are due. An opinion of this office found in Volume 25, Opinions of the Attorney General, Page 655 gives the answer since the facts are similar to those in this case. It was said:

> "The answer must be determined by the words of the statute. Section 111 of Article 81 of the Code (1939 ed.), enacted prior to the execution of the deeds in the instant case, expressly states that the tax shall be applicable to all property passing 'by deed, gift, grant, bargain or sale, * * * intended to take effect in possession at or after the death of a decedent * * * including property over which the decedent retained any dominion during his lifetime.' It is further provided that 'the reservation of a beneficial interest in favor of the decedent * * * shall be deemed to constitute dominion within the meaning of this section.' "

"The conveyance of property with reservation of a life estate comes squarely within the terms of the statute. It is therefore our opinion that in the present case a tax * * * is payable on the half-interest which has vested in possession by virtue of the death of the life tenant. Compare 24 Opinions of Attorney General 894."

HALL HAMMOND, *Attorney General.*

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TAXATION — INHERITANCE TAXES — WHERE MOTHER AND SON HELD PROPERTY AS TENANTS IN COMMON AND OTHER PROPERTY AS JOINT TENANTS, HER INTEREST WAS SUBJECT TO TAX UPON HER DEATH—WHERE PROPERTY WAS CONVEYED TO MOTHER IN 1924 FOR LIFE, WITH REMAINDER TO HER SON, NO TAX IS PAYABLE—PROPERTY HELD BY A SIMILAR CONVEYANCE IN 1945 IS TAXABLE UPON HER DEATH—DEED OF TRUST EXECUTED IN 1945 WHEREBY SON WAS TO USE INCOME FOR HER CARE WITH REMAINDER TO HIM IS TAXABLE.

March 9, 1950.

*Mr. Frank E. Hudson,*
*Register of Wills for Worcester County.*

You have inquired as to the taxability of various parcels of real estate owned jointly in one form or another by the late Mrs. Zilpha Corbin and her son Guy Corbin. Mrs. Corbin died recently. Three properties were deeded to Mrs. Corbin and her son as tenants in common in equal shares. As to these three, of course, no question can arise since the half interest of Mrs. Corbin passes under the intestate laws of the State and is subject to inheritance tax.

There is a deed of one property to the mother and son as joint tenants, made in 1926. Under the holding in *My-*

*lander v. Connor,* 172 Md. 329, there can be no question that this property is subject to inheritance tax on the half interest accruing to the surviving son by reason of his mother's death.

One property was deeded under date of February 16, 1924 to Mrs. Corbin for life with remainder to her son. I believe that this property is not subject to inheritance tax under the opinion of this office in Volume 26 of the Opinions of the Attorney General, page 426. See also 33 Opinions of the Attorney General, 379. However, a similar conveyance dated September 11, 1945, of course, would be taxable since the mother had a beneficial interest in the property by reason of her life estate which was acquired after the effective date of the direct inheritance tax law in Maryland. See 25 Opinions of the Attorney General, 655.

You also direct my attention to a deed of trust, executed by Mrs. Corbin to her son in 1945, in which she conveys all her property to her son in trust, the income to be used for her care and comfort for her life with remainder to her son in fee simple. There can be no question, of course, that the property conveyed by this deed of trust is fully taxable since the decedent retained a beneficial interest for life and the statute expressly covers such a situation. Of course, I am assuming that in each case, the consideration was furnished by the mother. The fact that the conveyance was arranged by her to be to her and her son, rather than direct by her with a reservation for life or by means of a straw man, is without legal significance. See 30 Opinions of the Attorney General, 198.

HALL HAMMOND, *Attorney General.*

TAXATION — ADMISSIONS TAX — GROSS RECEIPTS DERIVED FROM SALES OF TICKETS TO INTERCOLLEGIATE ATHLETIC CONTESTS SUBJECT TO TAX WHERE PROCEEDS USED TO DEFRAY EXPENSES OF SUCH CONTESTS—UNDER SUCH CIRCUMSTANCES EDUCATIONAL EXEMPTION INAPPLICABLE.

March 13, 1950.

*Mr. J. Charles Judge, Chief,*
*Admissions Tax Division,*
*Comptroller of the Treasury.*

You have referred to us the request by the Western Maryland College for exemption from the necessity of collecting an admissions tax on the sale of tickets to College football games on the ground that the proceeds derived thereby are used exclusively for educational purposes, within the meaning of Section 341(a) of Article 81 of the Annotated Code of Maryland, as added by Chapter 255 of the Acts of 1949. In connection with this request, you have sent us the data furnished by Western Maryland College, which shows that the proceeds derived from the sale of tickets to College athletic games are used primarily to reimburse the College for the holding of such contests and is expended, *inter alia,* for replacement of equipment, hotels and meals, guaranties, transportation, band expenses, sound truck rental and salaries and wages. Unlike some of the other like educational institutions in this State, the proceeds from the sale of tickets are not handled by an athletic association or an athletic council, but are paid directly into and disbursed from the funds of the College.

In considering the question which you present, we have considered two authorities which seem to shed light on the problem, *Allen v. Regents,* 304 U.S. 439, 82 L. Ed. 1448 (1938) and *State Tax Commission v. Board of Education,* 146 Kan. 722, 73 Pac. (2d) 49, 115, A.L.R. 1401 (1937).

To consider these authorities in chronological order, the Kansas case was concerned with a gross receipts tax statute substantially similar to our own admissions tax. The Kansas statute imposed a tax on the gross receipts derived from the sale of admissions to any place of amusement, except where the entire amount of receipts therefrom is expended for educational purposes. The case concerned the taxability of gross receipts derived from the sale of tickets to the general public to athletic contests, such as football, basketball and track. While the Kansas court held that the School Boards and Boards of Education in Kansas were clearly authorized to include as part of an educational program athletic or other recreational activity, it did not precisely decide the question which you present. The reservation of opinion of the Kansas court appears from the following:

> "It is argued by the defendants and interveners that all items of disbursement made are either directly spent for educational purposes or in payment of expense so incidental thereto that it must be held the expense items are part and parcel of the educational activity; that in so far as athletic contests are concerned, officials for games must be hired, the place of the contest lighted, the contest advertised so that the students and public may be aware it is to occur; that expenses or guaranties to visiting teams must be paid; that the school team must have proper equipment. We need not now decide just where the line is that determines where the expenditure passes beyond an educational purpose, * * *."

For the reason that part of the gross receipts derived from the sale of admissions to athletic contests was used to purchase certain athletic goods, confectionery and soda pop for *resale*, the Court concluded that the gross receipts derived from the sales of admissions were not used exclusively for educational purposes and hence were subject to the tax.

Such a factor is not present in the situation involving Western Maryland College so that it cannot be said that the actual decision in the Kansas case is applicable.

*Allen v. Regents, supra,* was concerned with the application of the Federal admissions tax to the sale of football tickets at intercollegiate football games held by State public educational authorities. Payment of the tax was resisted on the ground of sovereign immunity in that it was claimed that the holding of the football games was a function of State government which the Federal government could not tax. This decision has been discussed by us at length in 30 Opinions of the Attorney General 161 (1945). As pertinent to the situation under consideration, it may be noted that the Supreme Court *assumed, without deciding,* that the holding of intercollegiate athletic contests and the sale of tickets therefore constituted an educational activity. The same case in the Fifth Circuit, *Page v. Regents,* 93 F(2d) 887, (1937), was the subject of a sharp division within the Court as to whether the holding of intercollegiate football games and other athletic contests may be said to constitute educational activities.

The majority of the Court, through Judge Sibley, held that physical education, as such, is a legitimate part of education and that public contests are a part of a program of physical education because "they give stimulus and life to the whole athletic enterprise." The majority stated:

> "Great judgment is necessary to prevent the stimulus of publicity from becoming too great, lest the athletic tail be found wagging the dog of mental culture in the schools, but in principal the public exhibition of the best in athletics is not different from the school exhibitions of our boyhood or from the honors and speakerships at commencements of most colleges."

The majority concluded, as did the Kansas court, that the sale of admissions to the general public to athletic contests and exhibitions does not alter their educational status.

Judge Hutcheson, dissenting from the judgment of the majority, was emphatic in expressing a contrary view. The essence of his thoughts appears from the following extract of his opinions:

> "My associates, apparently to their own satisfaction, have rationalized themselves into the frame of mind to believe and to say that these modern gladiatorial spectacles, conducted in vast and costly amphitheaters, for the excitement and amusement of the American public, all present being keyed to a pitch and under a tension wholly foreign to that ordinarily associated with academic and educational pursuits, are an essential part of higher education in Georgia, and, as such, a governmental function of that State. They have not rationalized me into that frame of mind; I cannot rationalize myself into it. It seems to me that the mental processes by which the din and delight, the struggle and stress, the flying arms and legs, the alternate tangles and extrications, and all the heady actions of an intercollegiate football game, are envisioned as higher education, are a 'reductio ad absurdum' of even modern higher educational theory. They seem to me in the slangy but expressive vernacular common in the stadiums, to 'take higher education for a ride'."

Inasmuch as the Fifth Circuit decision was reversed by the Supreme Court and the Supreme Court carefully pointed out that it was assuming, without deciding, that the staging of intercollegiate athletic contests to which admissions are sold served an educational purpose, it cannot be

said that either the Fifth Circuit decision or the Supreme Court decision provides an answer to the question which you pose. However, on careful analysis, we subscribe to the views of Judge Hutcheson without, however, indicating that we believe that his colorful language describes the part which intercollegiate athletic contests play in the program of physical education of Western Maryland College.

When the word "education," as used in Section 341(a), *supra,* is considered with due regard to the canon of construction that tax exemptions are to be construed strictly against the taxpayer, we do not think that it can be said that the Legislature intended to exempt gross receipts derived from the sale of tickets to intercollegiate athletic contests from the admissions tax. While a program of physical education in modern educational thinking is as essential as training in purely academic and technical subjects, it seems to us that it would unduly strain the ordinary and usual meaning of the word "educational" to include intercollegiate athletic contests. Our opinion might be otherwise were the proceeds derived from the sale of tickets to athletic contests used by Western Maryland to purchase equipment and to defray the other necessary expenses of a program of intermural athletic contests or physical education to individual students. We do not believe, however, that when these gross receipts are used to defray expenses of intercollegiate athletic contests that they may be properly said to be tax exempt.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

TAXATION—RECORDING TAX—AGREEMENT OF SALE HELD TO BE CONDITIONAL CONTRACT OF SALE AND HENCE NOT SUBJECT TO RECORDATION TAX.

March 14, 1950.

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

You have referred to us a printed form contemplated to be used by Alban Tractor Co., Inc., entitled a "Machine Lease Agreement," and have asked us whether it will be necessary to affix tax stamps to this document before it can be recorded, and if so, the manner in which the amount of stamps required should be calculated.

Section 220(a) of Article 81 of the Annotated Code of Maryland (1947 Supp.) 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. The tax, by Section 220(b), is fixed at the rate of 55c per each $500 or fractional part thereof of the actual consideration paid or the principal amount of the debt secured. By Section 220(a), the term "instrument of writing" is defined to include deeds, mortgages, chattel mortgages, bills of sale, leases, deeds of trust, contracts and agreements, but mechanics liens, crop liens, purchase money mortgages, assignments of mortgages, conditional sales contracts, judgments, releases or orders of satisfaction are specifically excluded from the definition and hence from the application of the tax.

The question on which you seek advice, therefore, becomes a problem of the proper classification of this so-called Machine Lease Agreement. By its terms, it purports to be a lease from Alban Tractor Co., Inc., as lessor, to a specific lessee. Certain property is leased to the lessee for

a fixed term at a total rental payable in certain specified amounts on designated dates. The lease is renewable by endorsement of both the lessor and lessee. Highly significant to the answer to the question which you ask is paragraph 5 of the "Machine Lease Agreement." It provides that the lessee shall have an option to purchase the leased property at any time during the term of the lease, or within five days thereafter, for a designated purchase price plus interest at 6% per annum from the date of the lease until the purchase price is paid. In the event that the option is exercised, the purchase price is to be reduced by the amount of rentals theretofore paid and interest is to be computed on the amount of the purchase price less the rentals theretofore paid.

This Machine Lease Agreement is nothing more than a so-called bailment lease which, under the laws of Maryland, is a conditional sales contract. In *Beckwith Machinery Co. v. Matthews*, 190 Md. 182, 57 A 2d 796 (1948), a similar lease was considered. It was pointed out that whether a given instrument is a bailment lease or a conditional sales contract is a question which has given courts throughout the country much difficulty. See 17 A.L.R. 1441, 43 A.L.R. 1257, 92 A.L.R. 323. In the *Beckwith* case, it was found that the weight of authority throughout the country is to treat a bailment lease as a conditional sales contract. Only in Pennsylvania and a few other States are such agreements held to create a true bailment.

On its facts, the *Beckwith Machinery Co.* case held that the agreement under consideration was intended by the parties as a conditional sales contract. The main evidence of this intention appears to have been the fact that the agreement there considered (and the one which you have submitted for our consideration) provides for a transfer of title upon payment of the full purchase price of the article leased. We believe that the holding of the *Beckwith Machinery Co.* case is applicable to the situation which you present.

It follows, therefore, that the Machine Lease Agreement is a conditional sales contract and no recording tax is payable.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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TAXATION—RECORDATION TAX—RECORDING OF CONDITIONAL CONTRACTS OF SALE—AGREEMENT HELD TO BE CONDITIONAL CONTRACT OF SALE.

March 14, 1950.

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

You have submitted to us an agreement between Enterprise Fuel Co. (called "Seller"), and Cleanliness, Inc. (called "Buyer") with regard to certain described property.

By the agreement, the Buyer purchases and agrees to accept for delivery 20,000 gallons of fuel oil per year for a period of four years at and for the price of 2c per gallon over and beyond the current market price of such fuel oil at the time of delivery. The Buyer agrees to pay on the 15th of each calendar month during the four year period $33.34 (or an aggregate of $1,600), which is a sum equivalent to 2c per gallon beyond the current market price at the time of delivery of 20,000 gallons of oil per year when reduced to a monthly basis of 1,667 gallons per calendar month. The Buyer covenants to make these payments whether it may or may not have ordered and accepted delivery of any fuel oil during any such month.

The Seller, in consideration of the Buyer's undertakings, provides to the Buyer and allows for use during the life

of the contract, a certain described boiler and oil burner and appurtenances. The Seller agrees, upon the faithful performance by the Buyer of all the terms and conditions of the agreement, to convey or cause to be conveyed to the Buyer without additional cost title to the equipment provided for the use of the Buyer.

You ask us whether or not this agreement is one which you are obliged by law to record. You state that you have refused to record the agreement as a conditional sales contract, because there is no reservation of title in the contract and nothing described in the contract which you could short record as to the amount due and remaining unpaid or when and how any particular amounts are payable.

This agreement in substance appears to be a conditional contract of sale, somewhat similar to the one considered by us under even date hereof contemplated to be used by Alban Tractor Co., Inc. Certainly the agreement between Enterprise Fuel Co. and Cleanliness, Inc. is a contract " . . . for the sale of goods and chattels wherein the title thereto . . . is reserved until the same be paid in whole or in part, or the transfer of title is made to depend upon any condition therein expressed and possession is to be delivered to the vendee . . ." It is our opinion, therefore, that the agreement is to be treated as a conditional contract of sale.

By Section 71 of Article 21 of the Annotated Code of Maryland, as amended by Chapter 430 of the Acts of 1949, the recording of conditional contracts of sale " . . . shall be sufficient to give actual or constructive notice . . . when a memorandum of the paper writing signed by the vendee or vendees, setting forth the date thereof, the amount due thereon, when and how payable, and a brief description of the goods and chattels therein mentioned shall have been recorded . . .". The agreement which you have submitted is signed by the vendee and is dated. By its

face it shows the amount due thereon, namely, the purchase price of the property stated in the agreement as $1,600. The property is described and the agreement provides that payments are to be made on the 15th of each calendar month in the amount of $33.34.

It appears, therefore, that all of the necessary information required for short recording is deducible from the terms of the agreement itself.

In summary, therefore, it appears that it is your duty to record this agreement as a conditional contract of sale in the manner in which we have set forth. We return herewith the Agreement which you forwarded.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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TAXATION—SALES AND USE TAX—USE OF TIRES MANUFACTURED FROM MATERIALS NOT READILY OBTAINABLE IN MARYLAND.

April 12, 1950.

*Mr. James L. Benjamin,*
*Retail Sales Tax Division,*
*Office of the Comptroller.*

Your letter of November 29th with enclosed copy of letter from Judge William C. Walsh presents these facts:

The Kelly-Springfield Tire Company, a Maryland corporation, is under contract with The Potomac Edison Company and Blue Ridge Transportation Company to keep the latters' motor buses, which operate within Maryland, supplied with tires. Judge Walsh has furnished us copies of

the Potomac Edison contract and says that the Blue Ridge Contract is essentially the same. It appears that Kelly is compensated under both contracts on a tire-mile basis in accordance with a formula. The contracts stipulate that title to the tires remains in Kelly. Kelly services and repairs the tires and repossesses them when no longer serviceable. You state that these contracts represent a standard type in use between a number of tire manufacturers and operators of motor buses.

The tires are manufactured by Kelly at its Cumberland, Maryland, plant and we are asked to assume that none of the materials used in the process are "readily obtainable in Maryland" within Section 310(f) of the Maryland Use Tax Act.

You state that the Comptroller formerly took the position that these contracts really result in sales taxable under the Retail Sales Tax Act; that pursuant to a hearing granted another taxpayer, the Comptroller changed his position and held that the practice constitutes "use, storage or consumption" of the tires by the manufacturer within Section 309 of the Use Tax Act, and that the measure of the tax is the cost of the raw materials to the manufacturer. You state that this ruling has been acceptable to a number of tire manufacturers (all of them non-resident) and bus operators who have similar contracts. But Judge Walsh ably attempts to distinguish this case on the ground that Kelly manufactures its tires in Maryland from raw materials that are not readily obtainable in Maryland, and is thus entitled to the exemption of Section 310(f) of the Use Tax Act.

Pursuant to the Comptroller's ruling we assume without conceding that there is no taxable sale to or purchase by The Potomac Edison Company or Blue Ridge Transportation Company either under Section 259 (d) of the Sales Tax Act or under Section 308(f) of the Use Tax Act. (But see Rule 73, Sales and Use Tax Regulations).

Upon this assumption is the use of the tires taxable to Kelly?

Section 309 of the Use Tax Act imposes a tax upon "the use, storage or consumption in this State of tangible personal property *purchased from a vendor* . . . for use, storage or consumption within this State" (emphasis supplied). Under this Section you seek to impose a tax upon the use of the tires themselves and not upon the use of the raw materials which go into the manufacture of the tires. From this premise you argue that the exemption of Section 310(f) does not apply because tires are readily obtainable in Maryland. But we do not concur in your premise. The tires as such are not "purchased from a vendor" by Kelly. They are manufactured by Kelly. True, the raw materials which go into the tires are purchased by Kelly; but in the manufacturing process these raw materials lose their identity and through chemical and physical change and the addition of labor become an entirely different product. See Rule 62—Sales and Use Tax Regulations.

The tax then must be upon the use, storage or consumption of raw materials (the only property which is "purchased") and not upon the use, storage or consumption of the tires themselves.

Assuming, as we are asked to do, that the raw materials are not readily obtainable in Maryland, it seems to us that the exemption of Section 310(f) squarely applies. This Section exempts from the tax the use, storage and consumption in this State of tangible personal property not readily obtainable in Maryland "which is stored, used or consumed in this State by a person engaged in the business of rendering services, or manufacturing, compounding for sale, profit, or use of any article, substance or commodity, if such tangible personal property enters into the processing of or becomes an ingredient or component part of the product or service which is manu-

factured, compounded or furnished . . ." To state the case is to decide it. Rule 62 of the Sales and Use Tax Regulations which interprets Section 310(f) is equally applicable.

For these reasons (if our assumptions are correct), we believe no Use Tax is payable in the case stated.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Assistant Attorney General.*

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TAXATION—INHERITANCE TAX—BEQUEST TO TRUSTEES TO MAKE PAYMENTS TO INDIVIDUAL IF SHE BECOMES CONFINED IN INSTITUTION NOT TAXABLE UNTIL CONFINEMENT OCCURS.

April 24, 1950.

*Mr. Raymond L. Pickett,*
*Register of Wills for Howard County.*

Your letter of April 20, 1950, states that a testator who died recently, leaving a will, the Fifth Item of which gives $25,000 to trustees to hold during the life of testator's niece, to collect the income thereof and to use income and, in their discretion, principal for the niece "at any time that she is ill so as to be confined in any hospital or institution." When not so confined, the trustees are not to pay her anything but are to accumulate the income. At her death, whatever remains of both principal and income is to become part of the residue, which, by the Tenth Item of the will, is left to the trustees to pay the income to testator's wife for life, remainder to certain charities. You state that the niece is alive and not confined in any hospital or institution. She is, therefore, not currently entitled to

anything and will not be unless she becomes confined. The question is whether any inheritance tax is now due with regard to the $25,000 or its income.

Section 110 of Article 81 of the Code of General Laws (1947 Supplement) imposes the seven and one-half percent collateral inheritance tax on the clear value of property "passing at the death of any * * * decedent, in trust or otherwise, to or for the use of any person * * *." Section 124 of Article 81 (1939 Code) provides that "whenever any life estate, or interest for a term of years or other interest less than an absolute estate, in trust or otherwise, shall pass to a person * * *," the Orphans' Court shall value the interest and assess the tax thereon, which shall be paid within thirty days.

It is difficult to say that any interest passed to the niece at testator's death under either of these Sections, or will pass unless she becomes confined in a hospital or institution. Then, only such interest will pass as she actually receives of income and principal from the trustees, and this interest will be subject to defeasance upon her ceasing to be confined. Actually, she has no life estate or any other present estate. She has only a possibility dependent upon future undeterminable events and the exercise of a power conferred upon the trustees. *Levi v. Bergman,* 94 Md. 204, 212; Miller, *Construction of Wills,* pp. 535-536; see also 34 Opinions of the Attorney General, 273; 30 Opinions of the Attorney General, 468. We therefore, think that no tax is compulsory with respect to the $25,000 or its income during the niece's life until payments are actually made by the trustee to or for her benefit, and then the tax will be seven and one-half percent of such payments, regardless of whether they are from income or principal. This view is consistent with Section 125 of Article 81 (1939 Code). It is also consistent with our prior opinions holding that a life estate with power to invade principal is taxable under Section 124 only as a life estate, and that additional taxes are due when and to the extent that prin-

cipal is actually invaded. 34 Opinions of the Attorney General, 259; 33 Opinions of the Attorney General, 360; 25 Opinions of the Attorney General, 630; 19 Opinions of the Attorney General, 510.

Of course, further taxes must be paid upon the widow's life estate if and when it vests in possession and upon the ultimate remainder (unless subject to the charitable exemption) when it vests in possession. See 32 Opinions of the Attorney General, 493; 31 Opinions of the Attorney General, 228; 30 Opinions of the Attorney General, 154; 24 Opinions of the Attorney General, 881.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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TAXATION — RECORDATION TAX — CLERKS OF COURT — RECORDING OF LEASES OF RAILROAD EQUIPMENT—RECORDING TAX MUST BE PAID—LEASE OF RAILROAD EQUIPMENT AS PART OF TRANSACTION TO REFUND CONDITIONAL CONTRACTS OF SALE HELD NOT SUPPLEMENTARY AGREEMENT AND HENCE NOT TAX EXEMPT.

April 24, 1950.

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

By an opinion dated March 14, 1950, volume 35, page 311, we advised you that a certain agreement of sale, in the form of a bailment lease, was in fact a conditional contract of sale, and that in recording the same, you were not required, under the provisions of Section 220(a) of Article 81 of the Annotated Code of Maryland

(1947 Supp.), to collect a recording tax as a condition precedent to its recordation. This opinion has given rise to the problem of whether a lease of certain railroad equipment from a bank as trustee to the Baltimore & Ohio Railroad Company should likewise be recorded without payment of the recordation tax.

The lease is the second of two agreements (entitled Lease of Railroad Equipment and Agreement, respectively) whereby the B. & O. Railroad Company has undertaken to refund the purchase of certain railroad equipment under various conditional sale agreements heretofore executed and recorded in your office. By the Agreement, certain named individuals, who have acquired the interests of the conditional vendors under the original conditional sale agreements, transfer those interests to the bank, as trustee, and appropriate provision is made for the issuance of equipment trust certificates therefor. By the Lease the Railroad covenants to have conveyed to the bank, as trustee, title to the railroad equipment free and clear of all liens and encumbrances including all rights and interests of the vendors under the original conditional sale agreements. In turn, the trustee, in consideration of annual rentals, leases the equipment to the Railroad for a period of 15 years. The Lease specifically provides that title to the equipment shall remain in the trustee until payment of the last of the annual rentals and thereafter title shall pass to and vest in the Railroad without further transfer or act on the part of the trustee. The trustee also agrees to execute for record or filing in public offices such instrument or instruments in writing as reasonably shall be requested by the Railroad, in order to make clear upon the public records the title of the Railroad to all of the railroad equipment.

The Lease and the Agreement, as above stated, were entered into in order to refinance certain conditional sale agreements entered into between the Railroad and the manufacturer of the equipment. After those conditional sale agreements had been executed and the equipment

manufactured, the agreements were assigned to Mellon National Bank and Trust Company, which stood in the place and stead of the vendor, in so far as the vendor's rights to payment under the agreements were concerned. The Lease and Agreement are by and between the Railroad and a different bank, as trustee. The principal amount of the debt secured by the Lease and Agreement is less than the debt incurred under the conditional sale agreements since the Railroad has made payments under the original conditional sale agreements and thereby reduced its indebtedness.

We consider first the rationale of our earlier opinion. It was based upon the authority of *Beckwith Machinery Co. v. Matthews,* 190 Md. 182, 57 A. 2d. 796, 175 A. L. R. 1360 (1948). We construed that case as holding that bailment leases with respect to ordinary personal property were to be considered as conditional contracts of sale. We concluded that the Court, in the *Beckwith* case, had held that a bailment lease of ordinary personal property had no existence under the laws of the State of Maryland; and, therefore, agreements in such form must necessarily be considered conditional contracts of sale. For that reason, we advised you that a bailment lease, construed as a conditional contract of sale under the authority of the *Beckwith* case, was a conditional contract of sale within the meaning of Section 220(a) of Article 81, *supra,* and not subject to the recordation tax.

Such a result does not follow with respect to the Lease now offered for record. By its terms, it purports to be a lease and not a conditional contract of sale. There is no basis, however, on which we can say that the Lease must be construed as a conditional contract of sale because agreements in such form are specifically authorized by Section 109 of Article 21 of the Annotated Code of Maryland (1939 Ed.). That Section validates for all intents and purposes, as to subsequent purchasers in good faith and creditors, a reservation of title by the lessor in a *lease* of

railroad equipment and rolling stock or other personal property to be used in or about the operation of any railroad until the purchase price of the property shall have been paid, notwithstanding possession of the property by the lessee until the condition is met. The Section also directs that such contracts shall be in writing and shall be acknowledged and recorded as deeds. We construe this Section as approval by the Legislature of agreements in the form of the Lease under consideration.

With this distinction in mind, we turn to the provisions of Section 220 of Article 81, *supra*. That Section imposes a tax on the recordation of "instruments of writing." The Section states that:

> "The term 'instruments of writing' shall include deeds, mortgages, chattel mortgages, bills of sale, leases, deeds of trust, contracts and agreements, but shall not include mechanics liens, crop liens, purchase money mortgages, assignments of mortgages, conditional sales contracts, judgments, releases or orders of satisfaction."

Thus, there is excused from imposition of the recordation tax *inter alia* conditional sales contracts. As before stated, because of the provisions of Section 109 of Article 21, *supra*, we cannot apply the reasoning of the *Beckwith* case, *supra*, to hold that the Lease of the railroad equipment from the trustee to the Railroad is a conditional contract of sale; and hence, when due respect is paid the underlying principle of statutory construction that tax exemptions must be construed, in cases of doubt, strictly against the taxpayer, we are constrained to hold that recording of the lease is not exempt from application of the recordation tax.

This construction is supported by subsection (e) of Section 220, which reads as follows:

> "Upon deeds of trust, mortgages, contracts or agreements covering the rolling stock or equip-

> ment of railroads (whether the title is reserved in the vendor or not), the tax shall apply to such proportion of the debt secured as the number of miles of the line of such railroad in this State bears to the number of miles of line of the whole railroad."

This subsection, as you will note, provides a means of allocating the amount of the debt, and hence the amount of the tax, according to the proportion which the number of miles of the railroad located within the State bears to the number of miles of line of the whole railroad. It may be argued that this subsection, granting as it does a partial exemption from the tax, must be read as subsidiary to subsection (a) which defines the scope of the tax. However, the language employed in granting the partial exemption ("deeds of trust, mortgages, contracts or agreements covering the rolling stock or equipment of railroads") is so inclusive that it implies that all such instruments, including the Lease herein considered, must be within the scope of the tax. In 24 Opinions of the Attorney General, 983 (1939) and 25 Opinions of the Attorney General (1940), subsection (e) was relied on as imposing the tax on a lease of railroad equipment and conditional sales contracts of railroad equipment, respectively.

The Railroad also invokes subsection (h) of Section 220 as an additional reason for non-payment of the tax. That subsection provides:

> "No tax shall be required for the recordation of any instrument securing a debt that merely confirms, corrects, modifies or supplements an instrument previously recorded, or conveys or pledges property in addition to, or in substitution for the property originally conveyed or pledged, if such supplemental instrument does not increase the amount of the debt secured by the instrument previously recorded."

The Railroad contends that this subsection relieves it from the necessity of paying a double tax, inasmuch as the debt to be paid under the Lease is the same debt as that which was created by the original conditional sale agreements, the recording of which was taxed.

As before pointed out, the original conditional sale agreements were between parties different from those which are parties to the Lease. Moreover, the Lease and Agreement specifically provide that the conditional sale agreements are to be released. The Lease and Agreement have no existence independent of the conditional sale agreements which, by the terms of the Lease and Agreement, are released. Consequently, we do not believe that the Lease and Agreement may be considered as instruments that merely confirm, correct, modify or supplement instruments previously recorded within the meaning of subsection (h) of Section 220. This conclusion is supported by the decision in *Hammond v. Philadelphia Elec. Power Co.*, 192 Md. 179, 63 A 2d. 759 (1949). There the recording of a supplemental indenture was held not subject to the recordation tax where the supplemental indenture in turn depended upon an original mortgage and the lien of the original mortgage was preserved. In construing subsection (h) of Section 220, the Court stated:

> "If the refunding is accomplished without the need of the original mortgage, then the new instrument is not supplemental, but original, and the tax must be paid."

This language is applicable to the situation now presented and clearly indicates that since, as are the facts as we understand them, the Lease and Agreement are in *substitution* for the conditional sale agreements, rather than *supplementary* thereto, the tax must be paid.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—PARTNERSHIP, VALUATION OF DECEDENT'S INTEREST IN.

May 4, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

This will answer your letter of January 17 concerning the Morris Bluefield estate. Since receiving the letter, we have had two conferences with Mr. Samuel B. Bechkes, attorney for the executors. It appears that the decedent left his entire estate to his widow, but died insolvent except for such interest as he may have had as one of four partners in a catering business. A copy of the partnership agreement has been furnished us. The Twelfth Item thereof provides that upon the death of any partner, the surviving partners have the privilege of buying the decedent's interest in the firm by paying to his estate the value of such interest "with the distinct understanding that there is to be no payment made for good will or any other asset except as to the valuation of the partnership, as shown on the books of the partnership, and by no other method." A copy of a balance sheet prepared by Mr. Lester Ellin, certified public accountant, shows that at the time of the death the book value of decedent's interest in the firm was less than nothing. But this valuation does not include possible appreciation of real estate owned by the firm, nor does it include "good will" or "going concern value."

The surviving partners have exercised their privilege granted by Item Twelve of the agreement and have paid the widow, through the executor, a nominal consideration for the deceased partner's interest. The widow has given the surviving partners and the executor full releases. The question is whether inheritance taxes are to be computed upon this nominal amount actually distributed to the widow, or whether the State is entitled to inheritance taxes based upon the value of decedent's interest in the firm appraised at the time of death at its actual "going concern value."

We have no hesitation in saying that the former is the correct answer. Article 73A, Sections 25(d) and 42 of the Annotated Code of Maryland (1939 Edition) provide that on the death of a partner all rights to specific partnership property vest in the surviving partners, who are required to account to the decedent's personal representatives for his interest therein. 22 Opinions of the Attorney General, 775. But the extent of the interest and the method of accounting are subject to the terms of the partnership agreement. *Noel v. Noel,* 173 Md. 152; *Hermes v. Compton,* 23 N. Y. S. (2d) 126, 260 App. Div. 507. Here the agreement provides that the accounting shall be based upon book value without including good will. Furthermore, in settlement of the claim, the widow and sole distributee has given her complete release for a nominal figure. This she is competent to do, and the Maryland inheritance tax must abide the result. *Hart v. Mercantile Trust Company,* 180 Md. 218.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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TAXATION — SALES TAX — CONSTITUTIONAL AS APPLIED TO SALES WHEREIN GOODS ARE DELIVERED TO PURCHASERS OR THEIR CONTRACT CARRIERS FOR TRANSPORTATION TO OTHER STATES.

June 9, 1950.

*Mr. Edward F. Engelbert,*
*Retail Sales Tax Division,*
*Comptroller of the Treasury.*

You request our opinion as to the application of the Retail Sales Tax (Article 81, Section 259, etc., of the Code) to sales of asphalt by Esso Standard Oil Company to out-

of state buyers. Apparently, the contracts are made in Maryland, the asphalt is manufactured in Maryland, and is delivered by Esso in Maryland into the buyers' vehicles, or into the vehicles of "contract carriers" employed by the buyers, for transportation to other States.

Under Section 260 of Article 81 (entitled "Imposition of Tax") the vendor is required to collect the Sales Tax from the purchaser "for the privilege of selling" and the tax is to "be paid by the purchaser." Section 261(f) exempts sales which are not within the taxing power of the State under the United States Constitution. There is thus presented the question whether the tax here unlawfully infringes upon Congress' power "to regulate commerce . . . among the several States" (Article I, Section 8). Rule 64 of the Retail Sales and Use Tax Regulations attempts to point up the intersection between the constitutional barrier and the Maryland tax. It exempts sales in which, by the terms of the sales contract, the seller is obligated to deliver the goods to a common carrier or the mails for transportation out of the State. It expressly does not exempt Maryland sales in which the purchaser takes possession in Maryland, even though he accepts delivery for immediate transportation out of the State. The latter squarely applies to the instances in which the buyers accept delivery of the asphalt in their own vehicles; and for the reasons hereinafter stated, we think the application is constitutional.

As to the contract carriers: Esso argues that an opinion of this office in 33 Opinions of the Attorney General, 362, held that there is "no difference between a contract carrier and a common carrier, and concluded that the same rule should apply in both cases." But this was not the conclusion. After pointing out that other States have adopted such a rule, the opinion quotes by contrast that part of our Rule 64 which refers expressly only to "common carriers." The opinion concludes that the term "common carrier" should not include "one who reserves the right to reject offers of goods for carriage for reason other than the car-

rier's ability or inability to perform the contract." We expressly declined to decide the contract-carrier question for lack of definition of the term "contract-carrier." As we still have no definition, we shall assume that the question relates to contract motor carriers as defined in the Motor Carrier Act. This definition (Title 49 U. S. C. A. Section 303) (a) (15) is as follows:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation . . . by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Nothing herein, or in any other part of the Motor Carrier Act, suggests that a contract-carrier may not deal with whom he pleases. *A. W. Strickle & Co. v. Interstate Commerce Commission,* 128 F(2) 155; cert. denied 317 U. S. 650, 87 L. Ed. 523; rehearing denied 317 U. S. 707, 87 L. Ed. 564; *Schenley Distillers Corp. v. United States,* 61 F. Supp. 981; Aff'd 326 U. S. 432, 90 L Ed. 181.

We are not informed of the terms of the contracts between the buyers and carriers in this instance, nor do we think the terms are material. The fact that the buyers may, by their contracts, exert such control as they wish over the carriers (subject only to the route limitations, safety regulations and minimum rate limitations of Sections 309, 315 and 318 of the Motor Carrier Act) seems to us sufficient to consider the contract-carriers as agents of the buyers for the purpose of accepting delivery. Of course, common carriers are not.

If such is the case, the application of the tax in the case stated is constitutional. In *Department of Treasury v. Wood Preserving Corp.,* 313 U. S. 62, 85 L. Ed. 1188 (1941), the taxpayer, a non-resident corporation, authorized to do business in Indiana, contracted in Ohio to sell ties to and

creosote them for a railroad. Taxpayer bought the ties in Indiana and there had them delivered to the railroad for immediate transportation to taxpayer's Ohio plant, where they were to be creosoted. The railroad accepted the ties in Indiana. The purchase price and the price for creosoting were stated separately. The imposition of the Indiana gross receipts tax to the sale part of the transaction was sustained.

*International Harvester v. Department of Treasury*, 322 U. S. 340, 88 L Ed. 1313 (1944) involved three classes of sales, the second of which (Class D) is in point here. A foreign corporation authorized to do business in Indiana sold merchandise through its Indiana sales branches to users residing out of the State. The customers came to Indiana to accept delivery. Again the Indiana gross receipts tax was upheld.

Esso attempts to distinguish the sales tax from a gross receipts tax. But in the *International Harvester* case the Court (322 U. S. at 345) said:

> ". . . The Wood Preserving Corp. case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. *Those events would be adequate to sustain a sales tax by Indiana.* In McGoldrick v. Berwind-White Coal Min. Co. 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct 388, 128 A. L. R. 876, we had before us a question of the constitutionality of a New York City *sales tax* as applied to purchases from out-of-state sellers. *The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.'* Id. 309 U. S. p. 43, 84 L. Ed. 568, 60 S. Ct. 388, 128 A. L. R. 876. And it was 'conditioned upon events occurring' within New York, i. e., the 'transfer of title or possession

> of the purchased property.' Id, pp. 43, 44. *Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. . . .*" (Emphasis added.)

See also *Superior Oil Co. v. Mississippi,* 280 U. S. 390, 74 L. Ed. 504 (1930) and *Coe v. Errol,* 116 U. S. 517, 29 L. Ed. 715 (1886).

Esso also objects to the possibility that the State of the buyer may impose a use tax with resulting double taxation. But this argument was answered in the *International Harvester* case in these words (322 U. S. at 348-349):

> "Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State. But it will be time to cross that bridge when we come to it. *For example, in the Wood Preserving Corp. case the State to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax.* But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. Cf. J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429, supra. We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. *Such 'local activ-*

*ities or privileges'* McGoldrick v. Berwind-White Coal Min. Co. supra (309 U. S. p. 58, 84 L. Ed. 577, 60 S. Ct. 388, 128 A. L. R. 876) *are as adequate to support this tax as they would be to support a sales tax.* To deny Indiana this power would be to make local industry suffer a competitive disadvantage." (Emphasis added.)

Esso relies heavily on *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S 69, 91 L. Ed. 88 (1946). Were that a case concerned with the commerce clause, it would be difficult to distinguish from the present situation. There, the Richfield Oil Company sold oil to the New Zealand Government and delivered it on board a ship of the New Zealand Government at a California dock. The sale was held to be exempt from the California sales tax under the import-export clause (Article I, Sec. 10, Clause 2) of the United States Constitution. See also *Joseph v. Carter and Weeks,* 330 U. S. 422, 91 L. Ed. 993 (1947) ; *Joy Oil Co. v. State Tax Comm.,* 337 U. S. 286, 93 L. Ed. 1366 (1949) ; but see *Western Maryland Ry. v. State Tax Comm.,* 73 A. 2d affirmed 340 U. S. 520 95 L. ED. 501 (1950). However, the Supreme Court pointed out in the *Richfield* case that the import-export clause (unlike the commerce clause) expressly forbids the States without the consent of Congress to "lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." It was upon this very ground that the *McGoldrick, Wood Preserving Corp.* and *International Harvester* cases were distinguished. At 329 U. S. 75, the Court said: "We do not pursue the inquiry as to the validity of the tax under the commerce clause." We therefore cannot regard the import-export cases as precedents.

Our conclusion is that the imposition of the Maryland sales tax in the case stated would be constitutional. The exemption of Section 261 (f) therefore does not apply.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—PAYABLE ON INCOME ACCRUING ON SPECIFIC LEGACY TO DATE OF DISTRIBUTION.

July 11, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

You have asked me to send you the enclosed copy of an opinion rendered by this office and reported in 12 Opinions of the Attorney General, 260. It seems to me that the opinion is substantially correct. I believe inheritance taxes should be paid upon what is actually distributed to a specific legatee, including income accruing upon the property prior to distribution. I do not believe *Harrison v. Denny,* 113 Md. 509 and Miller, Construction of Wills, p. 356, to which you called our attention, affect this result. They hold that a specific legatee is entitled to income accruing from death. But the legatee nonetheless receives the income from the hands of the executor, and it is upon the right to receive that the Maryland inheritance tax is imposed. *Hospital v. Dugan,* 146 Md. 374.

True, the rule with respect to the income from real estate is ordinarily different. But unless the real estate is devised *to* an executor, the income which it produces after the testator's death does not pass through the executor's hands. This is so even where the executor has power of sale. The heir or devisee of the real estate may from the date of death enter and receive directly into his own hands the rents and profits until the sale is made. *Seeger v. Leakin,* 76 Md. 500, 510; *Jenifer v. Beard,* 4 H. & McH. 73; *Guyer v. Maynard,* 6 G. & J. 420; see Coke on Littleton, 236a, quoted in *Fredericks v. Cisco,* 72 Md. 393.

Chapter 226 of the Acts of 1929, amending Section 106 of the then Code, required "every executor * * *, before he pays *any legacy* or distributive share" to pay the then percentage "of every hundred dollars *he may hold for dis-*

*tribution* among the distributees or legatees * * *; provided that such tax shall not be paid or collected upon any increase in value of the estate *or any income thereon* accrued subsequent to the date of the death of the decedent." (Emphasis supplied.) The proviso was repealed by Chapter 520 of the Acts of 1935, but the remaining language of the Section was retained in all material respects and some of it still survives in Section 117 (Code, 1947 Supplement). The necessary implication of the repeal is that income accrued upon the estate in the executor's hands (including "any legacy" which "he may hold for distribution among * * * legatees") is subject to the tax. *Rosenberg v. Bouse,* 172 Md. 530. The parenthetically quoted language certainly embraces a specific legacy.

The Section, of course, has no reference to real estate (at least where it is not devised to an executor) for the executor does not *"hold"* such real estate or its income "for distribution among distributees or legatees," nor does he "pay" it as a "legacy or distributive share."

For these reasons, I think income received by an executor from specifically bequeathed property and distributed by him to the legatee is subject to the tax.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—CHARITABLE EXEMPTION—DIRECTION TO FORM CORPORATION TO ADMINISTER BEQUEST FOR CHARITABLE PURPOSES.

July 17, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

This is in reply to your letter of June 16, enclosing copy of letter from Mr. Alexander Gordon, III, Trust Officer of the Maryland Trust Company, concerning the estate of Charles C. Cook.

It appears that the decedent left a will in which he bequeathed the residue of his estate to the Maryland Trust Company, in trust, to hold for transfer to a corporation contemplated by the testator to be formed within a year after his death. The will directs three named people within such year to form the corporation, to be known as the "Dr. Charles C. Cook Foundation for Charities, Inc.," to be empowered by its Charter to utilize all income and $3,000 a year of its principal "to finance the education of poor and deserving students by helping them through the various grades of schools, colleges and universities and further to aid financially the small, struggling, poor and deserving churches of all denominations." The will directs that the corporation shall have a Board of Trustees, provides as to how such Board shall be selected, and directs that the corporation shall have power to sell, lease, mortgage or otherwise dispose of its assets and invest and reinvest the same and generally to manage the same "and such other powers as the incorporators thereof may deem appropriate to carry out its ultimate purpose as hereinbefore set forth."

The question is whether the gift is exempt from the Maryland inheritance tax under Section 110 of Article 81 of the Code (1947 Supplement). That exemption applies 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 purpose, * * * *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.*" (Emphasis supplied.)

The purposes expressed in the will are clearly charitable, educational or religious, within the meaning of the exemption. There is no direction in the will, however, that no part of the net earnings inure to the benefit of any private individual nor is there any direction in the will that a substantial part or all of the activities and work of the corporation be carried on in Maryland. However, we do not believe that the absence of such direction in the will necessarily defeats the exemption. The charter of the corporation could well be set up to fulfill these requirements. If this is done, we believe the bequest will be entitled to the exemption.

Of course, the charter could be set up and could later be amended after the gift had been received. But, the same objection could be made in the case of a bequest to any other corporation whose charter and activities render the exemption applicable at the time the gift is received. Its charter and activities may later be changed so that the exemption is no longer in terms applicable, but such possibility does not defeat the exemption.

I believe the status of the corporation with respect to the exemption is to be determined at the time the bequest is received.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—CHARITABLE EXEMPTION—
FRATERNAL SOCIETY NOT ENTITLED TO.

July 18, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

This is in answer to your letter of June 12, enclosing copy of letter to you from Mr. John H. Hessey concerning a legacy to the "Trustees of Warren Lodge No. 51, A. F. & A. M. of Baltimore, Maryland',, to be expended for the purposes set forth in its charter. The question is whether this legacy is exempt from the Maryland inheritance tax.

It appears that the Warren Lodge No. 51 is an unincorporated agency of the Grand Lodge of Ancient Free and Accepted Masons of Maryland, which was incorporated by Chapter 147 of the Acts of 1822, as amended by Chapter 141 of the Acts of 1866. Enclosed with your letter is the so-called charter of the Warren Lodge No. 51, granted to the agency by the parent organization in 1812. This document authorizes certain named people "to hold their Lodge at such times as they shall think necessary and convenient, according to the Constitutions of Masonry" and to admit new members and "to hear and determine all and singular the matters and things relating to the Craft, within the jurisdiction of their Lodge" and to appoint their successors. Presumably, this document (if anything) controls the use of the bequest.

The charter of the parent corporation (Chapter 147 of the Acts of 1822) grants the power to hold and convey property of all kinds, to sue and be sued and "shall in general have and exercise all such rights, privileges and immunities, as by law are incident or necessary to corporations and what may be necessary to the corporation herein constituted, to enable the members of said society duly and fully to execute all things touching and concerning the

design and intent of this corporation, for the benevolent succor and relief of distressed persons, and for the attainment of equally laudable objects." Chapter 141 of the Acts of 1866 made no material amendment to the charter for present purposes.

*Mayor and City Council of Baltimore v. Grand Lodge*, 60 Md. 280, involved a claim of exemption from real estate taxes by the Masons of the lower portion of a building which was owned by the Masons and rented out as storerooms and halls. The upper portion of the building was used for Lodge purposes and was conceded by the Appellant to be tax exempt under a Section of the Code exempting "buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions or * * * the grounds appurtenant thereto * * * which is necessary for the respective uses thereof." The Court held the lower portion of the building taxable and never really passed on whether the Masons were a charitable or benevolent institution within the meaning of the then law.

The language of the real property tax exemption (Article 81, Section 7(7) of the Annotated Code (1947 Supplement)) remained substantially the same until its amendment by Chapter 134 of the Acts of 1949. This Act, after reciting that it was the intention of the General Assembly to exempt from taxation the real and personal property of fraternal organizations, as therein defined; that such intention has been implemented and carried out by long continued practice of the taxing authorities; that the State Tax Commission had recently directed the levy of an assessment upon the properties of certain fraternal organizations in Allegany County resulting in Court action, repeals and re-enacts Section 7 to exempt:

> "Buildings and the ground not exceeding one hundred acres in area appurtenant thereto, and necessary for the respective uses thereof, equipment and furniture of hospitals, asylums, charit-

> able, fraternal or benevolent institutions or organizations incorporated or unincorporated, no part of the net income, except sick or death benefits, of which inures to the benefit of any private shareholder or individual, provided such fraternal organizations are carried on solely for the mutual benefit of their members and their beneficiaries and not for profit and have a lodge system, with ritualistic form of work, and representative form of government. The above exemption shall also apply to any such property held by any corporation or trustees for the benefit of any of the aforegoing institutions or organizations. Any property of such institutions or organizations which is commercially rented shall be taxable to the extent of such commercial use on the fair value of the property so rented."

Clearly, the Masons are now exempt from real property taxes to the extent set forth in the above amendment. To what extent, if any, does the exemption from inheritance taxes, set forth in Section 110 of Article 81, differ from the real property exemption? That exemption applies to property passing to or for the use of a corporation, etc., "organized and operated *exclusively* for religious, charitable, scientific, literary or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Not only is the Act of 1949 broader than this language, but the real property exemption as it existed prior to the 1949 amendment was also broader. Both of them lack the word "exclusively," which appears in Section 110, so even if we concede that the 1949 amendment may be taken as a legislative construction of the prior real estate exemption, such construction would have no necessary effect upon the inheritance tax exemption. It is difficult to say, under the above quoted charter provisions, that there is any showing that the Masons are organized and operated

exclusively for charitable purposes. True, the Charter of 1822 refers to the "benevolent succor and relief of distressed persons," but it also authorizes "the attainment of equally laudable objects." Laudable as the attainment of such objects may be, the objects are not defined and they may not be charitable or otherwise within the provisions of Section 110. We, therefore, are unable to say that the right to an exemption in this case has been demonstrated.

The view which we have taken makes it unnecessary for us to decide whether or not the sick and other benefits which the members of the Masons receive from the organization constitute "part of the net earnings" inuring to the benefit of a private shareholder or individual, within the meaning of Section 110.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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TAXATION—INHERITANCE TAXES—CONVEYANCE BY DECEDENT TO A CHILD, RESERVING LIFE ESTATE, SUBJECTS PROPERTY TO INHERITANCE TAX.

August 4, 1950.

*Miss Ruth R. Startt,*
*Register of Wills for Talbot County.*

You ask us as to the taxability of a farm in which a decedent had a life interest without power of disposition with remainder in her child. The conveyance from the decedent to the child was made in 1944 with reservation of a life estate. Counsel for the remaindermen contend that there is no tax because the transfer was not intended

to take effect in possession or enjoyment at or after the death of the decedent, and attempt to distinguish a previous opinion of this office that the reservation of a life estate constitutes a retention of beneficial interest which makes transfer of property at death taxable. The previous opinion of this office is in Volume 25 page 655.

In my view, the contention of counsel is untenable on both points. The matter seems to have been foreclosed by the Legislature when it passed Section 111 of Article 81 of the Code in its present form. By that Section all property passing by deed, gift, grant or sale "intended to take effect in possession or enjoyment at or after the death of a decedent" is made taxable. By definition such property is deemed to include any property over which the decedent obtained any dominion during his lifetime. It is further provided that "The reservation of a beneficial interest in favor of the decedent . . . shall be deemed to constitute dominion within the meaning of this Section."

In 25 Opinions of the Attorney General, 655, above referred to, it was flatly held that the conveyance of property, with the reservation of a life estate, came squarely within the terms of the statute because it constituted dominion by reason of a reservation of a beneficial interest for life. See 32 Opinions of the Attorney General, 450, 33 Opinions of the Attorney General, 400, 35 Opinions of the Attorney General, 302. It has been consistently held by this office that the reservation of a life estate constitutes dominion within the meaning of Section 111 and that, therefore, at the death of such a life tenant, a tax is due.

HALL HAMMOND, *Attorney General.*

TAXATION — INHERITANCE TAXES — INTANGIBLE PERSONAL PROPERTY LOCATED HERE AND BELONGING TO ESTATE OF OHIO DECEDENT IS EXEMPT FROM INHERITANCE TAX, BUT TANGIBLE PERSONAL PROPERTY IS TAXABLE.

August 23, 1950.

*Mr. John H. Bouse,*
*Register of Wills for Baltimore City.*

Your recent letter and enclosure from the Maryland Trust Company and Mr. Wilson K. Barnes reveal that a decedent made his will while domiciled in Maryland, appointing Maryland executors, then moved to Ohio where he established a new domicile and there executed a codicil to his will (which did not change the appointment of his executors) and died.

The will was probated here under the provisions of Article 93, Section 350 of the Code, which authorizes that procedure if the decedent were formerly domiciled in Maryland. Letters testamentary for primary administration were granted the executors named in the will by the Orphans' Court of Baltimore City. In the hands of the executors are securities and cash which were physically in Maryland at the time of death and various items of tangible personal property which were physically in Ohio at the time of death. The latter have since been sent to Maryland to be appraised for the personal inventory, and distributed.

The question is whether the intangible property and the tangible property, or either, is subject to the Maryland inheritance tax and the tax on commissions of executors.

There seems to be little doubt that Maryland constitutionally has the power to subject both classes of property to inheritance or transfer taxes. The decisions of the Su-

preme Court make it plain that there is situs for tax purposes within the meaning of the Constitution if the State which taxes has afforded the protection of its laws or otherwise given a governmental *quid pro quo* in return for the exaction. Maryland also so holds. In *State v. Dalrymple,* 70 Md. 294, one William died a resident of California, entitled at the time of his death to a one-fourth of the personal estate of his brother, Edward, a resident of Maryland. Edward's estate was settled and the Appellees in the *Dalrymple* case, the executors of William, received intangible personal property worth some $27,000, which, under the will of William, went to a resident of California. The State of Maryland claimed the collateral inheritance tax on the amount so passing. The Court held the tax payable, holding that the statute at that time which taxed property "being in the State" covered the intangible property there involved. The Court said:

> "A careful examination of the several sections of Art. 81 of the Code, relating to this subject, has brought us to the conclusion that the tax is payable out of the estate of a deceased non-resident when property owned by him is actually within this State; * * *."

The present law provides, in Sections 109 and 110 of Article 81, that the tax is imposed and payable in relation to all property "having a taxable situs in this State passing at the death of any resident or non-resident decedent." It is clear, therefore, that, barring some waiver of the State's claim, both classes of property here involved would be subject to the Maryland tax on inheritances.

However, Maryland has seen fit, as have a number of States, to waive collection of the tax in the case of all property except tangible personal property having actual situs here—it does this by Section 137 of Article 81 of the Code—if the State of the domicile of the decedent similarly treats the property of Maryland decedents in that State.

Ohio has a reciprocal exemption statute similar to ours, the effect of which is to excuse the tax in the case of property of Maryland decedents in Ohio. This being so, the intangibles in Maryland of the decedent here involved are not subject to inheritance tax or the tax on commissions under the express language of Section 137.

For the reasons we have stated above, this result does not follow in the case of the tangible personal property in Maryland for the purposes of administration. Our laws are being invoked to pass title to that property and to govern its devolution. Section 137 expressly excepts tangible personal property in such cases from the exemption which the State accords to the intangible property of non-residents.

HALL HAMMOND, *Attorney General.*

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TAXATION—INCOME TAX—TAXPAYER PAYING DEFICIENCY ASSESSMENT WHICH HAS BECOME FINAL AND IRREVOCABLE, MAY NEVERTHELESS WITHIN THREE YEARS FROM THE DATE THE RETURN WAS DUE, CLAIM AND RECEIVE A REFUND WHEN IT APPEARS THE ASSESSMENT WAS ERRONEOUSLY MADE.

August 24, 1950.

*Mr. Frank W. Forestell,*
*Income Tax Division,*
*Office of State Comptroller.*

Under Section 244 of Article 81 of the Annotated Code of Maryland, as amended by Chapter 480 of the Acts of 1949, the Comptroller, in the event that a person liable for income tax does not file an income tax return, is authorized to make an estimate of the income of the taxpayer

and of the amount of tax due from any information in his possession, and to assess the tax at not more than twice the amount estimated to be due. This Section provides that fifteen days after notice to the taxpayer and demand for the return, the assessment "shall become final and irrevocable" and shall be collected by filing a tax lien or in any other manner authorized by law for the collection of taxes due and owing to the State. In the exercise of this authority, you advise that the Comptroller makes assessments from the best information available to him. This information is primarily information returns filed by employers and many times fails to reflect the correct personal exemptions which may be claimed by a taxpayer and fails to show a taxpayer's deductions. As a result, such assessments result in the assessment of a greater amount of tax than would be warranted if a return were prepared embodying all of such data. In such cases, many of the taxpayers permit such assessments to become final and irrevocable, in that they permit 15 days from the date of the assessment to expire without making any application to modify or amend the assessment or to file a return, and then pay the tax. Some of these taxpayers, within a period of three years from the date on which their returns were originally due, have filed claims for refunds pursuant to the provisions of Section 248 of Article 81 of the Annotated Code of Maryland (1947 Supp.).

You ask if a taxpayer, after having permitted an assessment to become final and irrevocable and after having paid the same, may nevertheless, claim a refund upon showing that consideration of all of the facts relating to income, personal exemptions and deductions indicates a tax liability lesser in amount than the assessment.

Section 248 states that, in the event any person pays more tax than is found to have been due, the Comptroller shall refund the overpayment in the same manner as other refunds are made, except to the extent provided in Section 248. That Section further states "All such refunds

shall be made in the same manner as other refunds are made. Any kind of a refund . . . shall be filed within three years from the date the return was due to be filed, otherwise such claim shall be barred and in no event shall the Comptroller honor or pay said refund claimed, anything in Section 162A of this Article to the contrary notwithstanding."

Obviously a claim for a refund filed three years after the date the return was due to be filed may not be honored, but the problem is whether a claim for refund filed within three years from the date the return was due to be filed may be honored, notwithstanding that the tax was paid pursuant to an assessment which by statute had become "final and irrevocable."

Section 247 obviously refers to the refund procedure established by Sections 161 to 162E, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.). Section 162 relates to refunds for "ordinary county or city taxes," and has no application to refunds of income taxes which are special taxes. Section 162A relates to refunds of special taxes or other fees or charges and permits refunds whenever any person shall have "erroneously or mistakenly paid . . . more money for special taxes . . . than was properly and legally payable, or shall have paid any special taxes which were erroneously or illegally assessed or collected . . ." Unlike Section 162, Section 162A contains no provision prohibiting refunds in any cases where it appears that the assessment upon which taxes were levied and collected has become final and has not been modified on appeal.

Aid for your problem is found in *Wasena Housing Corp. v. Levay*, 188 Md. 383 (1947). There a refund of ordinary taxes was sought and denied when it appeared that the taxpayer had failed to appeal from an assessment as authorized by law. The legislative history of the statute authorizing refunds of ordinary taxes and past decisions construing that statute were examined at length. It was pointed out that, prior to legislative modification, the sta-

tutory right to appeal an assessment was not exclusive but cumulative, and a taxpayer had available as an alternative remedy the right to apply for a refund, *Baltimore v. Home Credit Co.*, 165 Md. 57 (1933); *Baltimore v. Gibbs*, 166 Md. 364 (1934); *Tidewater Oil v. Anne Arundel County*, 168 Md. 495 (1935). Following such decisions the Legislature engrafted on the statute permitting refunds of ordinary taxes the proviso that a claim for refund might not be had where the validity of the assessment upon which the taxes were levied might have been challenged by way of appeal, Chapter 407, Acts of 1935; Chapter 469, Acts of 1937; Chapter 701, Acts of 1941. As before stated, such a proviso has never been made part of Section 162A which permits refunds of special taxes. Moreover, Section 162A permits a refund where special taxes were erroneously or illegally assessed while Section 162 permits refunds only where taxes have been erroneously or mistakenly paid.

We conclude, therefore, that there is no basis upon which it can be said that the remedy contained in Section 248 of Article 81, as set forth with particularity in Section 162A of that Article, is not available to a taxpayer, notwithstanding that he has failed to appeal the assessment and thus has permitted it to become "final and irrevocable", *Baltimore v. Home Credit Co., supra; Baltimore v. Gibbs, supra; Tidewater Oil Co. v. Anne Arundel County, supra.* It should be noted, however, that on such claim a taxpayer would be entitled only to have his tax liability modified to reflect his proper personal exemptions and deductions. It appears to us that obviously he would not be entitled to be excused from double liability for failure to file a return if the Comptroller had exercised his discretionary power to make a double assessment and require penalties and interest, and to have his tax liability amended in that respect.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

TAXATION—EXEMPTIONS—GROUND APPURTENANT AND NECESSARY TO EDUCATIONAL INSTITUTIONS WITHIN AND OUTSIDE OF CITIES.

October 20, 1950.

*Mr. Albert W. Ward, Secretary,*
*State Tax Commission.*

This will answer your letters of August 8th and October 16th in which you state that the Westminster Theological Seminary owns a home in the town of Westminster which is occupied by members of the staff as part of their compensation. You question whether the ground appurtenant to this home is exempt from taxation under Section 7, subsection (8) of Article 81 of the Code which, as amended by Chapter 27 of the Acts of 1950, reads as follows:

> "Buildings, furniture, equipment and libraries of educational or literary institutions, no part of the net income of which inures to the benefit of any private shareholder or individual, and the ground, not exceeding (outside of any city) one hundred acres in area, appurtenant thereto, and necessary for the respective uses thereof."

In our opinion, the parenthetical words "outside of any city" modify the words "not exceeding" and not the word "ground." Thus in a city an unlimited amount of appurtenant and necessary ground is entitled to the exemption, but outside of a city only one hundred acres of such ground is entitled to the exemption. This conclusion is dictated not only by the position of the parenthetical phrase in the sentence, but also by the history of the legislation.

Prior to Chapter 226 of the Acts of 1929, the predecessor of the present exemption (found in Sec. 4 of Article 81 of the 1924 Code), read as follows:

"* * * nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions or to the grounds appurtenant thereto in any city or incorporated town of this State which are necessary for the respective uses thereof, nor to the buildings, equipment or libraries of incorporated educational or literary institutions in any County of this State, nor to the ground not exceeding forty acres appurtenant thereto which are necessary for the respective uses thereof, * * *"

Thus, in incorporated towns all ground appurtenant and necessary to educational or literary institutions was exempt but in the counties only forty acres of such ground were exempt.

The Maryland State Tax Revision Commission of 1927 proposed a recodification of all of Article 81 and arranged the exemptions in separate paragraphs under Section 7. The paragraph dealing with educational and literary exemptions was as follows:

"(9) Buildings, furniture, equipment and libraries of incorporated educational or literary institutions and the ground, not exceeding (outside of any city) forty acres in area, appurtenant thereto, and necessary for the respective uses thereof."

Preliminary Report of the Maryland Tax Revision Commission of 1927, page 13; Report of the Maryland Tax Revision Commission of 1927, page 15. This language was adopted in Section 7(9), Chapter 226 of the Acts of 1929 (which generally recodified the tax laws pursuant to the Commission's recommendations) and has remained substantially unchanged to the present.

The Tax Revision Commission of 1927 stated its intention not to change the substance of the tax laws except as expressly reported, but to recodify only. See Preliminary

Report, supra, pages iii and iv; Report, supra, page iv. Section 1 of the Act of 1929 is as follows:

> "The provisions of this article, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and as intended to make no substantive change in existing laws, except so far as such change shall be clearly manifest; and no implication of a change of intent shall arise by reason of a change in words or phraseology, or by reason of a relocation or rearrangement of sentences, phrases, sections or paragraphs except so far as such change of intent shall be clearly manifest."

As no substantive change is manifest, the law has remained after the Act of 1929 as before; and the 40 (now 100) acre limitation applies only outside of cities with no acreage limitation in the cities.

HALL HAMMOND, *Attorney General.*

WARD B. COE, JR., *Asst. Attorney General.*

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TAXATION—INHERITANCE TAXES—WHERE SETTLOR MADE DEED OF TRUST RESERVING LIFE ESTATE AND THE RIGHT TO REVOKE DEEDS, THE PROPERTY PASSING THEREUNDER WAS, AT HIS DEATH, SUBJECT TO INHERITANCE TAX.

December 20, 1950.

*Mr. Robert L. Wheeler,*
*Register of Wills for Harford County.*

In your recent letter, you set forth the fact that a decedent, shortly before his last marriage in January, 1948,

executed a deed of trust conveying a portion of his personal estate to trustees, the income to be paid to him for life and thereafter to his children and grandchildren. Shortly after his marriage, he executed two other similar deeds conveying additional personal property and all of his real property on the same trusts. The right was reserved by the settlor to revoke the trusts at any time during his lifetime.

After his death, his widow contested the trusts and was finally awarded, by a Court decision, a one-third interest in the property covered in the trusts on the theory that the deeds, to the extent that they interfered with her dower and inheritance interests, were fraudulent. Except to this extent, the deeds were ratified and confirmed by the Court.

It is claimed by the executors of the estate that there is no inheritance tax due on the property which is covered by the deeds of trust, relying on *Downs v. Safe Deposit & Trust Co.*, 163 Md. 30, decided in 1932.

It seems entirely clear that Section 111 of Article 81, passed in 1936 in substantially its present form imposes an inheritance tax upon property which passes under the deeds. This office has repeatedly ruled that the reservation of a right to income for life constitutes dominion and where, as in this case, in addition to a life interest in income there is a right to revoke, it can scarcely be argued that the transaction is other than testamentary in essential effect. See 25 Opinions of the Attorney General, 655; 35 Opinions of the Attorney General, 301, 302; see also, on the precise fact situation presented here, 33 Opinions of the Attorney General, 400.

HALL HAMMOND, *Attorney General.*

## TEACHERS' RETIREMENT SYSTEM

TEACHERS' RETIREMENT SYSTEM—EXPENDITURE OF GENERAL APPROPRIATION TO SUPPLEMENT EXISTING PENSIONS TO RETIRED SCHOOL TEACHERS SHOULD NOT EXCLUDE TEACHERS RETIRED AFTER THIRTY YEARS OF CREDITABLE SERVICE.

September 21, 1950.

*Mr. J. P. Mannion, Director,*
*State Teachers' Retirement System.*

We have your letter enclosing a request from a retired member of the Teachers' Retirement System for supplements to the pension which is presently being paid her. This member retired under the provisions of the Thirty Year Bill, Chapter 236 of the Acts of 1949, which, by amendment to Section 99(1) (a) of Article 77 of the Code, permitted members who have rendered 30 years of creditable service as teachers to retire, notwithstanding that the member has not as yet attained the age of 60, which, prior to the amendment, was the earliest permissive age of voluntary retirement. The request arises out of the policy of the Board of Trustees of the Teachers' Retirement System not to grant supplements to existing pensions paid to persons who have retired under the Thirty Year Bill. You ask for our advice regarding the propriety of the policy of the Board in this respect.

In 1945 the General Assembly, by supplemental appropriation, appropriated $30,000 for the fiscal years 1946 and 1947 as an "emergency supplement to existing pensions for retired school teachers, to be spent under the direction of the Board of Public Works," Chapter 893 of the Acts of 1945, page 1317. A similar appropriation has continued from year to year (Chapter 514, Acts of 1947, page 1242;

Chapter 193, Acts of 1949, page 513), the only change being that these appropriations were made to the Board of Trustees of the Teachers' Retirement System of the State of Maryland. Such an appropriation was made by Chapter 7 of the Acts of 1950, page 196, in the amount of $100,000. the words of the appropriation being, "to Teachers' Retirement System to continue emergency supplement to existing pensions for Retired School Teachers."

Other than the language employed in the appropriations and the broad published statement that the money is to "supplement existing pensions for retired school teachers," there is no express direction in the law as to how the money appropriated is to be spent. We understand that the Board has concluded to deny supplementary payments to persons who have retired under the Thirty Year Bill for dual reasons. First, it is said that the Thirty Year Bill became effective June 1, 1949 at a period of increased costs of living, that supplemental payments to retired teachers were designed to compensate teachers who retired during the pre-war depression period at a time when teachers' salaries were depressed and consequently, there is little reason to grant supplements to persons who retired recently and who, if there has resulted economic hardship by reason of retirement, have placed themselves in that position voluntarily. Secondly, it is said that the provisions of the Thirty Year Bill make it clear that the pension to be paid to persons taking advantage of it should be less than the amount of pension paid to those who retire voluntarily upon reaching 60, or who are required to retire upon reaching 70 and to grant supplements therefore would be counter to that policy.

As before stated, there is no provision in the law which establishes a definite legislative policy with regard to disbursement of the appropriation. The only intent which can be gleaned from the language employed by the Legislature is that the money should be used as an emergency supplement to existing pensions. In view of this very general

language employed, we think that there is little justification for the Board of Trustees to deny a supplement to the pension paid a person retiring under the Thirty Year Bill.

The reasons upon which the Board bases its conclusion that supplementary pensions are not to be given to voluntary retirees under the Thirty-Year Bill could apply with equal force in other situations wherein pensions are being granted. One who has reached the age of 60 is not compelled to retire, but if such a person does voluntarily leave the service, he or she can receive a pension although the retirement may have resulted in economic hardship at the time of high prices. There can be little logical distinction as to pensions where the Legislature has permitted voluntary retirement in both cases between one who, say, at the age of 58 retires under the thirty-year plan, and one who retires at 60. It is true that the law consists in many cases of drawing lines which have to be at times arbitrary to a certain extent, but certainly the example we have cited goes beyond the point where the line can properly be drawn, particularly in the absence of legislative intent that it should be.

The Legislature has not differentiated in principle between the amount to be paid the person retiring under the sixty-year plan or one retiring after thirty years' service. In each case actuarial considerations are brought into play to make the pension the equivalent of that which would be received at the compulsory retirement age.

In short, we do not believe that the Board of Trustees may properly refuse to supplement the pensions of any group, as a group, in the absence of express indication of a definite legislative policy so permitting.

HALL HAMMOND, *Attorney General.*

HARRISON L. WINTER, *Asst. Attorney General.*

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