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COMPLIMENTS OF

HALL HAMMOND

ATTORNEY GENERAL

ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1951

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
Nathaniel 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
Albert C. Ritchie	1916
³ Ogle Marbury	1918
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr.	1930
Herbert R. O'Connor	1934
William C. Walsh	1938
William Curran	1945
Hall Hammond	1946

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

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

³During 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 HammondAttorney General
J. Edgar Harvey.....Deputy Attorney General
¹Harrison L. Winter.....Assistant Attorney General
²Robert M. Thomas.....Assistant Attorney General
Kenneth C. Proctor.....Assistant Attorney General
Ward B. Coe, Jr.....Special Assistant Attorney
General for the Comptrol-
ler of the Treasury
Joseph D. Buscher.....Special Assistant Attorney
General for the State Roads
Commission.
Aaron A. Baer.....Special Assistant Attorney
General for the Employ-
ment Security Board
O. Bowie Duckett.....Special Assistant Attorney
General in Charge of Sub-
versive Activities.
Philip T. McCusker.....Special Attorney for the
State Accident Fund
³Ambrose T. Hartman.....Law Clerk
Mrs. Anne Davis Greer.....Chief Clerk
Miss L. Erma Leonard.....Stenographer-Secretary
Miss Margaret E. Holliday.....Stenographer-Secretary
Miss Agnes T. Conroy.....Senior Typist

¹Resigned March 31st, 1951.

²Appointed April 1st, 1951.

³Appointed February 1st, 1951.

Offices: 1201 Mathieson Building
Baltimore 2, Md.

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Annual Report For 1951

January 1, 1952.

*Hon. Theodore R. McKeldin,
Governor of Maryland,
Annapolis, Md.*

DEAR GOVERNOR MCKELDIN:

In order to comply with the provisions of Section 8 of Article 32A of the Annotated Code of Maryland, I am submitting herewith, a report of the business and proceedings of the State Law Department for the year beginning January 1st, 1951, and ending December 31st, 1951, together with an itemized statement of the receipts and disbursements for the fiscal year beginning July 1st, 1950, and ending June 30th, 1951. The official opinions rendered by the Department during the year follow this report.

There were one hundred and seventy cases disposed of during the year, and sixty-eight 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.

The number of cases tried in the Court of Appeals has been unusually large in the last several years, and twenty-eight criminal cases and thirteen civil cases were disposed of during 1951. 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 Court for the various Counties and the Courts of Baltimore City. In prosecutions 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 tried covered a variety of subjects, among them being murder, false pretenses, gambling, including lotteries and bookmaking, selling alcoholic beverages without a license, bigamy, rape, assault, manslaughter by automobile, keeping a disorderly house and extortion.

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, gasoline and property, constitutional law, testamentary law, election laws, motor vehicle suspensions and revocations and claims for damages to State property.

During the year several State agencies acquired real estate for the purpose of extending their operations and augmenting their facilities. The State Teachers College at Frostburg purchased a considerable amount of real estate, and while I did not send a member of my staff to Allegany County to examine the titles, but had it done by local counsel, the title reports were submitted here and inspected by us, and the entire work, including the settlements, were under my supervision. Furthermore, there were numerous building contracts entered into by the State during the year and all of these contracts were examined by members of my staff and approved before being executed on behalf of the State.

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 more than a 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. Also, 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.

When the Legislature met on January 3rd, following our established custom, we again opened an office in the State House, with Mr. Buscher in charge and assisted by Mr. Frank T. Gray, Special Assistant Attorney General, appointed for the duration of the Legislative Session. There were seven hundred and sixty-nine bills passed during the Session and all of these were reviewed by this Department for constitutionality as to form and legal sufficiency.

Matters involving the enforcement of the Blue Sky Law continued very active during the year and a number of brokers and dealers were registered with this Department during the year.

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 meetings in Washington in connection with matters pertaining to both Committees.

On July 29th I went to Seattle, Washington, to attend the Annual Meeting of the National Association of Attorneys General from August 4th to the 8th. Many vital

problems confronting the States and Nation were discussed and plans proposed to help solve the problems, such as preparation for civil defense, the control of organized crime, and the administration of justice and federal-state relations in various fields.

On March 31st, 1951, Mr. Harrison L. Winter resigned as Assistant Attorney General, to resume the private practice of law, and in his place I appointed Mr. Robert M. Thomas on April 1st, 1951. On March 1st, 1951, I appointed Mr. Ambrose T. Hartman to the vacancy of Law Clerk (Part Time) created by the recall of Mr. Malcolm B. Smith to the Air Force.

We have continued to have frequent conferences with the various officials and State Department heads, finding it mutually satisfactory in administering the State's business, and expediting many important matters.

With kind regards, I am,

Sincerely yours,

HALL HAMMOND,

Attorney General.

SUMMARY OF LITIGATION FOR 1951

CASES DISPOSED OF 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. These two cases were appeals from judgments of conviction by the Circuit Court for Harford County, Maryland. The appellants were charged with disturbance of the public peace under the Annotated Code of Maryland, Article 27, Section 131. The appellants were tried, in the first instance, before a Trial Magistrate for Harford County, and were found guilty. They appealed to the Circuit Court for Harford County and, in a joint trial de novo, before a jury, were again found guilty. The appellant Niemotko was sentenced to pay a fine of \$25.00 and costs. The appellant Kelley was sentenced to pay a fine of \$50.00 and costs. Pursuant to the provisions of the Code, Article 5, Section 104, each of the appellants petitioned the Court of Appeals of Maryland for a writ of certiorari in an attempt to have that Court pass upon the case. In each instance the petition was refused. Thereupon, appellants noted appeals to this Court. On March 13th, the Court entered an order as follows: "In these cases probable jurisdiction is noted. The motion to consolidate is granted and the cases are ordered consolidated and transferred to the summary docket." The case was argued on October 17th, 1950, and the judgments of the lower Court reversed. Mr. Proctor represented the State in the proceedings.

Herman T. Reiling vs. J. Millard Tawes, Comptroller of the State of Maryland. No. 588, October Term, 1950. See Volume 35, page 9, Report and Official Opinions of the Attorney General. This was a petition for a writ of certiorari, which was denied on May 16th, 1951. Mr. Winter represented the Comptroller.

CASE PENDING IN THE SUPREME COURT
OF THE UNITED STATES

Roma Smith vs. State of Maryland. No. 7, October Term, 1951. Miscellaneous.

CASES DISPOSED OF IN THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

John P. Byars vs. Colonel Edwin T. Swenson, Warden of the Maryland Penitentiary. No. 6291, Civil. Byars filed a petition for a writ of habeas corpus with the United States District Court for the District of Maryland. His petition was denied. Thereupon he filed an appeal to this Court. A brief was prepared by this office and the case argued before this Court, which affirmed the decision of the trial court. Mr. Proctor represented the Warden.

Richard Goodman vs. Colonel Edwin T. Swenson, Warden of the Maryland Penitentiary. No. 6292, Civil. Goodman filed a petition for a writ of habeas corpus with the United States District Court for the District of Maryland. His petition was denied, and he thereupon filed an appeal to this Court. A brief was prepared by this office and the case argued. The decision of the trial Court was affirmed. Mr. Proctor represented the Warden.

CASES DISPOSED OF 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. No. 5169, Civil Docket. This was a suit for an injunction to restrain the State Board of Education and the State Superintendent of Education from denying the plaintiff, a negro, the right to attend the State Teachers College at Towson, Maryland, solely because of race and color, said plaintiff having been given the right to attend the Bowie State Teachers College for Negroes. By stipulation of the parties the suit was

dismissed. Mr. Winter and Mr. Thomas represented the Board of Education.

Richard Goodman vs. Colonel Edwin T. Swenson, Warden, Maryland Penitentiary. This was a petition for a writ of habeas corpus filed by Goodman, an inmate in the Maryland Penitentiary. On March 13th, 1951, after a hearing, the petition was dismissed by Judge Chesnut. Mr. Proctor represented the Warden.

Oliver H. McCready, Libelant, vs. Vessel Silver Wave, Respondent. In Admiralty No. 3348. This case involved a libel and a number of intervening libels against the Vessel Silver Wave which had been forfeited to the Department of Tidewater Fisheries for a violation of the oyster laws. The claims included an alleged ship's mortgage in the amount of \$1,600.00 and various smaller maritime liens for supplies and repairs. The matter was tried before Judge Chesnut who disallowed the alleged mortgage, but allowed two of the claims. The other three claims were subsequently settled for two-thirds of their amount. The vessel was sold by the Marshal; all of the allowed and settled claims were paid and a balance of \$823.79 was paid to the Department of Tidewater Fisheries. Mr. Coe and Mr. Hartman represented the Department of Tidewater Fisheries.

Martin Duane McGuire, Harry Sody, Morton J. Hess, Max Silverman, J. Fred Manger, Gerard Morgan and J. Edmund Major vs. Ralph H. Amrein, Isidor Glass and William F. Pence. Civil Docket No. 5527. *Eddie Bratburd and Ruth Bratburd vs. Walter A. Dawson, Kenneth W. Watkins, William M. Whalen and Ruben D. Hett.* Civil Docket No. 5592. The plaintiffs in these cases had been arrested and charged with the violation of the lottery laws of the State of Maryland. They had been indicted by the Grand Jury of Baltimore City; they filed a complaint in the District Court against three members of the Police Department of Baltimore City, in which they asked that Court to enjoin those officers from testifying concerning

information obtained by them by means of wire tapping. The Bratburds had been arrested in Montgomery County charged with violating the gambling laws of the State; they had been indicted by the Grand Jury of Montgomery County and had filed a similar bill of complaint against the members of the Police Department of Montgomery County and the State's Attorney for that County. In each case a motion to dismiss was filed on behalf of the defendants. These motions were overruled by Judge Calvin Chesnut for the reason that he did not wish to determine such a novel question as was presented by these cases, in a preliminary motion. Answers were filed to the complaints on behalf of the defendants. The cases were tried before Judge Chesnut and extensive arguments heard by the Court. In addition to this, law memoranda was submitted on behalf of all parties. After consideration of the evidence and arguments, Judge Chesnut dismissed the complaints in each case. Mr. Proctor represented the State.

CASE PENDING IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

United States of America vs. Certain Lands Situate in the City of Cumberland, Allegany County, Maryland, and Theodore F. Shaeffer, et al. Civil No. 5138.

CRIMINAL CASES TRIED IN THE COURT OF APPEALS

Allan Fisher vs. State of Maryland. No. 109, October Term, 1950. Upon order of the appellant the appeal was dismissed on January 9th, 1951.

Levi Acion, alias Lee White Crips and John Plummer Thorne vs. State of Maryland. No. 118, October Term, 1950. On February 15th, the Court granted the appellant's petition to dismiss the appeal. Mr. Proctor represented the State.

Joseph G. Lenoir vs. State of Maryland. No. 124, October Term, 1950. This was an appeal from three judgments

entered against the appellant in the Criminal Court of Baltimore. The appellant was tried before the Hon. W. Conwell Smith, Chief Judge of the Supreme Bench of Baltimore City, and a jury, on four indictments. At the conclusion of the testimony, a nol pros was entered by the State in one of the indictments. The appellant was found guilty on the third and fourth counts of indictment No. 1767 and on the first and eighth counts of indictment No. 1769. These two indictments charged the appellant with extortion. The appellant was found guilty generally under indictment No. 1770, which included two counts; one, assault upon a police officer, and the other, common assault. Under indictment No. 1767, the appellant was sentenced to two years in the Maryland House of Correction. Under indictment No. 1769, the appellant was sentenced to a like term concurrent with the sentence in indictment No. 1767. Under indictment No. 1770, the appellant was sentenced to pay a fine of \$25.00 and costs in the amount of \$16.75. The appellant paid his fine in the latter case and was released on bail. These appeals were from the judgments and sentences referred to above. The judgment of the lower Court was affirmed. On May 10th, a motion for reargument was filed, and on May 16th, 1951, was denied. On May 22nd, 1951, a petition to Stay Execution and in the Enforcement of Judgment was filed, and on May 22nd, the stay was denied. Mr. Proctor represented the State.

Mary Reed vs. State of Maryland. No. 129, October Term, 1950. This was an appeal from the Criminal Court of Baltimore, from a judgment entered upon a guilty verdict found by the Court, sitting as a jury, under an indictment charging the appellant with the operation of a disorderly house and of a bawdy house. The charges related to premises known as the Honor-Reed Hotel, located at 667 W. Franklin Street. The judgment of the Court was that the appellant serve a term of not more than eleven months and twenty days in the Maryland State Reformatory for Women, accounting from November 28th, 1950. This appeal was from that judgment. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

State of Maryland vs. Mike Barshack. No. 130, October Term, 1950. This was an appeal from a ruling by the Hon. Michael J. Manley, Associate Judge of the Supreme Bench of Baltimore City, by which he sustained the appellee's motion to quash the search warrant filed in this case. The appeal was dismissed. Mr. Proctor represented the State.

Clarence T. Bland vs. State of Maryland. No. 133, October Term, 1950. This was an appeal from the judgment in a case where a guilty verdict was found by the Hon. John B. Gontrum, Associate Judge of the Circuit Court for Baltimore County, sitting as a jury, under the third and fourth counts of a criminal information filed by the State's Attorney for Baltimore County. All four charges were filed under Article 27, Section 411 of the Code, pertaining to lotteries. The appellant was found guilty under two counts and sentenced to serve one year in the Maryland House of Correction and to pay a fine of \$1,000. This appeal was from that judgment. The judgment of the lower court was affirmed. Mr. Proctor represented the State.

Joseph Hobbs, Jr. vs. Harold E. Donnell, Superintendent of Prisons. No. 143, October Term, 1950. Because of the failure of the appellant to comply with the rules of the Court of Appeals relative to briefs, the Court dismissed the appeal on April 10th, 1951.

Thomas Alexander Edwards vs. State of Maryland. No. 147, October Term, 1950. SEE CASE UNDER HEADING COURT OF APPEALS CRIMINAL CASES. No. 75, OCTOBER TERM, 1949. VOLUME 35 (1950) page 10. The appellant was retried in June 1950, and was again found guilty of murder in the first degree and sentenced to be hanged. In this appeal he contended that the evidence was not sufficient to sustain the conviction. The FBI expert on ballistics testified the cartridge case picked up in the appellant's yard matched the case found near the deceased's body and also one fired by the appellant's pistol. A guard at the Penitentiary testified to a conversation overheard between the appellant

and another inmate amounting to an admission. The Court of Appeals affirmed the conviction. Mr. Thomas represented the State. On July 14th, 1951, a motion for reargument was filed, and in a per curiam opinion filed on October 5th, 1951, the Court denied the motion.

Bernard J. Del Negro, et al and Dean J. Kennedy vs. State of Maryland. No. 148, October Term, 1950. This was an appeal by eleven defendants from the judgments in a criminal case tried in Prince George's County, Maryland, before Hon. John B. Gray, Chief Judge, and Charles C. Marbury and J. Dudley Digges, Associate Judges, without a jury. Appellants, along with a number of other defendants had been charged in two separate indictments. Under indictment No. 542, all the defendants were charged with the operation of a lottery. Under indictment No. 543, all the defendants were charged with the conduct of a book-making establishment. All defendants filed a motion to quash the search warrant, which had been issued by a United States Commissioner for the District of Columbia, and to suppress the evidence obtained as a result of the execution of such warrant. This motion was granted as to four of the defendants, not involved in this appeal, and was overruled as to the remaining defendants. Upon the conclusion of the trial of the case, motions for a directed verdict of not guilty were filed on behalf of the defendants. As to appellants, these motions were denied. The Court, sitting as a jury, found all defendants not guilty under indictment No. 543; under indictment No. 542, the Court found appellants guilty—the remaining defendants, not guilty. Appellants Del Negro, Segar, Salet, Hinkle, Jr. and Welch were each sentenced to pay a fine of \$500 and costs and to serve a term of two years in the Maryland House of Correction. Appellant Dean Johnson Kennedy was sentenced to serve a term of two years in the Maryland House of Correction. This appeal was from those judgments. The judgments of the lower Court were affirmed. Mr. Proctor represented the State.

Ronald Harris vs. State of Maryland. No. 149, October Term, 1951. Because of failure to pay the required fee of \$10.00 and to file a brief within the time specified by the Rules of Court, a motion to dismiss the appeal was filed by the State, and on April 11th, 1951, the Court dismissed the appeal. Mr. Proctor represented the State.

Gerald B. Wright vs. State of Maryland. No. 150, October Term, 1950. This was an appeal from a judgment in a criminal case in the Circuit Court for Prince George's County, in which the appellant was found guilty by a jury of the crime of bigamy. The indictment charged that the appellant, on October 3, 1948, "being married to one Imogene Wright, the said marriage not having been dissolved by annulment or divorce a vinculo matrimonii, the said Imogene Wright being then alive, with force and arms feloniously marry and take as his wife one Jean Dunn." The appellant filed a motion for directed verdict at the end of the State's case and also at the end of the whole case. Such motions were overruled by the trial court. After the verdict, the appellant filed motions for judgment N. O. V. and for a new trial, which were overruled by the trial court. The appellant thereupon filed a motion to arrest the judgment, which was likewise overruled. Thereupon, the appellant was sentenced to serve seven years in the Maryland Penitentiary. The judgment of the lower Court was reversed and a new trial awarded. Mr. Proctor represented the State.

Allan A. Bassin vs. State of Maryland. No. 11, October Term, 1951. Appellant was indicted, charged with the operation of a disorderly house in Baltimore City on August 25th, 1950. The indictment contained five other counts, which, however, are not important for the reason that the court, sitting as a jury, rendered a verdict of guilty under the disorderly house count only. Sentence was suspended pending the filing of, and argument on, a motion for a new trial. That motion having been overruled by the Supreme Bench of Baltimore City, the appellant was sentenced to

serve nine months in the Maryland House of Correction. This appeal was from that judgment. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

Robert Lee vs. State of Maryland. No. 14, October Term, 1951. This was an appeal from a judgment of the Criminal Court of Baltimore entered upon a verdict of guilty on the fifth count of the indictments in cases Nos. 205, 206 and 207, Docket 1951, charging the appellant with possession of records of numbers drawn in a lottery. Before pleading, the appellant filed a Motion to Quash the search warrant basing his contention on the fact that the affidavit on which the warrant was issued contained no statements "forming a sufficient basis" or show "cause" for the issuance of the warrant. The Court below thought otherwise and denied the motion. After his conviction, the appellant filed a motion for a new trial on the same grounds. This motion was unanimously denied by the Supreme Bench of Baltimore City. The judgments of the lower Court were affirmed with costs. Mr. Thomas represented the State.

Melvin Alexander vs. State of Maryland. No. 16, October Term, 1951. This was an appeal from the judgments in two criminal cases tried together before Judge Joseph Sherbow, without a jury, in the Criminal Court of Baltimore City. The appellant had been charged under numerous counts in two separate indictments with violating the gambling and lottery laws of the State of Maryland. He was convicted on three counts of one indictment and three in another indictment. Sentence was deferred pending the filing of a motion for a new trial. Said motion was based on the precise points raised in the appeal. It was dismissed by the Supreme Bench of Baltimore City. Thereafter, the appellant was sentenced separately on each indictment to six months confinement in the Maryland House of Correction and to a separate fine on each indictment of \$1,000 and costs, the separate sentences of confinement to run concurrently. The judgments of the lower Court were affirmed with costs. Mr. Thomas represented the State.

Raymond H. Goss vs. State of Maryland. No. 18, October Term, 1951. The appellant was tried in the Circuit Court for Allegany County on a charge of gambling on March 17th, 1951, under an indictment which contained fifteen counts. The case was tried before Morgan C. Harris, Associate Judge. Judge Harris, sitting as a jury rendered a verdict of guilty under the fourth and eighth counts of the indictment. Those counts charged appellant with the establishment and maintenance of a certain house, and of a portion of a certain house, for the purpose of gambling. Appellant was sentenced to serve a term of sixty days in the Allegany County jail and to pay a fine of five hundred dollars and court costs. This appeal was from that judgment. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

Walter S. Shelton vs. State of Maryland. No. 19, October Term, 1951. The appellant was indicted for promoting or being concerned in a lottery in Prince George's County, on the 16th day of January, 1951. He pleaded not guilty, and was tried before a jury. After a motion for directed verdict at the end of the whole case was overruled, the Trial Court orally gave advisory instructions, and submitted the case to the jury which returned a verdict of guilty. Judgment of the Court was entered sentencing the appellant to serve a term of six months in the House of Correction. This appeal was taken from that judgment. The judgment of the lower Court was affirmed with costs. Mr. Hartman represented the State.

Gilbert Heath vs. State of Maryland. No. 21, October Term, 1951. The appellant was charged under a criminal information filed by the State's Attorney for Anne Arundel County, with rape, assault with intent to rape, and assault upon Martha A. Matlack on March 15th, 1951. At the trial, the Court sitting as a jury, found the appellant not guilty under the first and second counts of the information (rape and assault with intent to rape) and guilty under the third count (assault). The Court imposed sentence of five years

in the Maryland House of Correction and this appeal was from that judgment. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

William J. Hughes vs. State of Maryland. No. 22, October Term, 1951. This was an appeal from a verdict and judgment of the Circuit Court for Allegany County, wherein the Court, Judges Mish and Henderson sitting without a jury, found the appellant guilty of Manslaughter by Automobile on the 21st day of April, 1951, and sentenced the defendant, appellant herein, to three months in the Allegany County Jail. The judgment of the lower Court was affirmed with costs. Mr. Hartman represented the State.

William T. Meade and Edgar A. Riley vs. State of Maryland. No. 31, October Term, 1951. Appellants were indicted for violation of the gambling laws (Annotated Code of Maryland, 1939 Edition, Article 27, Section 291). The indictment contained fifteen separate counts, all of which were concerned with gambling on March 2, 1951. The case was tried before the Honorable Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, sitting without a jury. Judge Sherbow rendered a verdict of guilty as to both defendants under the first, second, third, twelfth, thirteenth and fourteenth counts of the indictment. A motion for a new trial was filed but withdrawn. Sentence was imposed on each of the defendants as follows: one year in the Maryland House of Correction and \$1,000 fine, plus court costs. This appeal is from those judgments. The judgments of the lower Court were affirmed. On December 21st, 1951, a Motion for Reargument was filed by the appellants but the Motion was denied. Mr. Proctor represented the State.

Frank R. Diggins vs. State of Maryland. No. 35, October Term, 1951. This was an appeal from a judgment entered upon a guilty verdict rendered by the Court (Chief Judge W. Conwell Smith), sitting as a jury in the Criminal Court of Baltimore, in a case in which appellant was charged with

assault upon one Harry S. Miller on October 19th, 1950. Sentence was suspended pending the filing of a Motion for a New Trial. The Motion for a New Trial having been overruled, the appellant was sentenced to pay a fine of \$5.00 and costs of the suit. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

Lewis B. Cockey vs. State of Maryland. No. 50, October Term, 1951. On August 24th, the appellee filed a Motion to dismiss this appeal pursuant to the provisions of Rule 40, Section 2 of the "Rules and Regulations Respecting Appeals of the Court of Appeals". On September 25th, 1951, notice of the abandonment of the case was filed and the case was dismissed. Mr. Proctor represented the State.

Saul Kaufman vs. State of Maryland. No. 58, October Term, 1951. This was an appeal in a criminal case in which the appellant was found guilty on the first and second counts of an indictment charging him with intent to defraud by false pretenses in violation of Article 27, Section 152 of the Code of Public General Laws of Maryland. He was also found guilty "generally" on two other indictments charging the same offense, on different days, in different amounts. The case was tried by the Court sitting as a jury. The judgment of the lower Court was affirmed. Mr. Thomas represented the State.

Anthony DeAngelo, Jr., vs. State of Maryland. No. 60, October Term, 1951. This was an appeal from judgments of conviction in the Criminal Court of Baltimore City, wherein after pleas of not guilty, the Court sitting as a jury, found the appellant guilty on the 1st and 5th counts of Indictment No. 1153, charging him jointly with Anthony Martini, who pleaded guilty, with unlawfully making and selling books or pools on horse races, with keeping a house for the purpose of betting and gambling and with possession and sale of lottery tickets, all on March 16th, 1951, and also finding appellant guilty on the 1st, 2nd, and 3rd counts of indictment No. 1266, charging appellant alone with

similar offenses. Counts 1 and 5 of the No. 1153 indictment on which appellant was found guilty, charged the sale of a lottery ticket and having possession of lottery tickets, slips and records. Counts 1, 2 and 3 of indictment No. 1266, on which appellant was found guilty, charged gambling on horse races, making a book or pool upon the result of a certain race, test or contingency. Appellant was sentenced to serve six months in the Maryland House of Correction and to pay a fine of \$1,000, consecutive under each of the two indictments. This appeal was from those judgments. The appellant's motion for a new trial was denied by the Supreme Bench of Baltimore City. The judgments of the lower Court were reversed, with new trials awarded. Mr. Thomas represented the State.

Joseph Curreni vs. State of Maryland. No. 61, October Term, 1951. The appellant was tried in the Criminal Court of Baltimore on charges of violating the gambling laws on April 6th, 1951, under an indictment which contained fifteen counts. The case was tried before the Hon. Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, sitting without a jury. Judge Sherbow rendered a verdict of guilty under the first, second and third counts of the indictment, which charged the appellant with gambling on the result of a horse race, making a book on the result of a horse race and making book on the result of a certain race. Appellant filed a motion for a new trial, which was overruled by the Supreme Bench of Baltimore City. On June 6, 1951, appellant was sentenced to pay a fine of \$750.00 and court costs and to serve six months in the Maryland House of Correction. This appeal was from that judgment. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

Charles R. Kershaw vs. State of Maryland. No. 71, October Term, 1951. The appellant was indicted for violation of the gambling laws (Annotated Code, Article 27, Section 291). The indictment contained fifteen separate counts, all of which were concerned with gambling on

April 11th, 1951. The case was tried before the Honorable Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, sitting without a jury. Judge Sherbow rendered a verdict of guilty under the first, second, third and fourth counts of the indictment. A motion for a new trial was filed and denied by the Supreme Bench of Baltimore City. Thereupon, appellant was sentenced to serve six months in the Maryland House of Correction and to pay a fine of \$1,000 and the court costs. This appeal was from that judgment. The judgment of the lower Court was affirmed with costs. Mr. Proctor represented the State.

Jack Hayette alias Jack Hyatt vs. State of Maryland. No. 72, October Term, 1951. This was an appeal from a judgment and sentence in two cases against the appellant tried jointly with four others before Judge Sherbow sitting as a jury in the Criminal Court of Baltimore City. The appellant was found guilty of violating the first, second and fifth counts of one indictment and the second and fifth of another indictment. The appellant received a sentence of four months in jail and a fine of \$750.00. The judgments of the lower Court were affirmed with costs. Mr. Hartman represented the State.

Charles Lincoln vs. State of Maryland. No. 81, October Term, 1951. Under date of July 11th, 1951, Theodore R. McKeldin, Governor of the State of Maryland, issued his rendition warrant under which he directed the return of the appellant to the Commonwealth of Massachusetts for trial under three criminal charges; viz. abandonment, desertion and non-support of his wife. The appellant questioned the legality of this action by filing a petition for a writ of habeas corpus in the Circuit Court for Prince George's County. After hearing, Judge Gray ordered that the petition be dismissed and that the appellant be remanded to the custody of Lieutenant J. Frank Cavanaugh of the police force of Brockton, Massachusetts, to be extradited to Massachusetts pursuant to the warrant held by him. Thereupon, appellant filed a petition with this Court asking leave to

prosecute an appeal, which was authorized by this Court by order dated July 26th, 1951. The order of the lower Court was affirmed, with costs. Mr. Proctor represented the State.

William Adams vs. State of Maryland. No. 117, October Term, 1951. This was an appeal from an interlocutory order of the Criminal Court of Baltimore overruling the appellant's exceptions to the State's Answer to His Motion for Discovery. In a per curiam opinion filed on December 5th, 1951, the appeal was dismissed. Mr. Harvey represented the State.

CIVIL CASES TRIED IN THE COURT OF APPEALS

Theodore J. Phillips, etc. vs. Colonel Beverly Ober, Police Commissioner for Baltimore City. No. 78, October Term, 1950. This was an appeal from the Circuit Court of Baltimore City. The Amended Bill of Complaint sought to enjoin the appellee from closing the Western Police Station in Baltimore City. The Demurrer to the Amended Bill of Complaint was sustained without leave to amend, and the bill dismissed with costs. From that decree this appeal was prosecuted. The decree of the lower court was affirmed. Mr. Harvey represented the Police Commissioner.

State of Maryland, ex rel Roy M. Audler vs. Captain Henry Kriss. No. 103, October Term, 1950. This was an appeal from an Order of Honorable Robert France, Associate Judge of the Supreme Bench of Baltimore City, sitting in the Baltimore City Court, passed on June 20th, 1950. The appellant was remanded unto the custody of the Warden of the Baltimore City Jail and the Petition for a Writ of Habeas Corpus was dismissed. The petition had been filed after the Governor of Maryland issued his rendition warrant upon the request of the Governor of Virginia ordering the arrest of the appellant and his return to the Commonwealth of Virginia. The judgment of the lower Court was affirmed. Mr. Proctor represented the State.

The Dundalk Liquor Company, a body corporate, vs. J. Millard Tawes, Comptroller, et al. No. 117, October Term, 1950. This was an appeal from a final order of the Circuit Court of Baltimore City which sustained a demurrer filed by the appellees to the appellant's amended bill of complaint, and ordered the amended bill of complaint dismissed with costs to be paid by the appellant. The suit was instituted by the appellant against the appellees to contest the validity of Regulation 206 of the Comptroller of the Treasury, Alcoholic Beverages Division. A preliminary injunction against the enforcement of Regulation 206 was sought and denied and thereafter, the appellees filed an answer to the bill of complaint. A hearing on the bill and answer ensued and in the course of the testimony of the first witness the lower Court suggested that the essential question presented was purely a question of law and that it would be desirable if the parties could present that question on demurrer to an amended bill of complaint. The appellant acted upon that suggestion and requested the appellee to stipulate that an amended bill of complaint could be filed. The appellees J. Millard Tawes, Comptroller of the Treasury, and Roger V. Laynor, Chief of the Alcoholic Beverages Division of the office of the Comptroller of the Treasury, through counsel, agreed to the stipulation and, thereafter, an amended bill of complaint was filed, to which the appellees demurred. After the filing of the original bill of complaint, an incorporated association of dealers in alcoholic beverages affected by the Regulation, and numerous individual dealers in alcoholic beverages affected by the Regulation intervened in the proceeding. After the filing of the amended bill, the intervenors likewise demurred thereto. The Court held that the statute does not authorize the Comptroller to set minimum prices on a horizontal level and reversed the decision of the lower Court. Mr. Winter represented the Comptroller.

John B. Funk, et al. vs. the Mullan Contracting Company, et al. No. 128, October Term, 1950. At the short session of the Legislature held in 1950, an act was passed providing for a Commission on Prevailing Wages for the State of

Maryland. Appellees, four contracting companies, brought a bill in equity attacking the constitutionality of the act and requesting the court to restrain any action by the Commission. The constitutional amendment providing for the short session of the Legislature every even numbered year limited the legislation to be enacted at this session to budgetary, emergency or general public welfare legislation. The appellants contended that the legislation providing for the Prevailing Wages' Commission was general public welfare. The Court held that the term "general" as used in Section 15 of Article III of the Constitution is intended to mean legislation that applies to all of the state without exception and the provision for prevailing wages commission did not come under general public welfare. The decision of the lower Court was affirmed. Mr. Winter represented the State.

Association of Independent Taxi Operators, Inc. et al. vs. Yellow Cab Company, etc. et al. and Colonel Beverly Ober, Police Commissioner of Baltimore City. No. 160, October Term, 1950. This appellee adopted the "Statement of the Case and Points Involved" set forth in the Brief filed on behalf of the Pennsylvania Railroad Company, et al. So far as this appellee was concerned, the only question presented for the consideration of this Court was whether or not Ordinance No. 201 of the Mayor and City Council of Baltimore (approved January 26, 1948, applied to the Pennsylvania Station Drive.) The decree of the lower court was affirmed with costs. Mr. Proctor represented the Police Commissioner.

Richard F. Schneider, etc. td. City Barber Schools vs. Thomas G. Pullen, Jr. etc. et al. Constituting the Maryland State Board of Education. No. 161, October Term, 1950. This was an appeal from a decree of the Circuit Court of Baltimore City sustaining a demurrer to appellant's amended bill of complaint and dismissing the bill. The amended bill of complaint sought (a) a declaratory judgment that Section 14A of Article 77 of the Annotated Code

of Maryland (1947 Supplement) was null, void and unconstitutional, and (b) an injunction against enforcement of the provisions of the Act. Although appellant filed with the amended bill of complaints as Exhibits Nos. 2 and 3 the "Proposed Regulations for Approval of Non-Academic Private Schools in the State of Maryland" and "Proposed Particular Standards for Barber Schools in the State of Maryland", he did not in his prayer for relief ask the Court to determine that such rules were unconstitutional. The Court held that the standards were sufficiently explicit to limit the State Superintendent of Schools in his actions, and not permit him to exercise arbitrary power, and affirmed the decree of the lower Court. Mr. Proctor represented the Board of Education.

Chester T. Tawney vs. Board of Supervisors of Elections of Baltimore City. No. 9, October Term, 1951. This was an appeal from an order of the Superior Court of Baltimore City dismissing appellant's petition for a writ of mandamus. The prayer of the petition was that the Writ of Mandamus be issued to compel the Appellee to include Appellant's name on the ballot for Comptroller of Baltimore City in the election to be held on May 8th, 1951, for which office he was seeking election as an independent candidate. The case was advanced for hearing, and on April 26th, 1951, the Court filed a per curiam opinion in which the order of the lower Court was reversed with costs and the case remanded in order that the Writ of Mandamus might issue as prayed. The action of the trial court was reversed. Mr. Harvey represented the Election Supervisors.

Comptroller of the Treasury of the State of Maryland vs. the Crofton Company. No. 17, October Term, 1951. This was an appeal from that portion of the Order entered herein by the Baltimore City Court ordering that the appellant's assessment against the appellee for Sales and Use Taxes be reduced in the amount of \$182.48 which amount represents the use tax assessed against the appellee for the use of slate "not readily obtainable in Maryland" in the con-

struction of houses. The judgment of the lower Court was reversed with costs. Mr. Thomas represented the State Comptroller.

Leroy C. Shaughnessy, Register of Wills, etc. vs. Frederick H. Hennighausen, etc. and Linguistic Society of America, et al. No. 27, October Term, 1951. This case was appealed by the Register of Wills of Baltimore City from a decree of the Circuit Court of Baltimore City declaring that a certain bequest contained in the Will of Klara H. Collitz is exempt from the Maryland inheritance tax and, further, ratifying and confirming an Auditor's Account filed in said Court which did not allow for said tax. The decree of the lower Court was affirmed with costs. Mr. Coe represented the Register of Wills.

Walter Hite vs. State of Maryland. No. 47, October Term, 1951. The Court of Appeals had granted appellant's petition for a writ of certiorari to review the proceedings in the Juvenile Court and in the Circuit Court for Allegany County. This Court held that the Magistrate had no authority to sentence the defendant a second time for violation of parole. The Circuit Court could not enlarge the ten day sentence originally imposed. The judgment of the lower Court was reversed and the case remanded. Mr. Hartman represented the State.

Leroy C. Shaughnessy, Register of Wills of Baltimore City vs. Philip B. Perlman, et al. Trustees. No. 49, October Term, 1951. This was an appeal by the Register of Wills of Baltimore City from a decree of the Circuit Court No. 2 of Baltimore City declaring that certain property passing in remainder under the will of Claribel Cone, who died in 1929, is to be appraised for inheritance tax purposes as of the date of the testatrix' death rather than the date of vesting in possession. The decision of the lower Court was affirmed, with Judges Markell and Collins dissenting. A petition for a re-argument was filed, but was denied. Mr. Coe represented the Register of Wills.

H. R. Raymond, Superintendent, Maryland State Reformatory for Males vs. State of Maryland, ex rel. William Preston Leake. No. 16, Habeas Corpus Appeals, October Term, 1951. This was an appeal from the granting of a writ of Habeas Corpus. The petitioner was eighteen years of age at the time of the trial and in support of his petition, contended that his constitutional rights were infringed in that the Court did not appoint counsel to represent him. Judge Moser ordered the release of Leake from the State Reformatory for Males and further ordered that he be returned to the authorities for Prince George's County for re-trial. The State entered an appeal, but because of several Supreme Court decisions which had held that a youth of such tender age is entitled to Court appointed counsel, dismissed the appeal, with the concurrence of the State's Attorney for Prince George's County. Mr. Hartman represented the State.

H. R. Raymond, Superintendent, Maryland State Reformatory for Males vs. State of Maryland, ex rel. Arthur Merle Lydick. No. 17, Habeas Corpus Appeals, October Term, 1951. This was an appeal from the granting of a writ of Habeas Corpus. The petitioner was seventeen years of age at the time of the trial and in support of his petition, contended that his constitutional rights were infringed in that the Court did not appoint counsel to represent him. Judge Moser ordered the release of Lydick from the State Reformatory for Males and further ordered that he be returned to the authorities for Prince George's County for re-trial. The State entered an appeal but because of several Supreme Court decisions which had held that a youth of such tender age is entitled to Court appointed counsel, dismissed the appeal, with the concurrence of the State's Attorney for Prince George's County. Mr. Hartman represented the State.

CASES PENDING IN THE COURT OF APPEALS

State of Maryland vs. Jerome Harman. No. 76, October Term, 1951.

Paul R. Estep vs. State of Maryland. No. 97, October Term, 1951.

Samuel D. Kalis, ind. Samuel D. Kalis, Vice-President American Realty Company, Inc. et al. vs. Helen Elizabeth Brown, Housing Court Magistrate. No. 116, October Term, 1951.

Leon Lingner vs. State of Maryland. No. 118, October Term, 1951.

Leonard Cross vs. State of Maryland. No. 119, October Term, 1951.

Harry V. Reeves, Jr. vs. State of Maryland. No. 120, October Term, 1951.

Willard Howard vs. State of Maryland. No. 125, October Term, 1951.

Louis B. Robbins vs. State of Maryland. No. 126, October Term, 1951.

Charles Saunders vs. State of Maryland. No. 127, October Term, 1951.

Jesse Alfred Armstrong vs. State of Maryland. No. 131, October Term, 1951.

Samuel Leonard vs. State of Maryland. No. 132, October Term, 1951.

Joseph Burns vs. State of Maryland. No. 133, October Term, 1951.

Carl R. Haley vs. State of Maryland. No. 134, October Term, 1951.

WAAM, Inc. etc. vs. Beverly Ober, Police Commissioner of Baltimore City. No. 135, October Term, 1951.

Johns Hopkins University and the Board of Public Works of Maryland vs. Charles T. Williams, Jr. No. 139, October Term, 1951.

Noah Earl Beeman vs. State of Maryland. No. 141, October Term, 1951.

CASES FINALLY DISPOSED OF IN LOWER COURTS

Mabel Caldwell vs. Willie Caldwell, Arthur H. Brice, etc., Commissioner of Motor Vehicles. In the Circuit Court of Baltimore City. The bill in this case was filed for the purpose of setting aside a transfer of title to a motor vehicle. The Commissioner of Motor Vehicles was joined as a defendant solely for the purpose of preventing a further assignment of the title while the proceeding was pending. An answer was filed in behalf of the Commissioner stating that he had no interest in the cause and that he would abide by any order which may be passed in the premises. Mr. Harvey represented the Commissioner.

Frances Viola Pickett vs. Thomas H. Pickett, Equitable Trust Company, Thomas B. R. Mudd, Commissioner of Motor Vehicles. In the Circuit Court of Baltimore City. The bill of complaint in this case had as its object the setting aside of the transfer of certain property, including a motor vehicle. The Commissioner of Motor Vehicles was included as a defendant in order to prevent the further transfer of the motor vehicle while the proceeding was pending. An answer was filed in behalf of the Commissioner setting forth that he had no interest in the subject matter and that he would abide by any order passed by the Court. Mr. Harvey represented the Commissioner.

Herbert C. Layman vs. Motor Vehicle Commissioner. In the Circuit Court for Garrett County. This was a bill of complaint seeking an order restraining the Commissioner of Motor Vehicles and his agents from seizing the registration plates and operator's license of the plaintiff. A motion in behalf of the defendant was filed to dismiss the case and when it came on for hearing the Court passed an order dismissing it. Mr. Harvey represented the Commissioner.

Maurice Smith, et al. vs. Arthur H. Brice, et al., Department of Tidewater Fisheries. In the Circuit Court for Somerset County. Nos. 451, 452. Edwin C. Smith, Sr., filed an application with the Department of Tidewater Fisheries for forty acres of ground in Tangier Sound for the purpose of planting oysters. At the same time P. W. Marshall filed an application for the same amount of acreage in an adjoining area. Protests against both applications were filed. Answers were filed in behalf of the defendants; the cases were consolidated and tried together. At the conclusion of the protestants' case, a prayer was offered in behalf of the defendants to withdraw the cases from the Jury and the prayers were granted. Mr. Harvey represented the Commission.

Asa Crockett, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. This was a protest of an application for lease of thirty acres of oyster ground in Broad Creek, by Wayne Christy. The protest was based upon the assertion that the area was a natural bar; that it was within fifty yards of a natural bar, and that the applicant was a minor and did not sign the application. An answer was filed in behalf of the defendants and at the time the case was called for trial the application for lease was withdrawn in open court and a judgment was entered for the defendants with costs. Mr. Harvey represented the Commission.

Allen Parks, et al. vs. Arthur H. Brice, et al. Commissioner of Tidewater Fisheries. In the Circuit Court for

Somerset County. This proceeding involved the protest of an application for a lease of oyster ground by Dianne Christy in Broad Creek in the waters of Somerset County. The grounds of the protest were that the area was a natural bar; that it was within fifty yards of a natural bar; that the applicant was a minor and that the applicant did not sign the application. After an answer was filed on behalf of the Commission, the case came on for trial, and at the outset of the trial the applicant in open Court informed the Judge that the matter would not be pressed and that the application was withdrawn. Mr. Harvey represented the Commission.

Emory Nelson, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 368. This was an application for thirty acres of ground in Pocomoke Sound for planting oysters, the applicant being Richard Christy. A protest was filed by Nelson and others, and when the case was called for trial the protestants dismissed their protest. Mr. Harvey represented the Commission.

Gordon Crockett, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 366. This case involved the application of Clarence A. Christy for lease of thirty acres of ground in Pocomoke Sound.

Carey Evans, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 367. This case involved the application of Olive S. Christy for lease of twenty-five acres of ground in Pocomoke Sound.

Alex Kellam, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 369. This case involved the application of Elva N. Christy for thirty acres of ground in Pocomoke Sound. In each of these cases, that is, the Crockett, Evans

and Kellam cases here noted, the applicant withdrew his application in open Court when the case was called for trial. Mr. Harvey represented the Commission.

Baltimore Federal Savings and Loan Association vs. Emanuel Seth, Carrie Seth and Philip Washington. In the Superior Court of Baltimore City. This was a petition seeking an order to direct the Sheriff of Baltimore City to pay certain monies in his hands to the petitioner. An answer was filed in his behalf, stating that he had no interest in the matter and would disburse the funds in accordance with the directions of the Court. Mr. Harvey represented the Sheriff.

Naess, Mejlaender & Co. Inc. etc. vs. Compania Maritime Grevat, S. A. In the Superior Court of Baltimore City. The plaintiff in the above case filed a petition disputing the Sheriff's computation of the poundage fees which it was required to pay. An answer was filed on the Sheriff's behalf, setting forth the method of computation and stating that the Sheriff was willing to abide by any order which the Court might determine to be proper. After a hearing the Court reduced the poundage fees from \$1,200 to \$75.00. Mr. Harvey represented the Sheriff.

Laura May Hitchens vs. Herbert Henry Hitchens and Safe Deposit and Trust Company of Baltimore, tr. u/w John H. Hitchens, dec. In the Superior Court of Baltimore City. This was a petition to enjoin the Sheriff of Baltimore City from collecting poundage fees for levying a non-resident attachment against the property of Laura May Hitchens to satisfy a claim of the Safe Deposit & Trust Company of Baltimore. On hearing of the show cause order before Judge Warnken as to why the relief sought in the petition should not be granted, the Judge requested that the parties stipulate as to the facts contained in the petition and file such stipulation together with memoranda on the question of whether or not the Sheriff was authorized as a matter of law to charge and collect poundage fees for

levying a non-resident attachment, which question had never before been decided in this State. Thereafter a supplemental petition and answer thereto were filed and the case submitted. The Court then ordered the poundage fee reduced to \$41.25. Mr. Harvey represented the Sheriff.

Provident Savings Bank of Baltimore vs. Joseph P. Healy, State Bank Commissioner. In the Circuit Court No. 2 of Baltimore City. This was a proceeding instituted under the Declaratory Judgments Act for judicial determination of the question concerning the propriety of certain charges made by the Provident Savings Bank for servicing bank accounts. The Attorney General had ruled that such charges were not permissible under the proper construction of Article 11 of the Code. An answer was filed in behalf of the Bank Commissioner, the defendant in the cause, relying upon the statutory provisions. On December 27th the complainant filed an order of dismissal. Mr. Harvey represented the Bank Commissioner.

Hallmark Productions, Inc., a body corporate vs. Sydney R. Traub, et al. Board of Motion Picture Censors. In the Baltimore City Court. This was an appeal from the Board of Motion Picture Censors in refusing to approve for exhibition in Maryland, the picture entitled "Mom and Dad". The Board of Censors exhibited the picture to Judge Smith, the parties and their attorneys, and subsequently the case was heard in open Court. At the conclusion the Court passed an order affirming the action of the Board. Mr. Harvey represented the Board.

Joseph Hobbs, Jr. vs. Harold E. Donnell, Superintendent of Prisons. In the Circuit Court of Baltimore City. Hobbs who was confined in the Maryland Penitentiary, filed what purported to be a bill of complaint for an injunction to restrain the Warden from inflicting cruel and inhuman punishment upon him. A demurrer to the petition was filed and the bill was dismissed without leave to amend. Mr. Harvey represented the Superintendent of Prisons.

Roland L. Fisher vs. the State Board of Funeral Directors and Embalmers. In the Circuit Court for Carroll County. This was an appeal from the action of the State Board of Funeral Directors and Embalmers in suspending the appellant's license for six months. At the hearing of the case Judge Boylan reversed the decision of the Board. At the request of the Attorney General the State's Attorney for Carroll County represented the State Board.

Octavius Cherry vs. Motor Vehicle Commissioner. In the Baltimore City Court.

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

John L. Friskey vs. Motor Vehicle Commissioner. In the Baltimore City Court.

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

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

Franklin Oliver Hook vs. Motor Vehicle Commissioner. In the Baltimore City Court.

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.

Frank William McIntyre vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Willie B. Mitchell vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Harry Carroll Minor vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Thomas Parran, Jr. vs. Motor Vehicle Commissioner. In the Circuit Court of Baltimore City.

Garnet Morgan Prentis vs. Motor Vehicle Commissioner. In the Baltimore City Court.

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.

Charles Williams vs. Motor Vehicle Commissioner. In the Baltimore City Court.

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.

Richard W. Carter vs. Francis T. Peach, State's Attorney, Oscar M. Grimes, Chief of Police, and Hall Hammond, Attorney General. In the Circuit Court for Baltimore County. This was a proceeding for a declaratory decree asking the Circuit Court for Baltimore County, to declare unconstitutional Chapter 688 of the Acts of 1947. A demurrer was filed in behalf of the Attorney General who was one of the three defendants, and following the interposition of the demurrer the plaintiff dismissed the suit as to the Attorney General. Mr. Harvey represented the Attorney General.

Alexander Goodman vs. Leo M. Welsh, et al. Board of Supervisors of Elections of Baltimore City. In the Court of Common Pleas of Baltimore City. This was an appeal from the Board of Supervisors of Elections for Baltimore City, in refusing to erase the names of registered voters whose right to be registered was challenged by the appellant. After the conclusion of the hearing in open court, the Court passed an order requiring the Supervisors to erase the names of certain voters who appeared to be registered improperly. Mr. Harvey represented the Supervisors.

C. Markland Kelly vs. Leo M. Welsh, et al. Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the defendants to place the name of the petitioner on the ballot as an independent candidate for Mayor of Baltimore City at the municipal election of 1951. An answer was filed in behalf of the defendants. To this answer the petitioner interposed a demurrer which was overruled. After the conclusion of the hearing the Court passed an order directing the petition for writ of mandamus to issue as prayed. Mr. Harvey represented the Supervisors.

Gerard G. Keogh vs. Charles A. Dorsey, et al. Board of Supervisors of Elections. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the Supervisors of Elections to place the plaintiff's name on the ballot as an Independent Candidate for the office of City Council from the Third Councilmanic District. The Supervisors rejected the Certificate of Nomination upon the ground that it was invalid and ineffective because it did not meet the requirements of Section 40 of Article 33 of the Code, in that none of the signers placed the date of their signing to the right of their signature. An answer was filed in behalf of the Supervisors of Elections and to that answer the plaintiff demurred. The demurrer was overruled and following the hearing, the Court granted the writ. Mr. Harvey represented the Supervisors.

Thomas O. Murray vs. Leo M. Welsh, et al. Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the defendants to include the petitioner's name on the ballot as an independent candidate to the City Council of Baltimore City at the municipal election in 1951. An answer was filed by the defendants and after testimony was taken in open court, the petition was dismissed. Mr. Harvey represented the Supervisors.

Chester W. Tawney vs. Leo M. Welsh, et al. Constituting the Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the Supervisors of Elections of Baltimore City to place the name of the petitioner on the ballot for Comptroller of Baltimore City as an Independent candidate in the election to be held on May 8th, 1951. The certificate of nomination was rejected by the Supervisors on the grounds that it did not conform to the requirements of Section 39 of Article 33 of the Annotated Code, in that it did not contain the specified number of voters. The Court held that the Supervisors were authorized to determine if the persons signing the Certificate were registered voters and from the evidence it found that the certificate did not contain the specified number of voters and accordingly the petition was dismissed. Mr. Harvey represented the Supervisors.

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. This was a question of whether the Court could decree that a certain charitable bequest which was not accepted by the Happy Hills Convalescent Home for Children, Inc., be given to another charity. The Attorney General was interested in the case because under his statutory and common law duties he has the responsibility of enforcing charitable trusts. Judge Tucker filed an opinion awarding the bequest to St. Gabriels Home for Girls, the intervenor. Mr. Coe represented the Attorney General.

Frederick H. Hennighausen, etc. vs. Linguistic Society of America. In the Circuit Court of Baltimore City. This case involved the question of whether a certain legacy to the Linguistic Society of America was exempt from the inheritance tax, under the exemption in favor of charitable and educational institutions. It was tried before Judge France who held the legacy exempt. An appeal was noted to the Court of Appeals. Mr. Coe represented the State.

In the matter of the Trust Estates of Claribel Cone, Deceased. In the Circuit Court No. 2 of Baltimore City. This was a proceeding brought by the Trustees to determine the inheritance tax payable by the Moses H. Cone Memorial Hospital, the ultimate distributee of the Claribel Cone Estate. The Trustees contended that the tax should be paid on the value of the estate at the time of the death of the original decedent in 1929. The State contended that the tax should be payable upon the value of the estate appraised at the time of distribution to the Hospital in 1949. The Trustees prevailed before Judge Emory H. Niles. Mr. Coe represented the State.

Charles S. Jacquette, et al. vs. James J. Lacy, Comptroller, et al. etc. Estate of Percival C. Smith, Deceased. In the Circuit Court for Kent County. This was a proceeding brought by certain donees of about \$90,000's worth of property, for a declaratory decree to determine whether the gifts inherited were in contemplation of death and thus subject to collateral inheritance tax. The case was tried before Judge Kintner, who rendered an opinion holding that the gifts were in contemplation of death and subject to the tax. The plaintiffs appealed. A collateral matter, not included in the case concerned the taxability under the inheritance tax law of a gift of certain real estate made by the decedent to the same donees. The real estate was valued at approximately \$12,000. All questions were resolved by settlement, pursuant to which the plaintiffs dismissed their bill and the State renounced its claim to the inheritance tax on the gift of the real estate. Mr. Coe represented the Comptroller.

Bernard Evander vs. State of Maryland, Wm. P. Lane, et al. Board of Public Works, John B. Funk, Ind. and as State Engineer and Dr. H. C. Byrd, Ind. and as President of the University of Maryland. In the Baltimore City Court. This was a claim against the State for an alleged architects fee, in connection with construction work at Princess Anne for the University of Maryland. Before coming to trial, however, the case was settled by the Board of Public Works. Mr. Coe represented the State.

Thomas Pressley and Colonial Credit Corporation vs. Colonel Beverly Ober, Police Commissioner. In the Superior Court of Baltimore City. This was an action of replevin against the Police Commissioner to recover a stolen automobile which had been sold by a dealer to a bona fide purchaser and seized by the Police. The purchaser intervened as the real party in interest. The case was settled and dismissed. Mr. Coe represented the Commissioner.

In the matter of the Estate of James E. Clayton, Deceased, Baltimore National Bank, Substituted Trustee under the Will of James E. Clayton, et al. vs. Henry P. Manning and Isabella Ralston Manning, his wife. In the Circuit Court of Baltimore City. This case involved the construction of wills and the termination of trusts. The Register of Wills was made a party so that all inheritance taxes at the termination of the trusts might be determined and paid. After a hearing the Court decreed that such inheritance taxes as were payable to the State of Maryland against the respective portions of the trust estate or against the respective beneficiaries as might be liable therefor, be distributed to the Register of Wills for Baltimore City. Mr. Coe represented the Register of Wills.

State of Maryland vs. Charles H. Clarke, et al. t/a Mt. Jerry's Place, Thurmont, Md. In the Circuit Court for Frederick County. This was an attachment and short note to close a sales tax assessment. The defendant ultimately paid the assessment. Mr. Coe represented the State.

Chesapeake Marine Railway Company vs. James J. Lacy, State Comptroller. In the Baltimore City Court. This was an appeal from a sales tax assessment of the Comptroller on the ground that a certain bulk sale of the assets of a business was a casual or isolated sale and therefore exempt from the tax. The case was argued before Judge Tucker who found in favor of the taxpayer. We felt the Judge's decision was correct, and no appeal was noted. Mr. Coe represented the Comptroller.

In the matter of M. Charles Elko, t/a Oriole Flying Service. In the Superior Court of Baltimore City. This case involved an appeal from an order of the State Aviation Commission revoking a license to conduct a flying school. The appellant's attorney consented to a dismissal of the appeal, the appellant to pay the costs. Mr. Coe represented the Commission.

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.

Frostburg Lodge No. 99, Ancient Free and Accepted Masons, etc. vs. State Tax Commission. In the Circuit Court for Allegany County. These were appeals from decisions of the State Tax Commission which had affirmed assessments theretofore made against the property owned by the appellant, by the County Commissioners for Allegany County. The taxpayers contended that they were charitable and benevolent organizations within the intendment of Section 7 of Article 81 of the Annotated Code of Maryland, and were thereby entitled to tax exemption. However, the appeals were dismissed by the attorney for the petitioners. Mr. Coe represented the State Tax Commission.

Louis A. Montague vs. the Windsor Company and the State Tax Commission. In the Superior Court of Baltimore City. This was a mandamus suit by a stockholder against

a corporation, wherein the State Tax Commission was named as a nominal party defendant. The State had no interest in the matter and the case was ultimately settled between the parties. Mr. Coe represented the State Tax Commission.

Maurice Sneade, et al. vs. John Clark, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. This proceeding involved a protest of an application for an oyster lease. The case was dismissed without prejudice on our motion, because the application for the lease was advertised in the wrong county through error of the Department of Tidewater Fisheries. Mr. Coe represented the Commission.

Stanford R. Harrison, et al. vs. David H. Wallace, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. Civil Docket No. 270. This was an oyster lease protest. The applicant for the lease withdrew his application. As a result the case was dismissed without prejudice. Mr. Coe represented the Commission.

Willie Walters, et al. vs. Arthur H. Brice, et al. Commission of Tidewater Fisheries. Civil Docket No. 355. In the Circuit Court for Somerset County. This was an oyster lease protest. The applicant for the lease withdrew his application. As a result, the case was dismissed without prejudice. Mr. Coe represented the Commission.

Charles E. Hutson, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 378 Law. This was an oyster lease protest case. After the case was at issue the applicant withdrew his application. As a result, the case was dismissed without prejudice by stipulation of the parties. Mr. Coe represented the Department of Tidewater Fisheries.

Oscar M. White, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 482.

This was an oyster lease protest case. After the case was at issue, the applicant withdrew his application. As a result, the case was dismissed without prejudice on motion of the Department of Tidewater Fisheries. Mr. Coe represented the Department of Tidewater Fisheries.

Marion B. Lednum, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 497. This was an oyster lease protest case. After hearing the testimony of four witnesses for the protestants, the applicants withdrew their application in open court. As a result, the Department of Tidewater Fisheries consented to a judgment in favor of the protestants. Mr. Coe represented the Department of Tidewater Fisheries.

Hilton Haddaway, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 514. This was an oyster lease protest case. On the day of the trial the applicants withdrew their application so the case was dismissed without prejudice in open court. Mr. Coe represented the Department.

W. Bryan Smith, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 530, Law. This was an oyster lease protest. The applicant for the lease withdrew his application. As a result the case was dismissed without prejudice. Mr. Coe represented the Commission.

Salvatore J. Cicero vs. H. Courtenay Jenifer, et al. Maryland Racing Commission. In the Superior Court of Baltimore City. This was a petition for a mandamus filed against the Maryland Racing Commission by which the plaintiff sought to have the Court direct the Commission to reinstate the license of the plaintiff as an owner-trainer. The license of the plaintiff as an owner-trainer had been revoked by the Commission and the plaintiff had been suspended for a period of ten years. The case was tried before Judge Conwell Smith, and after consideration of the testimony and

arguments of counsel, Judge Smith dismissed the petition. Mr. Proctor represented the Racing Commission.

Leonard J. Harmatz vs. Colonel Beverly Ober, Police Commissioner of Baltimore City, et al. In the Circuit Court No. 2 of Baltimore City. This was a bill of complaint filed against the Police Commissioner of Baltimore City, under which the plaintiff sought to have the Court enjoin the Police Commissioner from moving a certain traffic light. A demurrer was filed to the bill of complaint which was sustained by the trial court, with leave to amend. However, no amendment was filed, and on January 26th, 1951, the suit was dismissed by order of the plaintiff's counsel. Mr. Proctor represented the Police Commissioner.

Malichi Holiday vs. Edwin T. Swenson, Warden, Maryland Penitentiary. In the Circuit Court of Baltimore City. Holiday, an inmate in the Maryland Penitentiary, filed an application for a Writ of Injunction on November 7th, 1950, and another on June 25th, 1951. Demurrers to the bills of complaint were filed, and arguments having been heard, the demurrers were sustained without leave to amend. Mr. Proctor represented the Warden in both cases.

Samuel D. Kalis, et al. and American Realty Company, Inc. and Benjamin Kalis, President of American Realty Company vs. Helen Elizabeth Brown, Housing Court Magistrate. In the Baltimore City Court. This was a petition for a writ of certiorari, in which the jurisdiction of the Housing Court was questioned. The case was tried before Judge Conwell Smith, who dismissed the petition. An appeal was entered to the Court of Appeals of Maryland. Mr. Proctor represented the Magistrate.

John S. Latimer vs. Maryland Racing Commission. In the Court of Common Pleas. This was a petition for a writ of mandamus filed against the Racing Commission, in which the plaintiff sought an order directed to the Commission requiring the re-instatement of his trainer's license.

The Commission, by order dated November 21st, 1950, had revoked his license and suspended him for a period of one year. The case was heard before Judge Conwell Smith, and at the conclusion of testimony and argument, he issued the writ of mandamus requiring the Commission to reinstate the plaintiff's license. Mr. Proctor represented the Commission.

R. Roy McClarin vs. H. Courtenay Jenifer, et al. Maryland Racing Commission. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus filed against the Maryland Racing Commission, in which the petitioner asked the Court to direct the Commission to rescind and countermand its order concerning the winning of a certain race at Bowie. The Commission had reversed the action of the stewards in determining the finish of such race. The case was tried before Judge Conwell Smith of the Supreme Bench, who ruled in favor of the plaintiff and issued the requested writ of mandamus. Mr. Proctor represented the Racing Commission.

State Racing Commission vs. Richard Williams. This proceeding was instituted by the Maryland Racing Commission against jockey Richard D. Williams because of the fact that he had become involved in certain criminal charges in the State of Rhode Island. The action was instituted before any indictments were handed down. Shortly thereafter, Williams was indicted; thereupon the Racing Commission suspended him until the final disposition of the criminal case in Rhode Island. Mr. Proctor conducted the hearing before the Commission.

William F. Wise vs. Shirley Lou Wise, Isaac Berman and Allan L. Berman and Beverly Ober, Police Commissioner of Baltimore City. In the Circuit Court No. 2 of Baltimore City. This was a bill of complaint filed against the Police Commissioner of Baltimore City, in which the plaintiff sought the return of certain diamond rings which had been seized by the Police Department of Baltimore City. An

answer was filed on behalf of the Commissioner, in which he submitted to such decree as the Court should determine to be proper in the premises, as the Police Department had no interest in the outcome of the litigation. Mr. Proctor represented the Commissioner.

State of Maryland vs. William Bishop and Henry Shipman. In the Criminal Court of Baltimore City. This was a petition for the return of certain monies held by the Police Department alleged to have been stolen from the Rialto Theatre by the defendants. This office filed an answer on behalf of the Police Commissioner of Baltimore City, submitting to any order which the Court might determine to be proper, for the reason that the Commissioner had no further interest in such monies. Mr. Proctor represented the Commissioner.

James Parker, II vs. State of Maryland. In the Circuit Court of Baltimore City. This was a bill of complaint filed by a prisoner in the Maryland Penitentiary, in which he sought certain relief. A demurrer was filed, which was sustained without leave to amend. Mr. Proctor represented the State.

Lillian Lindamood vs. John Stewart Morton, Board of Regents of the University of Maryland—Luther Lindamood vs. John Stewart Morton, the State of Maryland and the Board of Regents of the University of Maryland. In the Court of Common Pleas of Baltimore City. This was a negligence action instituted by the tenant of a property purchased by the State for the use of the University of Maryland in connection with the construction of the psychiatric unit in the City of Baltimore. A demurrer was filed to the declaration on behalf of the State of Maryland and the University of Maryland. After hearing on April 20th, 1951, these demurrers were sustained without leave to amend. Mr. Proctor represented the University.

Donald W. Stewart, etc. vs. Harry C. Byrd, President, et al. Board of Regents of the University of Maryland. In

the Baltimore City Court. This was a petition filed by the plaintiff in which he sought to have this Court order the Board of Regents of the University of Maryland to admit him to the School of Dentistry of the University. An answer was filed to the petition. In April, the suit was voluntarily dismissed by the plaintiff without prejudice. Mr. Proctor represented the University.

Hiram T. Whittle, etc. vs. Harry C. Byrd, President, et al. Board of Regents of the University of Maryland. In the Baltimore City Court. This was a petition for a writ of mandamus filed by the plaintiff against the Board of Regents of the University of Maryland, in which he sought to have this Court order the Board of Regents of the University of Maryland admit him to the College of Engineering of the University of Maryland. In view of the decision of the Court of Appeals in the case of *McCready vs. University of Maryland*, and in view of later decisions of the Supreme Court and of Judges of the Supreme Bench of Baltimore City, the University determined to admit Whittle to the College of Engineering at the University. As a result of this action by the University, the suit was voluntarily dismissed by the plaintiff. Mr. Proctor represented the University.

Re: Investigation of Charges of Mismanagement of the Maryland Training School for Boys, Loch Raven, Maryland. At the end of June, 1951, certain charges reflecting on the operation of the Maryland Training School by three former teachers of the School, were made public in the press of Baltimore City. The Board of Managers of the School determined that an investigation of the charges should be made. At the request of the Board, Mr. Proctor was assigned to assist the Board in the investigation of these charges. Voluminous testimony was taken before the Board, and upon its conclusion, the matter was considered by the Board and a report made to the Governor of the findings and recommendations of the Board of Managers.

Re: Investigation of Charges Against Lieutenant Ralph Amrein of the Police Department of Baltimore City. As a result of the Crime Investigations before Congress, it was made public that Lieutenant Ralph Amrein had borrowed the sum of \$5,000 from William M. (Buzz) King, alleged and known professional gambler, on or about November 15th, 1944; that although the loan was repaid when due, interest on the loan was waived by King. As a result, charges were filed against Amrein by the Police Department of Baltimore City. These charges were tried before Colonel Beverly Ober, Police Commissioner of Baltimore City. Upon the conclusion of the hearing and consideration of testimony and arguments of counsel, Lieutenant Amrein was dismissed from the force. Mr. Harvey, Deputy Attorney General, acted as adviser to Colonel Ober and the prosecution was handled by Mr. Proctor.

Harold L. Berrett and Louise Berrett, his wife, vs. Christian Scholl, et al. and the State of Maryland. In the Circuit Court for Howard County. 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, neither admitting nor denying the allegations of the bill of complaint, and submitting its rights and interests to the protection of the Court. Mr. Coe represented the State.

Malcolm Disney, et al. vs. Edgar D. Hilleary and State of Maryland. In the Circuit Court for Howard County. 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, neither admitting nor denying the allegations of the bill of complaint, and submitting its rights and interests to the protection of the Court. Mr. Harvey represented the State.

Louis C. Dannenfelsler vs. John Doe, et al. and State of Maryland. In the Circuit Court for Baltimore County. 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, setting forth that it had no knowledge of the matters and submitting its rights and interests to the protection of the Court. Mr. Proctor represented the State.

WAAM, Inc. a Maryland Corporation, etc. vs. Beverly Ober, Police Commissioner of Baltimore City. In the Circuit Court of Baltimore City. The complainant in this case was a television broadcasting company which sought an injunction to restrain the Police Commissioner of Baltimore City from enforcing Section 74 of Article 24 of the Baltimore City Code, against Custom Upholstering and Carpet Company, Inc., the sponsor of a program televised by the complainant. A demurrer to the bill of complaint was filed and after a hearing, was sustained without leave to amend. An appeal to the Court of Appeals was noted. Mr. Thomas represented the Police Commissioner.

Charles T. Williams, Jr. vs. Theodore R. McKeldin, et al. Board of Public Works. In the Circuit Court of Baltimore City. This case was instituted by a taxpayer who filed a bill of complaint for a declaratory decree and injunction to restrain the Board of Public Works of Maryland from taking any action whatever under the authority of Chapter 414 of the Acts of 1951. The said Chapter 414 of the Acts of 1951 authorized a State bond issue on behalf of the Johns Hopkins University. The complainant urged that the said Chapter was unconstitutional in that it violated Section 34 of Article III of the Constitution of Maryland. Answers were filed on behalf of the Board of Public Works and on behalf of the University, intervening defendant, alleging the validity of Chapter 414 of the Acts of 1951. After a hearing, the Court held that Chapter 414 of the Acts of 1951 was unconstitutional, and issued an injunction re-

straining the Board of Public Works from acting under the authority of said Chapter 414. An appeal to the Court of Appeals was noted. Mr. Thomas represented the Board of Public Works.

Herbert M. Frisby vs. Josiah Henry, Jr., et al. Trustee Committee on Negro Scholarships. In the Superior Court of Baltimore City. A petition for a writ of mandamus was filed to require the Trustee Committee on Negro Scholarships for the State of Maryland, to grant the petitioner sufficient scholarship funds to permit him to attend the University of Alaska. A demurrer was filed to the petition and it was sustained with leave to amend within fifteen days. Upon the petitioner's failure to amend his petition, a judgment was entered for the defendant for costs. Mr. Thomas represented the State.

Steven J. Everd and Margaret Everd, his wife, vs. Elsie Stigler, etc. In the Circuit Court for Anne Arundel County. This was a bill of complaint 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, denying some of the allegations of the bill of complaint and admitting other allegations, and submitting its rights and interests to the protection of the Court. Mr. Thomas represented the State.

Robert A. Johnston vs. John William Draper and Earle C. Rexroth, Garnishee. In the People's Court of Baltimore City. This was an attachment against funds in the hands of the Financial Responsibility Department of the Department of Motor Vehicles. On behalf of Mr. Earle C. Rexroth of that Department, a confession of assets was filed, the contention being that funds in the hands of a State officer are not attachable. The Court recognized this as a general principle, but held that the financial responsibility statute established an exception to the general rule. Consequently, the execution was had upon the funds held by Mr. Rexroth. Mr. Hartman represented the State.

William Houseman vs. William F. Laukaitis, Chief Magistrate, Presiding in the Central Police Station of Baltimore City. In the Superior Court of Baltimore City. This was a petition for a writ of certiorari by Houseman, from the Central Police Station of Baltimore City, William F. Laukaitis presiding. The petition was heard, at which time the petitioner argued that he had been convicted of allowing and permitting smoking in the Globe Theatre, and that the fire prevention code of Baltimore City does not provide that such is an offense. This office developed that the Chief Engineer of the Fire Department of Baltimore City had served notice upon the management of the theatre that it was not to permit smoking on the premises. It further developed that at the time of the offense in question, Houseman was Manager of the theatre. Judge Moser, who heard the case, ruled that the Chief Engineer had authority under the fire prevention code, to issue such notices and that a violation of such a notice was an offense. Judge Moser so ruled with some reluctance and advised that the Chief Engineer of the Baltimore City Fire Department should promulgate a regulation to the effect that it is incumbent upon the managers of theatres to prevent smoking on the premises. Mr. Hartman represented the Police Magistrate.

Matthew H. Taggart, etc. vs. Milton A. Reckord, Commanding General, Maryland National Guard. See Volume 33, page 25, Report and Official Opinions of the Attorney General. After a hearing, the demurrer was sustained and motion to dismiss filed. Mr. Hartman represented General Reckord.

Walter L. Taylor vs. Captain Thomas S. Dunn and Quality Towing Service. In the People's Court of Baltimore City. This was a writ of replevin served upon Captain Thomas S. Dunn of the Baltimore City Police Department, through which the plaintiff sought the return of his 1947 Lincoln Sedan automobile. The Police Department had found the automobile abandoned over an embankment in

Druid Hill Park. The Quality Towing Service, which had a contract with the Police Department for the removal of such automobiles, removed the automobile to the Northern Police Station. Because of the amount of labor involved, the Quality Service Company contended that the tow bill amounted to \$90.00. The Police Department would not return the automobile to Taylor until the towing charge had been paid, which was in accord with the rules of the Police Department. The plaintiff contended that the tow bill was excessive and refused payment. A hearing was held and the presiding Judge determined that the \$90.00 tow charge was excessive and reduced the charge to \$60.00. The Court ordered that the car be returned provided the \$60.00 tow bill was paid. Mr. Hartman represented the Police Department.

In the year 1951, at the request of the Court of Appeals of Maryland, this office prepared memoranda for that Court in each case where a petition for leave to file an appeal in a Habeas Corpus case had been filed with that Court. During the year, memoranda were prepared and filed by Mr. Proctor in the following cases :

Roma Smith vs. Warden, Maryland Penitentiary.

Aldine T. Carroll vs. Warden, Maryland Penitentiary.

Ernest Appitito and John R. Juratovac vs. Warden, Maryland Penitentiary.

Malichi Holiday vs. Warden, Maryland Penitentiary. (2 Petitions)

Harry Eyer vs. Warden, Maryland Penitentiary.

Donald Brennan vs. Warden, Maryland Penitentiary.

Joseph Hobbs vs. Warden, Maryland Penitentiary.

James Casey vs. Warden, Maryland Penitentiary.

David Obenstine, Jr. vs. Warden, Maryland Penitentiary.

Calvin Tyson vs. Warden, Maryland Penitentiary.

John Calvin Walker vs. Warden, Maryland Penitentiary.

Richard Hunter vs. Warden, Maryland Penitentiary. (2 Petitions)

Raymond L. Schaal vs. Warden, Maryland Penitentiary.

Leo Paul Chinquina vs. Warden, Maryland Penitentiary.

George S. Miller vs. Superintendent, Spring Grove State Hospital.

Patrick J. Hiron vs. Warden, Maryland Penitentiary.

William Edward Thompson vs. Warden, Maryland Penitentiary.

Ernest E. Wilson vs. Warden, Maryland Penitentiary.

Edward N. Cullings vs. Warden, Baltimore City Jail.

Clinton Coleman vs. Warden, Baltimore City Jail.

Donald Cave vs. H. R. Raymond, Superintendent, Maryland State Reformatory for Males.

Ira E. Robertson vs. Dr. Isadore Tuerk, Acting Superintendent, Spring Grove State Hospital.

Thomas B. Fisher, Jr. vs. Warden, Maryland House of Correction.

Roger Billman vs. Warden, Maryland Penitentiary.

Norman Richard Strait vs. Carlton G. Beall, Sheriff, Prince George's County.

Memoranda were prepared and filed by Mr. Hartman in the following cases :

James Parker II vs. Warden, Maryland Penitentiary.

Jerome S. Hanson vs. Warden, Maryland Penitentiary.

Donald Jess Langrehr vs. Superintendent, State Reformatory for Males.

Calvin Tyson vs. Warden, Maryland Penitentiary.

Malichi Holiday vs. Warden, Maryland Penitentiary.

James Edwards vs. Warden, Maryland Penitentiary.

Curtis Peoples vs. Warden, Maryland Penitentiary.

Richard Alvin Ingle vs. Superintendent, Maryland State Reformatory for Males.

Ernest Williams vs. Warden, Maryland Penitentiary.

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

As a result of the continuation of the accelerated roads program, the functions and duties of the office of the Special Assistant Attorney General for the State Roads Commission continues to be varied and many. One natural adjunct of the program is the vast increase in the number of rights-of-way necessary to be acquired by the Commission. Prior to the accelerated program which began several years ago, the Commission normally acquired only several hundred rights of way annually. During the calendar year ending December 31, 1951, the Commission acquired 1911 rights of way. Each of these acquisitions involved to a greater or lesser degree the rendering of professional legal services by this Department. In each of the 1911 rights of way acquired, this Department had to procure, through local counsel in the several counties, title examinations. After said examinations were received, they had to be checked, and when the right of way was finally acquired, this Department had to prepare the deeds and supervise the closing of the transaction and the recording of the deeds to the property involved. The increased number of acquisitions naturally reflected a greater number of condemnation cases.

During the year one hundred and thirty-eight (138) condemnation cases were prepared and filed in the Circuit Courts of the several Counties of the State. Many of these cases, because of crowded Court calendars, are still pending. However, during the year one hundred and fourteen (114) cases, some of which were filed in previous years, were tried or otherwise disposed of. In each of the cases tried the average time necessary for a representative of this office to be present in Court during the trial of the case, was two days.

In addition to the legal work necessitated by right of way acquisitions, this Department approved all contracts entered

into by the Commission for road construction and prepared or assisted in the preparation of all contracts negotiated between the Commission and the various Counties of the State and between other State or quasi State agencies.

Also, this office represented the State Roads Commission and the members thereof, individually, in all suits and causes of action brought against the Commission and the members, as individuals, acting in their official capacities. These legal services required the filing of appropriate legal papers and appearance in the Circuit Courts in a number of the Counties of the State and in the Baltimore City Courts, as well as the Court of Appeals.

During the year the Special Assistant Attorney General, or a representative of his office, attended all of the meetings of the Advisory Council of the State Roads Commission, many of the meetings of the Commission itself, and of other groups or individuals and furnished legal advice as requested.

Mr. John B. Russell resigned as Special Attorney on June 30th, 1951, to enter private practice. Mr. Edwin T. Steffey, Jr., was employed as Special Attorney to the State Roads Commission on July 1st, 1951.

The legal staff now consists of Mr. Joseph D. Buscher, Special Assistant Attorney General, Mr. Frederick A. Puderbaugh, Mr. Andrew W. Starratt, Jr., and Mr. Edwin T. Steffy, Jr., Special Attorneys.

The following is a list of condemnations prepared and filed by this office which have been tried and determined by a verdict of a Jury, or settled out of Court, or pending, as noted:

Allegany County:

Estate of Archibald Longerbeam,
Settled.

Maryland Coal and Realty Company,
Settled.

Walter M. White,
Verdict.

Pile Brothers,
Settled.

Della Estella Smith and husband,
Pending.

Clary Club,
Settled.

Anton J. Urbas,
Verdict.

Earl Cooper,
Settled.

Susie M. Robinette,
Settled.

George T. Mason,
Settled.

Anne Arundel County:

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

Melvin G. Sachs and wife,
Settled.

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

Emilie Beck, widow, et al.,
Verdict.

Joseph D. Bowen,
Pending.

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

Theresa Wagner,
Pending.

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

John H. Matthews and wife,
Verdict.

James E. Stewart,
Settled.

Edward H. Wiesner Estate,
Pending.

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

Gordon B. Clark and wife,
Settled.

Frank A. White,
Settled.

Anton J. Snyder,
Settled.

Angela G. Clark, Substituted Trustee,
Settled.

Augustus K. Snyder and wife,
Pending.

Frank Cifoni and wife,
Pending.

Claiborne A. Duval and wife,
Pending.

Heirs of Elizabeth S. Bannond,
Pending.

Louis H. Roth and wife,
Pending.

The Baltimore and Annapolis Railroad Company,
Pending.

Michael Szandrowski and wife,
Pending.

Amelia H. Harris and husband,
Pending.

Baltimore County:

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

Nolley E. Fisher and wife,
Pending.

Elizabeth S. Norris,
Settled.

Garde C. Duncan, et al., surviving Trustee under
the will of Charles H. Duncan,
Pending.

Fenton Sullivan and wife,
Settled.

Harry A. Pugh and wife,
Pending.

Harry A. Pugh, et al.,
Pending.

Samuel Elseroad,
Pending.

Charles Leslie Schultz,
Pending.

William Arthur Crowther and wife,
Pending.

Samuel T. Crowther and wife,
Pending.

Heirs of John W. Ullrich,
Pending.

Dr. Dudley C. Babb and wife,
Pending.

Roy M. McKee and wife,
Pending.

Alan L. Cofell and wife, et al.,
Pending.

Clyde E. Baldwin and wife,
Pending.

James H. Seeley and wife,
Pending.

Caroline County:

Lawrence Realty Company,
Settled.

Theodore E. Fletcher and wife,
Settled.

Edgar W. Wrightson and wife,
Settled.

Eileer G. Paris, et al.,
Settled.

Preston Trucking Company,
Verdict.

Carroll County:

Charles E. Dreschler, Jr., and wife,
Settled.

George W. Dreschler and wife,
Settled.

Stanley R. Burns and wife,
Pending.

Jeannette L. Goetze and husband,
Pending.

Charles A. Nickoles and wife,
Pending.

Thomas Francis Wright,
Pending.

Cecil County:

John Kutz and wife,
Pending.

Stanley S. Stevens and wife,
Pending.

Winfred Schaefer Estate,
Pending.

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

Wilmer H. S. Bouchelle,
Pending.

James A. Osterhout and wife, et al.,
Verdict.

Joseph C. Wise,
Pending.

Jesse D. Otley and wife,
Pending.

Charles County:

Melvin F. Peters and wife,
Pending.

Peter L. Grinder and wife,
Settled.

Ora Dyson Queen and husband,
Pending.

Dorchester County:

Dorchester Oil Company,
Verdict.

Edgar P. Collins, et al.,
Verdict.

Fred R. Waddell,
Settled.

Albert T. Harper,
Verdict.

Charles C. Adkins and wife,
Pending.

Frederick County:

Sarah A. Grumbine and husband,
Pending.

Abou A. Pollack and wife,
Settled.

John Wier and wife,
Pending.

Fred G. Shepley and wife,
Pending.

Beulah E. Hildebrand,
Pending.

Clagett B. Wiles and wife,
Pending.

C. Lease Bussard and wife,
Pending.

Garrett County:

Garrett County Co-Operative Inc.,
Pending.

Cobey Engle and wife,
Settled.

Jack N. Savage and wife,
Pending.

Trustees of Assembly of God,
Settled.

Steward S. Savage and wife,
Pending.

Leo Fredlock Schenk and wife,
Pending.

Ambrose F. Schenk and wife,
Pending.

William R. Browning and wife,
Pending.

Harford County:

John J. Ayres, Jr.,
Pending.

Charles Carroll Creaghan,
Pending.

Mamie E. Marll,
Pending.

John Greene Perry and wife,
Settled.

N. Webster Grafton and wife,
Pending.

Carl Nelson and wife,
Settled.

J. Frank Norman and wife,
Settled.

W. Parker Hawkins and wife,
Pending,

Woodrow B. Moats and wife,
Settled.

George E. Proctor and wife,
Verdict.

Martin R. Wagner and wife,
Pending.

Prospect Mills,
Pending.

Charles H. McComas and wife,
Settled.

Leonard E. McGrady and wife,
Verdict.

Stephen M. Kahoe and wife,
Settled.

Milton P. Kirk and wife,
Settled.

Glenn E. Tilley and wife,
Verdict.

Sabret A. Richardson and wife,
Settled.

Samuel C. Guerico and wife,
Settled.

Philip O. Bordner and wife,
Pending.

Dewey F. Bowman and wife,
Settled.

Tyler M. Fulton and wife,
Pending.

Orlando Dayhoof,
Tried, Settled.

Joseph A. Carrico and wife,
Verdict.

Maude B. Dorrance,
Settled.

Edward D. Stamper,
Pending.

Edward Sinclair Smith,
Verdict.

Donald S. Stubbs and wife,
Pending.

J. Royston Stifler and wife,
Pending.

Eldron Earl Irwin and wife,
Pending.

Felix M. Irwin and wife,
Pending.

Annie M. Dibb, et al.,
Pending.

Roscoe S. Todd and wife,
Pending.

Howard County:

Gerald J. Bankert and wife,
Settled.

George W. Bowman and wife,
Settled.

Harry S. Engel and wife,
Settled.

Perry Harless and wife,
Settled.

B. Frank Hernandez and wife,
Settled.

Beatrice S. Pfefferkorn and husband,
Settled.

Augustus Riggs and wife,
Settled.

Emma Shipley,
Settled.

Howard F. Streaker and wife,
Settled.

Andrew Thomas and wife,
Settled.

William K. Gonce, et al.,
Settled.

Herbert W. Wessel and wife,
Pending.

August Wessel and wife,
Pending.

Preston E. Musgrove and wife,
Verdict.

Caroline B. Harding,
Verdict.

Howard M. Robinson and wife,
Settled.

Louis R. Iager and wife,
Settled.

Cordelia E. Sollers,
Pending.

Dorothy K. Warfield and husband,
Pending.

George E. Gregg and wife,
Pending.

Roland Vane,
Pending.

Amos T. Holland and wife,
Pending.

J. Elmer Fleming and wife,
Pending.

Charles J. Fleming and wife,
Pending.

Walter Van Durand and wife,
Pending.

Montgomery County:

Irene Humphrey,
Settled.

Bank of Silver Spring,
Pending.

Mary K. James, et al.,
Pending.

Mary A. Harmon Estate,
Settled.

John O. Harmon Estate,
Settled.

Otto D. Holland,
Settled.

W. Charles Heitmuller and wife,
Settled.

Rose Bellatti Crow,
Settled.

Wendell E. Davis and wife,
Settled.

Margaret Xander, et al.,
Settled.

Arcola Development Company,
Settled.

Suburban Builders,
Settled.

Esso Standard Oil Company,
Settled.

Immanuel Baptist Church,
Settled.

J. Marion Bankhead and wife,
Pending.

W. Charles Heitmuller and wife,
Pending.

Victor R. Beauchamp and wife,
Pending.

Clyde L. Thompson and wife,
Pending.

The Maryland Real Estate Company,
Pending.

Theodore L. Heitmuller, Trustee,
Pending.

Prince George's County:

Harley W. Leizear and wife,
Settled.

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

Annie LaFontaine (widow),
Pending.

Morris E. Marlow and wife,
Settled.

James A. Hogue and wife,
Settled.

Southern Maryland Oil Company,
Pending.

Morris W. Suit and wife,
Settled.

Adele Almo and husband,
Settled.

John B. Mitchell and wife,
Verdict.

Edgar P. Hamilton and wife,
Pending.

Margaret M. Parran,
Pending.

Herbert M. Jernigan and wife,
Pending.

Leco Inc.,
Pending.

Southern Maryland Oil Company,
Pending.

John C. L. Ritter and wife,
Pending.

Linda B. Bull,
Pending.

Queen Anne's County:

George R. Benton and wife,
Settled.

Harry P. Breeding and wife,
Pending.

Walter L. Price,
Settled.

Tilghman Eaton and wife,
Settled.

Ellsworth Ford and wife,
Settled.

Thorpe Nesbit and wife,
Verdict.

J. Rodney King and wife,
Settled.

Guarantee Realty Company,
Settled.

C. Perry Saddler and wife,
Settled.

Thomas J. Keating, Trustee,
Settled.

Henry H. Evans, et al.,
Settled.

Charles E. Snyder and wife,
Verdict.

John C. Benton,
Pending.

St. Mary's County:

Philip G. Hayden and wife,
Pending.

Heath McC. Steele and wife,
Pending.

Martin Gasparovic and wife,
Pending.

T. Melvin Jarboe and wife,
Pending.

Joseph H. Spencer,
Pending.

Ira F. Tennison,
Pending.

George R. Quirk and wife,
Pending.

James W. Guy and wife,
Pending.

Talbot County:

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

Washington County:

William O. Daub and wife,
Settled.

John D. Griffin,
Pending.

R. J. Witmer,
Pending.

William W. Smith and wife,
Verdict.

Sadie E. Piper, et al.,
Settled.

Raney H. South and wife,
Settled.

Robert Edward Teays and wife,
Pending.

Howard W. Couchman and wife,
Pending.

Richard W. Hebb and wife,
Pending.

Carl B. Price and wife,
Pending.

Martha E. Lumm, et al.,
Settled.

J. Stanley Johnson and wife,
Pending.

William W. Smith and wife,
Pending.

Floyd C. Main and wife,
Pending.

Grover C. Wishard and wife,
Pending.

Wicomico County:

Rosa J. Bethard and husband,
Settled.

Harry C. Rayne and wife,
Pending.

J. A. Watson and wife,
Pending.

Elizabeth W. Spicer and husband,
Settled.

Cozy Cabins, Inc.,
Settled.

Samuel Feldman and wife,
Settled.

James J. Jones and wife,
Settled.

William Parks Young,
Verdict.

John W. Crockett and wife,
Settled.

Elmer C. Williams and wife,
Settled.

E. O. Wheatley and wife,
Settled.

Wm. R. Anger and wife,
Pending.

Elwood B. Fleming and wife,
Pending.

Grover C. Bennett and wife,
Pending.

Worcester County:

Anna Burbage,
Verdict.

REPORT OF PHILIP T. MCCUSKER, SPECIAL ATTORNEY
FOR THE STATE ACCIDENT FUND

During the year 1951, this Assistant represented the State Accident Fund at hearings before the State Industrial Accident Commission concerning Workmen's Compensation claims against the Fund as follows:

Baltimore City.....	216	Bel Air.....	8
Cambridge	12	Cumberland	31
Easton	10	Elkton	8
Frederick	12	Hagerstown	15
Hyattsville	5	Oakland	10
Rockville	2	Salisbury	9
		Westminster	3

making a total of 341 hearings on accidental injury claims.

Cases disposed of by Final Settlement Agreements numbered twenty-seven (27), nine of which cases were pending on appeal when settled.

The case of *Sunshine Laundry Inc. and State Accident Fund vs. Aaron White, father of Rosa Mae Furr, deceased*, No. 136, October Term, 1950, was argued in the Court of Appeals of Maryland and the decision of the lower Court was sustained.

Four cases were disposed of by trial in the nisi prius courts.

Twelve cases to which the State Accident Fund is a party were pending on appeal at the close of the calendar year 1951.

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

Baltimore	23	Cumberland	9
Hagerstown	1		

making a total of thirty-three (33) hearings.

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

Collections of premiums on accounts certified to the Attorney General under Section 75 of Article 101 of the Annotated Code, amounted to \$8,704.54 during the year.

This Assistant also handled numerous other compensation cases for the various self-insured and non-insured departments of the State, which cases had commenced prior to the effective date of the Compensation Coverage by the Fund of all State Departments.

REPORT OF AARON A. BAER
SPECIAL ASSISTANT ATTORNEY GENERAL FOR THE
MARYLAND EMPLOYMENT SECURITY BOARD

During the year 1951, counsel for the Employment Security Board obtained eight hundred seventy-eight judgments amounting to \$185,934.81. As of November 31, 1951, there were on hand seven hundred eighty-eight uncollected judgments amounting to \$266,977.51. Six hundred judgments were collected during the year totaling \$109,405.86, and one hundred twenty-nine judgments totaling \$38,623.55 were marked off as uncollectible. During the year, seventy-nine liens totaling \$13,101.34 were prepared for recordation, but payment of same was enforced prior to recording.

In enforcing collection of the judgments mentioned, counsel was required to issue executions in four hundred eighty-four cases and attachments in sixteen cases. Claims were filed in thirty-two bankruptcy cases, eleven Orphans' Court cases, forty-nine receivership cases, twenty-two deed of trust cases, four foreclosure cases, and eleven in Re-Organization cases under Chapter X of the Bankruptcy Act, involving a total of \$50,283.12. Thirty-seven of the aforesaid cases were brought to a close and resulted in the collection of \$2,726.77.

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

We learned of two hundred and thirty-nine 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 thirteen complaints involving forged checks, of which twelve have been closed.

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

We also filed in the courts twenty-five petitions and nisi orders requiring employers to appear before the Employment Security Board of Maryland to either offer testimony regarding past due contributions incurred under the Maryland Unemployment Compensation Law, or 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. Five of these employers were actually held in contempt of court and punished accordingly. Many of these petitions resulted in the employers paying past due contributions or filing delinquent employer contributions reports.

Employment Security Board of Maryland vs. Nina B. Peck. In the Circuit Court for Baltimore County. This was a civil suit filed by the Board for the recovery of benefits in the amount of \$471.00 paid to the claimant under the law, as a result of fraud. Judgment in the amount of \$471.00, being the full amount of the administrative overpayment, was entered by the Court after an inquisition was held.

During the year twelve appeals were entered in the courts from decisions of the Board. There were also pending in the courts fifty-one appeals taken prior to 1951. We disposed of thirty-one cases, which included twenty-six cases instituted prior to 1951, and five cases instituted in 1951. There are now pending in the courts thirty-four cases, which include twenty-seven cases instituted prior to 1951, and seven cases instituted in 1951.

The following cases were completed:

William A. Adams vs. Department of Employment Security and Celanese Corporation of America. In the Circuit Court for Allegany County.

Adler's, Inc. (Towson) vs. William H. Mahaney, et al. In the Superior Court of Baltimore City.

Harry B. Branham vs. George's Transportation Company and Department of Employment Security. In the Superior Court of Baltimore City.

John W. Broll vs. Department of Employment Security and the Davis Coal and Coke Company. In the Circuit Court for Allegany County.

Mary Margaret Burns vs. Employment Security Board. In the Superior Court of Baltimore City.

William Claybon vs. State of Maryland, Department of Employment Security. In the Circuit Court for Washington County.

Stanley Cohen vs. Employment Security Board and Baltimore Technical Institute. In the Superior Court of Baltimore City.

Margaret M. Cole vs. William H. Mahaney, et al. In the Superior Court of Baltimore City.

Consolidated Fuel Company, Inc. vs. Andrew Green, et al. In the Circuit Court for Allegany County.

Harry O. Cook vs. Department of Employment Security. In the Circuit Court for Allegany County.

John W. Duckworth vs. Alex Breski and the Employment Security Board. In the Circuit Court for Allegany County.

Phyllis I. Duckworth vs. Department of Employment Security and the Kelly Springfield Tire Company. In the Circuit Court for Allegany County.

Charles E. Hardy, et al. vs. William H. Mahaney, et al. In the Superior Court of Baltimore City.

Harry Jaffe vs. State of Maryland, Department of Employment Security. In the Superior Court of Baltimore City.

In the Matter of the Claims of Darrell K. Lantz and All Other Persons Similarly Situated, Employees vs. the Davis Coal and Coke Company, Employer, and Maryland Employment Security Board. In the Circuit Court for Garrett County.

Harry W. Lewis vs. Department of Employment Security and Bethlehem Steel Company, employer. In the Circuit Court for Allegany County.

Robert J. Lucas vs. the Employment Security Board and the Glidden Company. In the Superior Court of Baltimore City.

Harry C. Morin, Jr. vs. Department of Employment Security and Trico Mills, Inc. In the Circuit Court for Allegany County.

Roy J. Murphy vs. Maryland Employment Security Board. In the Superior Court of Baltimore City.

The Northwestern Loan Company vs. Employment Security Board and Milton Samuelson, td. The Boston Loan Company vs. Employment Security Board. In the Superior Court of Baltimore City.

William T. Page vs. William H. Mahaney, Chairman, et al. In the Superior Court of Baltimore City.

Raymond J. Pierzchalski vs. Maryland Employment Security Board. In the Superior Court of Baltimore City.

James H. Rogers vs. Department of Employment Security. In the Superior Court of Baltimore City.

William R. Seibert, et al. vs. Maryland Employment Security Board and Celanese Corporation of America. In the Superior Court of Baltimore City.

Mildred M. Sparks vs. Unemployment Compensation Board of the State of Maryland. In the Superior Court of Baltimore City.

Robert C. Todd vs. Department of Employment Security and Caroline Publishing Company, employer. In the Circuit Court for Caroline County.

Edwin J. Tress vs. Department of Employment Security. In the Superior Court of Baltimore City.

In the Matter of the Claim of Mary A. Tyree vs. Department of Employment Security and Celanese Corporation of America. In the Circuit Court for Allegany County.

Manaen F. Warrington vs. Campbell Soup Company and Employment Security Board. In the Circuit Court for Wicomico County.

Patrick E. Zembower, et al. vs. Maryland Unemployment Security Board. In the Circuit Court for Allegany County.

In connection with the thirty-four cases open and pending in the courts as of December 31st, 1951, fourteen relate to claimants leaving work voluntarily, without good cause, eight involve the misconduct of an employee in connection with his work, four relate to the question of whether claimants are able to work, available for work and actively seeking work, three involve claimants' failure to apply for

available, suitable work, two are concerned with the question of whether a claimant received wages with respect to certain weeks, two are concerned with the question of whether an employer is entitled to a refund of contributions paid under the law, and one involves the question of whether a claimant knowingly failed to disclose a material fact in order to obtain or increase benefits under the law.

Of the said thirty-four cases open, twenty are pending in the Superior Court of Baltimore, nine in the Circuit Court for Allegany County, three in the Circuit Court for Baltimore County, one in the Circuit Court for Wicomico County, and one in the Court of Appeals of Maryland.

CASES PENDING IN LOWER COURTS

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

Simeon Ralph Carpenter vs. Motor Vehicle Commissioner. In the Circuit Court for Harford County.

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

Romie W. Parks vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

George C. George td. Regent Appliance Centre, Claimant, property of Paul Lawrence Tucker, at suit of Lee Furniture Company vs. Paul Lawrence Tucker. In the Superior Court of Baltimore City.

State of Maryland vs. the Preferred Accident Insurance Company of New York, a body corporate. In the Circuit Court of Baltimore City.

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

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

Samuel B. Arwood, et al. vs. W. Richard Ferguson, M. D. et al. Board of Physical Therapy Examiners. In the Baltimore City Court.

John L. Estes vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Allegany County.

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

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

State of Maryland vs. Marie J. Kunkel, t/a Kay's Luncheonette. In the Circuit Court No. 2 of Baltimore City.

L. Edgar Mackbee vs. Elizabeth Engel & Register of Wills of Baltimore City. In the Circuit Court of Baltimore City.

Herman T. Reiling vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Anne Arundel County.

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.

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

Richard S. Lewis, Jr., et al. vs. David H. Wallace, Department of Tidewater Fisheries. In the Circuit Court for Dorchester County. Nos. 113, 114.

Milton M. Shenton, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Dorchester County. Nos. 198-199.

Wilson Ward, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Queen Anne's County.

Ray Daugherty, et al. vs. Delmas Price, et al. and Department of Tidewater Fisheries. In the Circuit Court for Somerset County.

Luther Daugherty, et al. vs. John E. Clark, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. Nos. 6 and 7, Miscellaneous.

John W. Abbott, et al. vs. David H. Wallace, et al. Department of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 199.

Willie Walters, et al. vs. Arthur H. Brice, et al. Commission of Tidewater Fisheries. In the Circuit Court for Somerset County. No. 354.

William Taft Tippet, et al. vs. Edwin Warfield, Jr., Conservation Department. In the Circuit Court for St. Mary's County. No. 553.

John W. Hall, et al. vs. Edwin J. Baetjer, et al. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. Nos. 569 and 570.

Clarence Poe, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 571.

Garner Gibson vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 588.

Swope A. Ball, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 589.

Melvin Marshall, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for Talbot County. No. 547.

Irvin Foster Morris, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 238.

J. E. Beitzell, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 243.

Richard A. Clarke, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 254.

Joseph Howard Forrest vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 309.

Andrew P. Scheible, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. Nos. 107, 108.

John Francis Bailey, et al. vs. W. Mason Shehan, et al. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 120.

Leroy Thompson, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 121.

Hayden B. Bond, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 122.

Latelle Thompson, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 127.

Thomas Spencer Wilkinson, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. Nos. 130, 131, 132 and 133.

T. Spencer Wilkinson, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. Nos. 612, 613.

James C. Simpkins, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 611.

George Woodall, et al. vs. Department of Tidewater Fisheries. In the Circuit Court for St. Mary's County. No. 610.

Clifton B. Mathay vs. Department of Tidewater Fisheries, and Board of Public Works. In the Superior Court of Baltimore City.

Montgomery County, Maryland vs. State Tax Commission and Bullis School. In the Circuit Court for Montgomery County.

In the Matter of the Appeal of Atlas Loan Service, Inc., etc. vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

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

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

U. S. Jewelry Company, Inc. vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

The National Distributing Company vs. State Tax Commission. In the Circuit Court of Baltimore City.

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

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

The County Commissioners of Washington County, etc. and the Brandt Cabinet Works, Inc. vs. State Tax Commission. In the Circuit Court for Washington County.

Isaac Cohen, et al. vs. State Tax Commission and Mayor & City Council of Baltimore. 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.

Marion Ashburn, etc. vs. John M. Wargon, State Police. In the Circuit Court for Howard County.

James Albert Eason vs. Arthur Dobson and Donald Wier, Members of the State Police. In the Circuit Court for Talbot County.

Wesley Grant Handy vs. John J. Harbaugh and Nobel K. Collison, Members of the State Police. 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.

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

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

Lucile Williams vs. Harry C. Byrd, President, et al. Board of Regents of the University of Maryland. In the Baltimore City Court.

Richard Tyson, et al. vs. Dr. Harry C. Byrd, President, et al. Board of Regents of the University of Maryland. In the Baltimore City Court.

Richard Williams, et al. vs. Dr. Harry C. Byrd, President, et al. Board of Regents of the University of Maryland. In the Baltimore City Court.

Frederick S. Jaffe vs. Police Commissioner Ober of Baltimore City and Acting Captain A. Gribben, Eastern Police District, et al. In the Baltimore City Court.

Allan A. Sollers, et al. vs. Arthur H. Brice, et al. Department of Tidewater Fisheries. In the Circuit Court for Calvert County. Equity No. 1541.

Bernard S. Melnicove vs. Marlen's Company, also known as Marlen's Sales Company. In the Court of Common Pleas.

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

FINANCIAL STATEMENT OF THE STATE LAW DEPARTMENT
FOR THE FISCAL YEAR BEGINNING JULY 1ST, 1950,
AND ENDING JUNE 30TH, 1951

Appropriation	\$61,735.00
Appearance fees	363.99
Sales of Attorney General's Reports outside of State	75.00
Sundry reimbursements	1,387.00
Comptroller of the Treasury, court costs ad- vanced	138.55
	\$63,699.54
Appearance fees turned into State Treasury.....	363.99
	\$63,335.55
Reimbursement to Comptroller for court costs advanced	138.55
	\$63,197.00

Salaries:

Attorney General	\$8,000.00
Deputy Attorney General.....	7,200.00
Assistant Attorney General (2).....	13,000.00
Chief Clerk	3,924.03
Law Stenographer (2).....	5,888.91
Senior Typist	2,451.25
Law Clerk (Part Time).....	800.00
<i>Contractual Services:</i>	
General Repairs	354.46
Motor Vehicle Repairs.....	35.85
Traveling	1,347.69
Communication	3,091.47
Printing, other than office supplies.....	150.00
All Other	\$1,917.09
Blue Sky Law Enforcement.....	31.50
Expenses Legislative Session 1951.....	3,438.64

AGRICULTURE

AGRICULTURE—MARYLAND STATE BOARD OF AGRICULTURE
MAY PROMULGATE REGULATIONS COVERING THE MANU-
FACTURE OF BIOLOGICAL PRODUCTS USED IN THE TREAT-
MENT OF POULTRY AND LIVESTOCK DISEASES.

December 7, 1951.

*Dr. A. L. Brueckner, Director,
Maryland State Board of Agriculture.*

We have your letter in which you ask if it is within the power of the Maryland State Board of Agriculture to promulgate regulations covering the manufacture of biological products within the State. You inform us that certain biological products used mainly in the treatment of poultry diseases, are being manufactured in Maryland.

Section 2 of Article 2A of the Annotated Code of Maryland (1939 Ed.) provides, in part:

“The State Board of Agriculture, immediately after its organization, is empowered to make reasonable rules and by-laws not in conflict with the Constitution and Laws of this State for its regulation and guidance, and repeal or amend the same as occasion may require.”

Section 7 of the same Article provides, in part:

“The State Board of Agriculture shall investigate the conditions surrounding the breeding, raising and marketing of livestock, and the products thereof, and contagious and infectious diseases affecting the same; * * * the preparation, manufacture, quality, analysis, inspection, control and distribution of animal and vegetable products, animal feeds, seeds, fertilizers, agricultural lime, agricultural and horticultural chemicals, and *biological products*; * * * the State Board

of Agriculture shall have general supervision, direction and control of the herein recited matters and generally of all matters in any way affecting or relating to the fostering, protection and development of the agricultural interests of the State, including the encouragement of desirable immigration thereto, *with power and authority to issue rules and regulations in respect thereof* not in conflict with the Constitution and laws of the State or the United States, which shall have the force and effect of law, and all violations of which shall be punished as misdemeanors are punished at common law; * * *." (Emphasis supplied.)

Section 22 of Article 2A defines the term "farm products" to include livestock and poultry. Considering this definition in reference to the quoted sections, we conclude that the Department of Agriculture clearly has the right to promulgate regulations covering the manufacture of biological products within the State when they are used in the treatment of poultry and livestock diseases.

HALL HAMMOND, *Attorney General.*

A. T. HARTMAN, *Spec. Asst. Attorney General.*

ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGES—LICENSEE IN ALLEGANY COUNTY SURRENDERING LICENSE AND PROCURING A NEW ONE FOR A CORPORATION OR PARTNERSHIP WITH WHICH HE IS CONNECTED, NOT ENTITLED TO REFUND OR CREDIT FOR UNEXPIRED TERM OF ORIGINAL LICENSE.

February 7, 1951.

Mr. Joseph E. Boden,
Clerk of the Circuit Court
for Allegany County.

You have written requesting our opinion relative to questions which have arisen under the alcoholic beverages law. Your first question is whether you collect the entire fee prescribed for a license when a licensee has formed a partnership and surrenders the license which he held as an individual. Your second question differs from the first one only to the extent that the licensee has formed a corporation, rather than a partnership. In each case the original licensee retains an interest in the business and is one of the individuals to whom the new license will be issued.

Licenses may not be granted under the alcoholic beverages law to partnerships or corporations as such, but only to individuals authorized to act for such partnerships or corporations. Article 2B, Section 32 of the Code.

Under the provisions of Section 62(b) of Article 2B, the holder of a license in Allegany County is not permitted to sell, assign or otherwise transfer it to another person and, upon his discontinuing its use, the license reverts to the Board which shall treat said license in all respects as if it had not been issued previously, and it may issue such license to another person or, in its discretion, not re-issue it at all. The only exception provided for by the statute is that which results from the death of a licensee.

Section 52 of the above Article provides that there shall be no refund for the unearned portion of the fee paid for any license upon the surrender thereof, except upon (1) receivership or bankruptcy; (2) death of the licensee; (3) entry of the licensee in the military forces of the United States; (4) obtaining of a license of another class "carrying a higher fee, in which case the refund shall be deducted from the amount of the fee to be paid for the newly obtained license"; (5) revocation of a license under certain circumstances.

It is our view that the cases mentioned by you do not fall within the provisions of that part of Section 52 permitting a refund where a license-holder of one class surrenders his license and obtains a license carrying a higher fee because licenses in cases of partnerships are required to "be applied for and be issued to all the partners as individuals", and, in cases of corporations, such licenses "shall be applied for by and be issued to three of the officers of such corporation or club, as individuals, for the use of the corporation or club. See 18 Opinions of the Attorney General, 97. It is our view, therefore, that a person surrendering his license to you and obtaining a new license for a partnership or a corporation to sell alcoholic beverages in Allegany County is required to pay the full license fee fixed by law, and that no part of the unearned license fee may be refunded, or credited against the cost of the new license.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ALCOHOLIC BEVERAGES—RULE OF BOARD RELATING TO CONSUMPTION OF BEVERAGES IS IN CONFLICT WITH STATUTE.

November 8, 1951.

*Mr. Joseph Van Collom, Jr.,
Executive Secretary,
Board of Liquor License Commissioners.*

You have referred to us for our opinion the question relating to the hours during which alcoholic beverages may be consumed upon the premises where purchased. In your letter, you call our attention to several former rulings by us and to Rule and Regulation No. 13 of your Board, which provides that "No license-holder shall permit any person and it is unlawful for any person to consume alcoholic beverages on the licensed premises during hours when such sales are prohibited by law." In our view, the question which you have presented is answered by our opinion to you dated October 19, 1950, 35 Opinions of the Attorney General, 89. However, we shall be glad to set forth anew the reasons for reaching that conclusion.

Prior to the enactment of Chapter 763 of the Acts of 1941, there was no statutory provision relating to the hours during which alcoholic beverages were permitted to be consumed upon the premises where purchased, although there were very definite restrictions upon the hours during which such beverages could be sold. It was during this period of time that the Attorney General ruled on May 10, 1935, that if licensed premises were being kept open for the consumption of liquor sold prior to the closing hour, contrary to the spirit of the Act, the Board could by regulation forbid its consumption after hours or otherwise limit the privileges conferred by the license under penalty of suspension or revocation. 20 Opinions of the Attorney General, 101. A few months later, he took the same position when the question was presented again. 20 Opinions of the Attorney General, 131. In 1938, the above-mentioned opinions were referred to and approved in considering a regulation made by the Board of Liquor License

Commissioners of Baltimore City that "No person, firm or corporation, licensed by authority of this Board, shall permit patrons to consume alcoholic beverages on the licensed premises during hours when the sale of such beverages is prohibited by law."

There can be little doubt that those rulings construed correctly the alcoholic beverage laws which were then in force. However, the General Assembly enacted Chapter 763 of the Acts of 1941, which added Section 42A to Article 2B of the Code. That section is now Section 74 of that Article and it is in substantially the same language as when enacted. It 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 entertainment, 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."

When the question of the hours during which alcoholic beverages were permitted to be consumed was next presented to us in 1945, we held that Rule 13 was invalid because it permitted beverages purchased prior to the closing hour to be consumed up to thirty minutes after the closing hour. This we thought was in direct conflict with the Act of 1941, which permits consumption until 2 o'clock. Accordingly, we held that the Rule was invalid. 30 Opinions of the Attorney General, 1.

Last year, the matter was presented to us again after an acquittal of an alleged offender by the Criminal Court of Baltimore. The offense charged in the indictment was that the accused made a sale of alcoholic beverages between the hours of 1 o'clock A. M. and 6 o'clock A. M.,

although the evidence disclosed that the sale was made before 1 o'clock and that the beverage was consumed after the closing hour. Again we held that under Section 74 of Article 2B of the Code "* * * 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." Opinion to Board of Liquor License Commissioners of Baltimore City, 35 Opinions of the Attorney General, 89.

The conclusion is inevitable that the cited opinions holding that the Board possessed the power by rule and regulation to determine when alcoholic beverages lawfully sold may be consumed on the premises have been superseded because the General Assembly has enacted Section 74 of Article 2B and has taken away from the Board the power which our predecessors held that it possessed. While your power to make rules and regulations is not to be denied, nevertheless those rules and regulations must operate within the framework of the law, and it needs no argument to show that you may not promulgate rules which are inconsistent with the statute. Otherwise, you would have power to nullify the Acts of the General Assembly.

Alcoholic beverages may now be consumed in accordance with Section 74 of Article 2B and not otherwise. We may add further, in support of this result, that our opinion in 30 Opinions of the Attorney General, 1, apparently met with legislative approval because, notwithstanding the numerous regular sessions, to say nothing of the several extraordinary sessions of the General Assembly held in the last six and one-half years, the Act of 1941 has not been amended in so far as it relates to the question presented by you. Consequently, legislative concurrence is presumed. *Popham v. Conservation Commission*, 186 Md. 62.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

ALCOHOLIC BEVERAGES—LICENSE MAY NOT BE BROADENED
IN A PROHIBITED ZONE TO AUTHORIZE THE SALE OF
ADDITIONAL ALCOHOLIC BEVERAGES.

November 8, 1951.

*Board of Liquor License Commissioners
for Baltimore City.*

We have your letter in which you inform us that, under the authority conferred upon you by Section 34 of Article 2B of the Code, you have made a rule and regulation which provides that within a radius of 400 feet from the Housing Authority's projects now erected or being erected in Baltimore City, no licenses of any type, except Special Class C Licenses, will be approved by the Board. In the past you have taken the position that the granting of a Beer, Wine and Liquor license to a person holding a Beer and Wine License amounted to the granting of a new license, rather than a mere renewal and, consequently, the rule mentioned above did not permit that addition within such a prohibited zone.

At the 1951 Session of the General Assembly, the House of Delegates passed a resolution requesting you to permit holders of Beer and Wine Licenses in prohibited zones to extend their licenses to permit the sale of liquor, and you have asked our opinion as to whether you have the power to do so under the provisions of law.

More than three years ago, we considered the question of licenses in prohibited zones, and concluded that the failure of the licensee to file its application within the period prescribed by Section 56 of Article 2B prevented your Board from granting a license to sell the precise beverages permitted by the expiring license. 33 Opinions of the Attorney General, 87. Section 56, which deals with the renewal of licenses, provides among other things, that "All applications for renewal received otherwise than as herein stated shall be treated as original applications."

We think that an application by the holder of a Beer and Wine License for authority to sell beer, wine and liquor is not an application for a renewal of an existing license but is quite clearly one for a new license. In Black's Law Dictionary (3rd Ed.), the word "renewal" is defined as "* * * the substitution of a new grant, engagement, or right, in place of one which has expired, of the same character and on the same terms and conditions as before; * * *." It cannot be said that the addition of the right to sell liquor, in the case presented by you, is in substitution for one which has expired because it never existed, and certainly it is not in any sense of the word a renewal license.

The resolution of the House of Delegates, in which Senate concurrence was not had, cannot, of course, be considered as an amendment of law. 22 Opinions of the Attorney General, 585. If the General Assembly feels that, as a matter of policy, Beer and Wine Licensees should be given the right to obtain licenses to sell liquor, under the circumstances set forth, that end may be accomplished by amendment of the law, but so long as the law remains in its present state, we are compelled to construe it in accordance with the conclusions stated herein.

HALL HAMMOND, *Attorney General.*

ALCOHOLIC BEVERAGES—STATE APPEAL BOARD MAY REVOKE
OR SUSPEND LICENSE FOR OFFENSE COMMITTED MORE
THAN A YEAR PRIOR THERETO.

November 8, 1951.

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

We have your letter in which you ask about the application of the statute of limitations in so far as it pertains to the suspension or revocation of an alcoholic beverage license by the State Appeal Board. Your letter states that in one of the counties, a person was convicted of an offense under the alcoholic beverages law, and when it was brought to the attention of the State Appeal Board, more than one year had elapsed from the time the offense was committed. In view of the provision of Section 11 of Article 57 of the Code that "No prosecution or suit shall be commenced for any fine, penalty or forfeiture, or any misdemeanor, except those punished by confinement in the penitentiary, unless within one year from the time of the offense committed," you ask if the State Appeal Board is permitted to suspend or revoke the alcoholic beverage license held by the person so convicted.

It is our view that Section 11 of Article 57 of the Code has no bearing upon a proceeding before the State Appeal Board. Under the provisions of Section 57 of Article 2B of the Code, your Board is authorized to revoke or suspend a license for any cause which, in its judgment, shall be necessary to promote the peace or safety of the community in which the place of business is situated. That section then proceeds: "* * * and such license must be revoked or suspended for the following causes: (1) conviction of the licensee for the violation of any of the provisions of this Article * * *." The quoted portion of Section 57 is imperative. We know of no provision of the alcoholic beverage law, or of any other law, which requires the State Appeal

Board to carry out the command of the statute within a specified period of time. Under Section 57 it is obvious that the mandatory revocation or suspension provision is inapplicable until there has been a conviction. This, we think, may very well mean a final conviction. If an accused is taken before a Trial Magistrate and charged with a violation of Article 2B of the Code, he may elect a jury trial (Code, Article 52, Sec. 13), in which event, the case will go to the Circuit Court for the County for trial. If he is found guilty, an appeal to the Court of Appeals of Maryland is permitted from the judgment of the trial court. (Code, Article 52, Sec. 13A). It is conceivable that more than a year may elapse between the time of the alleged offense and the final disposition of the case by the Court of Appeals. We do not believe that your Board is powerless to act merely for the reason that the revocation or suspension is not imposed within one year from the commission of the offense.

If a criminal proceeding is not undertaken within the time prescribed by the statute of limitations, the accused may interpose the statute as a defense, but in our opinion a hearing before an administrative board to determine whether a license shall be revoked or suspended is neither a prosecution nor a suit within the meaning of the statute of limitations.

Section 60 of Article 2B is clear in defining the status of an alcoholic beverage license. It is not property and it confers no property rights. It is our conclusion, therefore, that in the case which you present, Section 11 of Article 57 of the Code furnishes no restriction upon your power to suspend or revoke a license.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ANATOMY BOARD

ANATOMY BOARD—BODIES OF DECEASED RECIPIENTS OF PAYMENTS UNDER DEAF, DUMB AND BLIND AND OLD AGE ASSISTANCE LAWS NOT REQUIRED TO BE DELIVERED TO ANATOMY BOARD.

February 13, 1951.

*The Anatomy Board of Maryland,
University of Maryland
Medical School.*

You have presented this question: May the bodies of deceased persons who, during their lifetime, were the recipients of public assistance, be delivered to your Board for distribution to the Medical Schools under the provisions of Chapter 669 of the Acts of 1949. This Act, State-wide, repealed the former law which was in force in Baltimore City and Baltimore County, and enacted four new sections to be known as 161A to 161D, both inclusive, of Article 43 of the Code. After making provision for the creation of the Anatomy Board, the law then proceeds, in Section 161B(a), as follows:

“Any public officer of the State, of Baltimore City or of any county or other political sub-division of the State, having charge or control over the bodies of deceased persons required to be buried at public expense or at the expense of any institution supported by the State, by Baltimore City, by any county or by any other political sub-division of the State, shall immediately after death has been pronounced, notify the chairman of the Anatomy Board of the existence and possession of such body or bodies.”

Sub-section (d) of that section states:

“Bodies required to be buried at public expense as hereinabove provided, shall, at the expiration of forty-eight hours after death, be under the exclusive control of the Anatomy Board and shall be properly embalmed by the persons designated by the Board for this work; provided, however, that any relative or friend of the deceased person may claim the body for the purpose of interment and shall receive it upon payment to the Board of the cost of transportation and embalming.”

The answer to the question, we think, depends upon whether the bodies of the deceased recipients of relief are in the “charge or control” of public officers of the State or one of its sub-divisions, as set forth in Section 161B(a). It is true that sub-section (d) omits any reference to dead bodies in the “charge or control” of public officers and refers merely to “bodies required to be buried at public expense as above provided, * * *,” nevertheless the bodies to which that sub-section relates are not those required to be buried at public expense, but those which meet the further condition of being in the “charge or control” of a public officer.

Thus narrowed, the inquiry is whether the bodies of deceased welfare recipients are in the “charge or control” of public officers of the State or its political sub-divisions. There seem to be two provisions of the Code relating to the burial of the persons in the group above mentioned. Section 21 of Article 30 of the Annotated Code, dealing with the deaf, dumb and blind, provides that upon the death of a recipient, reasonable funeral expenses, not to exceed \$100.00, may, subject to the rules and regulations of the Board of Public Welfare, be paid by the County Board, if the estate of the deceased is insufficient to pay the same, and the persons legally responsible for the support of the deceased are unable to do so, and that of such pay-

ments, two-thirds shall be charged to State funds and one-third to local funds. Similar language is found in Section 12 of Article 70A of the Code. This Article deals with old age assistance and the pertinent section provides that, upon the death of a recipient, reasonable funeral expenses, not to exceed \$100.00, may, subject to the rules and regulations of the State Department of Public Welfare, be paid by the County Department if the estate of the deceased is insufficient to pay the same, and if the persons legally responsible for the support of the deceased are unable to do so. An identical division of the payments between State and local funds is made in this section.

From the language the General Assembly has used in providing for the payment of funeral expenses in the sections to which we have referred, we are unable to conclude that the bodies of deceased recipients of relief under the deaf, dumb and blind statute and the old age assistance law are in the "charge or control" of public officers. No duty is placed upon those administering these programs to take charge of the bodies of deceased recipients and provide them with decent interment. Rather, these laws do no more than authorize the payment of public funds for the burial of these persons when the estates of the decedents are insufficient and when the persons legally responsible for their support are unable to pay the funeral expenses. We know of no other public general laws dealing with the burial of persons at public expense.

In view of these considerations, it is our opinion that the bodies of deceased recipients of payments under the deaf, dumb and blind and old age assistance laws are not in the "charge or control" of public officers within the meaning of Chapter 669 of the Acts of 1949, and consequently the persons administering the relief program under those statutes have no authority to deliver the bodies to your Board. Inasmuch as Article 30, Section 21 and Article 70A, Section 12 are the only public general laws with which we

are familiar, dealing with the burial of recipients of welfare payments, it would seem to follow that allowances from public funds for funeral expenses are confined to the categories mentioned.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ATHLETICS

ATHLETICS—STATE ATHLETIC COMMISSION MUST REQUIRE A LICENSE FEE OF 10% ON THE GROSS RECEIPTS FROM THE SALE OF RADIO, TELEVISION AND MOTION PICTURE RIGHTS TO BOXING, SPARRING AND WRESTLING MATCHES.

December 3, 1951.

*Mr. Joseph M. Kelly, Secretary,
State Athletic Commission.*

You ask our interpretation of Chapter 324 of the Laws of 1951, which requires that every person, club, corporation or association, exercising the privilege of holding any boxing, sparring and wrestling matches or exhibition must pay to the State Athletic Commission a license fee of ten per centum (10%) of its total gross receipts from the sale of radio, television or motion picture rights.

The specific question you ask arises from a case in which the International Boxing Club sponsored a boxing exhibition, utilizing the services of a local athletic club, which was paid \$4,500. The two boxers received \$1,500 each. These payments represented proceeds from the sale of television rights. You wish to know whether the 10% due the State Athletic Commission is based on the total sum received from the television rights, or whether the amount paid to the boxers should be excluded.

It is our opinion that, since Chapter 324 specified that the 10% is to be paid on the "gross receipts" of the licensee, the fee in this case must be based upon the full value received for the television rights, and that the amount paid to the boxers cannot be deducted before computation of the license fee. Therefore, in this case, 10% would be due on the full amount received by the licensee before any deduc-

tion for expenses. "Gross receipts" is a term in common use and its meaning is clear. If A pays for B what B would otherwise have to pay for a common profit from a joint venture, B has paid it.

HALL HAMMOND, *Attorney General.*

BANKS AND BANKING

BANKS AND BANKING — SPECIAL DEPOSITORS' CONTRACT
COMBINING GROUP LIFE INSURANCE NOT INCONSISTENT
WITH MUTUALITY OF OWNERSHIP IN MUTUAL SAVINGS
INSTITUTION WHERE SUCH A DEPOSITOR BEARS COST
OF SUCH INSURANCE AND COST IS NOT BORNE BY
REGULAR DEPOSITORS.

March 1, 1951.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You advise that a mutual savings institution in Baltimore proposes to adopt a special form of depositors' contract which carries with it a form of group life insurance.

The plan contemplates that a depositor will contract to make a regular monthly deposit for a specified number of months. In connection with that deposit contract, the bank, which has theretofore placed a group life insurance policy, extends coverage of that policy to the depositor, and if, during the time that the deposit contract is in force, the depositor dies, his account will be credited with the difference between the amount deposited prior to his death and the overall amount contracted to be deposited by the special deposit contract.

In other words, if a contract were signed providing for a deposit of \$10 per month for fifty months, and if the depositor died after making such deposits for twenty-five months, the account would immediately thereafter have a balance of \$500.

The cost of the insurance would be borne by each depositor taking advantage of the plan and would be paid by a deduction of his pro rata share of the premium from the

amount of interest payable on his account, or by a specific charge to the depositor without affecting the rate of interest which his account would earn. The cost to depositors taking advantage of the plan would be the substantial equivalent of the cost of the premium of the group policy to the bank, so that the bank would make no profit on the insurance but rather would simply reimburse itself for the amount which it advanced.

You ask if any phase of this plan is inconsistent with the mutuality of ownership which presently exists among all depositors of mutual savings institutions.

Your question undoubtedly has reference to Section 41 of Article 11 of the Annotated Code of Maryland (1939 Edition), which states that no savings institution or savings bank shall have any capital stock but “* * * shall be a mutual association.” This phrase certainly operates as an implied prohibition against a savings institution or savings bank affording preferential treatment to a particular depositor or group of depositors. But as we view the operation of the plan outlined above, no such prohibited preferential treatment would exist.

The plan specifically contemplates that depositors desiring to avail themselves of the life insurance protection must pay for the same either by a reduction of interest or a special charge without reference to interest. Under these circumstances, it could hardly be said that any preferential treatment is being afforded such depositors. Benefits in the way of earnings, which should be available to all depositors, will not be preferentially used for the benefit of a group of depositors. Accordingly, we conclude that the special form of depositors' contract outlined above is not inconsistent with the requirement that the savings institution or savings bank be a mutual association.

HALL HAMMOND, *Attorney General.*

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

BANKS—DORMANT ACCOUNT LAW OF 1951 REPEALED BY
IMPLICATION SECTION 47 OF ARTICLE 11 OF THE CODE
REQUIRING REPORTS OF SUCH ACCOUNTS BY BANKS.

July 19, 1951.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

I have given careful consideration to the provisions of Section 47 of Article 11 of the Annotated Code of Maryland and to those of Chapter 417 of the Acts of 1951 in the light of your inquiry as to whether or not the earlier Act has been repealed in effect by the passage of the later Act.

Repeals by implication are, of course, not favored, but there are various situations in which such repeals are found to have been intended, even though there is no express reference in the later Act to the earlier. This is true where there is a repugnancy between the two Acts to an extent that they cannot be construed together or where the later Act deals with the same subject matter covered by the earlier Act. See 20 Opinions of the Attorney General, 831; *State v. Gambrill*, 115 Md. 506. As a further illustration of the principle, there is a repeal by implication where a subsequent statute takes over the regulation by law of a given subject and is intended as the complete regulation of it; see *State v. Coblenz*, 167 Md. 523, at 527. If such a statute is passed, it has the effect of withdrawing that subject from the application of the former statute by implication, if not by express repeal.

It is true that generally in the application of this last illustration of implied repeals the subject to be covered is broader in extent and aspect than is true in the instant situation. However, there can be no doubt that Chapter 417 of the Acts of 1951 deals fully and completely with the subject of dormant accounts and also that the purposes

and objects of Section 47 of Article 11 must be deemed to be fully accomplished by the broader and more inclusive provisions of Chapter 417.

It is our view therefore, that the Legislature of 1951 did repeal Section 47 of Article 11 of the Annotated Code when it passed Chapter 417 of the Acts of 1951.

HALL HAMMOND, *Attorney General.*

BUDGET

BUDGET—EDUCATION—POWER OF GOVERNOR AND GENERAL ASSEMBLY TO REVISE BUDGET REQUESTS FOR EDUCATIONAL PURPOSES.

January 12, 1951.

*Mr. James G. Rennie, Director,
Department of Budget and Procurement.*

You have asked to what extent may the Governor and General Assembly reduce budget estimates submitted for the public schools.

Article III, Sec. 52(4) (f) of the Constitution provides that each budget shall embrace an itemized estimate of appropriations for "the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article VIII of the Constitution and with the laws of the State." Section 1 of Article VIII requires that the General Assembly "shall, by law, establish throughout the State a thorough and efficient system of free Public Schools; and shall provide by taxation or otherwise, for their maintenance." Section 3 requires that the School Fund be kept inviolate and be appropriated only to the purposes of education.

Sub-section (6) of Section 52 of Article III says, in part:

"The General Assembly shall not amend the Budget Bill so as to affect * * * the provisions made by the laws of the State for the establishment and maintenance of a system of public schools * * *."

Sub-section (11) is, in part, as follows:

"* * * The estimates * * * for the public schools, as provided by law, shall be transmitted

to the Governor, in such form and at such times as he shall direct, and shall be included in the Budget without revision."

Certain provisions in Article 77, title "Public Education," require fixed or mathematically calculable expenditures by the State for the public school system. Some of these clearly fall within the constitutional requirements for the establishment and maintenance of a system of public schools. That others do is questionable—for instance, provisions for State-aid to public libraries (Code, Art. 77, Sec. 167), (1947 Supp.).

Other provisions in Article 77 delegate to administrative bodies or officers the power to prescribe amounts of money to be spent for specific purposes. For instance, the State Department of Education has power to fix the salary of the State Superintendent of Schools, which is to be paid from the appropriation for the expenses and maintenance of that Department (Sec. 27).

Section 23 of Article 77 requires the State Board of Education to transmit biennially to the Governor certified by the State Superintendent of Schools, "an annual state public school budget as determined by existing laws, including the appropriation for the state department of education, the maintenance of the state normal schools, the retired teachers' pensions, state-aid to approved high schools, state-aid to approved colored industrial schools, the part payment of the salaries of county superintendents of schools, and of one supervisor and one attendance officer in each of the counties and the superintendent, one supervisor and one attendance officer in the City of Baltimore, the free text book fund, materials of instruction and school supplies, and such other appropriations for special educational purposes as may from time to time be made by the General Assembly, * * *."

It is conceivable that neither the Governor nor the General Assembly has the constitutional power to reduce any

of these items. We think, however, that the words "the provisions made by the laws of the State for the establishment and maintenance of a public school system," found in Section 52(6) of Article III of the Constitution, refer only to those "provisions" in Article 77 which admit of no administrative discretion. Likewise we think that the words "the estimates for the public schools, as provided by law" found in Section 52(11) mean only those estimates the amount of which is made mandatory by law. Such, we are told, has been the construction of these constitutional provisions at least since 1922.

To hold that the Department of Education has uncontrolled power over all appropriations for the public school system would give that Department indirect control over the entire State budget. Yet the Governor and the General Assembly are by Section 52 of Article III of the Constitution charged with responsibility for the over-all fiscal program of the State.

The question remains whether the mandatory expenditures for State-aid to public libraries required by Section 167 of Article 77 come within the constitutional provision for "the establishment and maintenance of a system of public schools" found in Section 52(6) and the words "public schools" found in Section 52(11). As shown above, Article VIII, Section 1 of the Constitution imposes upon the General Assembly the duty to establish by law a thorough and efficient system of free public schools. The Legislature necessarily has broad discretion under this provision to determine what constitutes or will lead to such a system. By placing the provisions for public libraries in the Public Education Article of the Code of Public General Laws and under the general supervision of the Department of Education (Sec. 163), and by providing a mandatory minimum for State-aid to such libraries under certain conditions (Sec. 167, *supra*), it seems that the Legislature has considered these institutions an integral part of the public school system, and thus protected from budget reductions

by the Governor and future Legislatures. We cannot say that in so doing the Legislature has exceeded its discretion necessarily granted by Article VIII, Section 1.

The result is that budget estimates for the following, computed in accordance with the law and the facts, may not be reduced by the Governor or by the General Assembly:

Teachers' Retirement System, exclusive of the Administration Expense Fund—(Article 77, Section 102(6) (a), as amended by Chapter 236 of the Acts of 1949) ;

Aid per classroom unit (Article 77, Section 199A, as amended by Chapter 491 of the Acts of 1949) ;

Basic aid per pupil (Article 77, Section 199B, as amended by Chapter 491 of the Acts of 1949) ;

Equalization Fund (Article 77, Section 196, as amended by Chapter 458 of the Acts of 1949) ;

Part payment of salaries of school officials (Article 77, Section 199, as amended by Chapter 491 of the Acts of 1949) ;

Incentive Fund for buildings (Article 77, Section 199C, as amended by Chapter 491 of the Acts of 1949) ;

Education of physically and mentally handicapped children (Article 77, Section 229, as amended by Chapter 76 of the Acts of 1950) ; and

State-aid to public libraries (Article 77, Section 167).

Of course, the facts upon which the estimates are based must be correct, and we think the Department of Education ought to be compelled to show their accuracy. For instance, Section 199A of Chapter 491 of the Acts of 1949 provides that the Board of Education of each County and

the Mayor and City Council of Baltimore shall be entitled to and shall be paid, subject to certain limitations, \$400.00 for each classroom unit in operation in such County or City. It would be entirely proper to require the State Superintendent of Schools to show exactly how many classroom units there are in each County and in Baltimore City. The amount of the appropriation will follow as a mathematical certainty.

Section 199B of Chapter 491 of the Acts of 1949 provides that the Board of Education of each County and the Mayor and City Council of Baltimore shall be entitled to and shall be paid, subject to certain limitations, \$20.00 a year multiplied by the number of pupils enrolled in all public schools in such County or City. The facts as to the number of pupils enrolled ought to be clearly established by the Board of Education and the amount of the appropriation will follow as a mathematical certainty.

HALL HAMMOND, *Attorney General.*

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

BUDGET—STATE-AIDED INSTITUTIONS—BUDGET MAY NOT BE
AMENDED TO ADD THE NAME OF AN INSTITUTION AS A
RECIPIENT OF STATE AID.

September 26, 1951.

Mr. Clemens W. Gaines,
Chief, Bureau of Management,
State Department of Health.

We have your letter in which you inform us that one of the hospitals enumerated in that part of the Budget for the fiscal year 1951-1952 (Chapter 296 of the Acts of 1951), under the heading of "State-Aided Institutions," has ceased to exist, and you have asked if the sum of money which was set aside for it may now be allocated to a hospital which is not included in the Budget.

Under the plan which is now in use for aiding the several hospitals throughout the State, those which are the recipients of State funds are enumerated in the Budget, and they are paid only the amount of money which they earn in treating patients under certifications of the Department of Public Welfare. In other words, the amount of money set opposite the name of a given hospital is not necessarily the amount of money which it receives, but rather, it is the maximum amount, subject to amendment, which may be paid to it for rendering services to persons who are unable to pay the costs and expenses of obtaining hospital care, as determined by the Department of Public Welfare. It has never been the practice to amend the budget for State-aided institutions by adding thereto the name of a hospital. It may not be doubted that alterations may be made in conformity with the Budget Amendment of the Constitution, whereby an amount of money may be paid to an institution in excess of that specified in the budget, so long as the aggregate amount of the appropriations to State-aided institutions is not altered.

In our view, the institutions which receive aid from the State should be determined by the Governor and General Assembly, and we think it is beyond the scope and purpose of the provisions of law dealing with budget amendments to expand the list of hospitals by including therein those which have not been submitted by the Governor in the Budget Bill and approved by the General Assembly.

We conclude, therefore, that administrative officials may not, through the device of budget amendments, allocate funds to State-aided institutions other than those listed in the Budget.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

CIVIL DEFENSE

CIVIL DEFENSE—PAYMENT MAY BE MADE IN ADVANCE TO UNITED STATES FOR EQUIPMENT AND SUPPLIES FOR CIVIL DEFENSE.

June 8, 1951.

Colonel David G. McIntosh, III,
Director of Civil Defense.

In your letter you ask our opinion concerning the questions raised in the letter of Governor Millard Caldwell to Governor McKeldin, dated March 2, 1951, which are:

1. Can the State legally pay into the U. S. Treasury, in trust, advance sums to be applied in payment of your share of the cost of defense equipment and supplies, and
2. Can the State legally reimburse the Federal Government for your share in any instance where the initial outlay is wholly paid from the U. S. Treasury?

The laws of 1949, Chapter 563, enacted 12 new sections to Article 41 of the Annotated Code of Maryland (1947 Supp.), known as Sections 178 to 189, inclusive. Section 181(b) provides as follows:

“The Adjutant General, upon the recommendation of the Director, with the approval of the Governor, may employ such technical, clerical, stenographic, and other personnel and fix their compensation and may make such expenditures within the appropriations, or from other funds made available to him for purposes of civil defense, as may be necessary to carry out the purposes of this sub-title. He shall be provided with

necessary and appropriate office space, furniture, equipment, supplies, stationery and printing.”
(Emphasis supplied.)

In view of the above quoted provision and of the objectives expressed in the Act, particularly the desired coordination between Civil Defense functions of the State of Maryland and of the Federal Government, it is the opinion of this office that the Adjutant General of the State, upon your recommendation as Director, and with the approval of the Governor, within the limits set forth in the above quoted section, can legally pay into the U. S. Treasury, in trust, advance sums to be applied in payment of your share of the cost of defense equipment and supplies, and reimburse the Federal Government for your share in any instance where the initial outlay is wholly paid from the U. S. Treasury.

HALL HAMMOND, *Attorney General.*

K. C. PROCTOR, *Asst. Attorney General.*

CONSERVATION

CONSERVATION — CLERKS OF COURT — FEES FOR DREDGING
LICENSES COMPUTED ON NUMBER OF WHOLE GROSS
TONS OF BOATS.

February 6, 1951.

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

We have your letter in which you ask if the license fee imposed by Section 7(d) of Article 72 of the Annotated Code is applicable to fractional parts of gross tons of dredge boats, as well as the number of whole gross tons thereof.

The statute imposes a license fee of \$2.00 "per gross ton for every gross ton said boat shall measure." The law is silent on the application of the license fee to fractional parts of a ton and we find no previous ruling of this Department relative thereto. While the statute has been amended in recent years, the portion quoted above has remained unchanged for a great many years, and the Department of Tidewater Fisheries informs us that it has been the unvarying practice for the license fee to be collected on the number of whole gross tons, disregarding the fractional parts thereof.

In 32 Opinions of the Attorney General, 428, we ruled that the statute imposing a recordation tax of 55 cents for each \$500 of the principal amount of instruments securing debts was applicable to each \$500.00 of the principal amount, and that fractional parts were not subject to the levy.

It is our view that the long-standing practice of collecting the fees for dredging licenses on the number of whole gross tons of boats may be accepted as strong evidence of

the intent of the Legislature, and that the failure of that body to amend the law may be accepted as its concurrence in the construction which has been placed upon it by the officers who direct its administration. *Baltimore v. Machen*, 132 Md. 618; *Mahoney v. Byers*, 187 Md. 81; *Popham v. Conservation Comm.*, 186 Md. 62.

Accordingly, we conclude that the tax is to be measured by the number of whole gross tons of boats, and that the fractional parts of tons may be ignored in calculating the license fees.

J. EDGAR HARVEY, *Deputy Attorney General.*

CONSERVATION—FISH AND FISHING—LICENSE TO OPERATE
 DRIFT GILL NET NOT TO BE ISSUED TO TWO PERSONS
 RESIDENT OF DIFFERENT COUNTIES.

March 8, 1951.

Captain A. S. Creighton,
Assistant to the Chairman,
Department of Tidewater Fisheries.

A resident of Talbot County holds a license issued under the provisions of Article 39 of the Code to operate drift gill nets. He contemplates the formation of a partnership with a resident of Calvert County. The question which you have presented for our consideration is whether the license may now be assigned under the provisions of Section 63D of that Article to the partnership.

Section 63D of Article 39 permits the transfer of a license “* * * whenever the owner of the nets, boats, gear and other equipment necessary for their operation, or the personal representative of such owner, shall sell and convey the same by bill of sale for a bona fide consideration to any person who is eligible under the provisions of Sections 27 and 62 of this Article.” Section 27 makes it unlawful for any person who is not a bona fide citizen or landowner of Maryland to fish in the tidal waters of this State with nets of any description. That Section then proceeds, as follows:

“Nothing in the above shall be construed to permit such citizen to fish in any tributary waters beyond the jurisdictional limits of the county whereof he is a resident or landowner, except that residents or landowners of the counties bordering on a dividing river may fish such river in common, but not in any creek, cove, river, inlet or sound emptying into the said dividing river and lying wholly within a county other than the one

of which he is a resident or landowner, except as provided for in Section 24, * * * except that a non-resident of one county may fish in the waters within the jurisdictional limits of another county after having first obtained the written permission of the abutting landowner * * *.”

Section 24 deals with the fishing rights of riparian owners.

You inform us that a license issued by the Department of Tidewater Fisheries for the use of nets in the tributaries of the Chesapeake Bay does not set forth the body or bodies of water in which the licensee is granted the right to fish. On the other hand, the county of which the holder of the license is a resident is shown on the face of the license and, therefore, your enforcement officers are readily informed whether the nets are being used within permissible waters. There is nothing before us to disclose whether the parties are riparian owners and are entitled to the benefits of Section 24, nor are we informed whether permission has been obtained by them from riparian owners under Section 27.

In the view which we take of the case, if the license is granted, an effort will be made on the part of the resident of Talbot County to fish in the waters of Calvert County and, similarly, the resident of Calvert County will undertake to exercise fishing rights in the waters of Talbot County. While ordinarily two licenses would be required for this purpose, the effect of the transfer, it seems to us, will be to provide a method by which the necessity for one license will be eliminated and reciprocal fishing rights will be bestowed upon the two residents of the counties, one of which lies on the Eastern Shore and the other on the Western Shore of the Chesapeake Bay. We do not believe that an arrangement of this character was within the contemplation of the General Assembly. For instance, Section 62 of Article 39 of the Code provides that prior to December 1st of each year, the Commission of Tidewater Fish-

eries shall make an estimate of the quantity of marketable fin fish of every species that may be available during the succeeding license year, and of the number and types of nets that may be employed profitably without injury to the fishery. If the Commission determines that additional nets may be used over and above the number applied for prior to December 1st, then it shall give public notice by advertisement once a week for two successive weeks in newspapers of general circulation in the county or counties where the licenses will be issued of the number of additional nets which may be used and of the areas in which they may be used. In order for an applicant to qualify for a license, it is necessary for him to show that he has been issued a license for the taking of crabs or oysters for two preceding years, and to prove that he has been engaged in the catching of seafood, or, he shall be required to submit proof that he has been engaged or employed in the business of catching fish commercially for two years as his principal occupation. After the expiration of the time for the reception of applications for licenses, the Commission shall choose by lot those to whom the additional licenses may be granted. The wisdom and fairness of the procedure which the General Assembly has established for granting these licenses are readily apparent. Yet it seems to us that the arrangement suggested by your letter entirely circumvents the provisions of Section 62.

In view of the foregoing, it is our conclusion that a license may not be granted, and that an existing license may not be transferred, where its effect is to authorize a person to fish in the waters of a county other than that of which he is a resident or landowner, except in dividing rivers, without the consent of the riparian owners, and the fact that the applicants for the license, or for the transfer, may be conducting a partnership does not alter our conclusion.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

CONSERVATION—OYSTERS—LEASES TO NON-RESIDENTS PROHIBITED — PROCEDURE FOR TESTING QUESTION OF RESIDENCE.

August 29, 1951.

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

Your letter of July 23 states that a Mrs. Van Brunn applied for an oyster lease on April 4, 1951. The application was duly advertised, and no timely protest having been filed, the lease was granted in June, 1951. See Code Article 72, Sec. 12(a), (h), (i), (j), (k) and (l).

Now, another, who desires a lease of the same bottom, contends that Mrs. Van Brunn is not, or when she applied, was not a resident of Maryland. Sec. 12(d) of Article 72, *supra*, sub-heading "Who May Obtain a Lease," authorizes leasing to "any resident of Maryland." Sec. 12(q) prevents any assignment of a lease to "a non-resident of this State," and declares that if any such assignment is attempted to be made, all interest of the assignor "shall revert to the State as if no lease had ever been made."

It may be argued that the proper advertising of the lease without timely protest concludes the matter. Sec. 12(i), (j) and (k), *supra*. But Sec. 12(j) provides that after the filing of a protest and answer thereto, "the Court shall promptly hear all evidence adduced by the parties, or either of them, and shall decide whether the area described in said petition is or is not within any of the prohibited areas, set forth in sub-section (b) of this section and for which a lease shall not be granted, and judgment shall be entered accordingly." Sub-section (b) merely lists areas not available for leasing. Neither in sub-section (b) nor in sub-section (j) is the residence requirement mentioned. It seems, therefore, that the residence requirement is independent of the protest procedure. Conversely, the time

limitations applicable to the protest procedure do not apply to testing the residence requirement.

No procedure is specified for testing the residence requirement, which appears to be absolute. Any lease made to a non-resident seemingly is void—beyond the power of the Commission. If an admitted non-resident applied for a lease, we believe the Commission on its own motion would have the duty to deny it. We assume, however, that in granting the lease to Mrs. Van Brunn, the Commission acted in good faith and relied on her own statement of residence. May it now, of its own motion, reopen the matter, undertake to decide the question of residence and cancel the lease? We think not. No such discretion appears to be granted it by the statute. See 17 Opinions of the Attorney General, 98.

We believe the question of Mrs. Van Brunn's residence can be conveniently raised by the filing of an application by a qualified resident for a lease of the same area. The Commission will, of course, have to deny it on the ground that Mrs. Van Brunn's lease is outstanding. The applicants would then proceed by application for writ of mandamus, or perhaps by a proceeding against both the Commission and Mrs. Van Brunn for a declaratory judgment. Code, Article 31A (1947 Supp.).

An alternative procedure may be by way of a bill for injunction against the Commission and Mrs. Van Brunn as suggested in 17 Opinions of the Attorney General, 98, *supra*.

In any event, we believe the test will be whether Mrs. Van Brunn was a resident of Maryland at the time the lease was granted, rather than at the time of application or the present time. Sec. 12 (a), Article 72, *supra*.

HALL HAMMOND, *Attorney General*.

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

CONSERVATION—CLERKS OF COURTS—DUTY OF CLERKS TO
MAKE A RECORD OF GAME AND INLAND FISH COMMISSION
REGULATIONS.

October 3, 1951.

*Mr. Harold Smith Kolmer,
Assistant Director, State Game
and Inland Fish Commission.*

Mrs. Sandrock, Deputy Clerk of the Court of Appeals, forwarded to us your letter to the Clerk of the Court of Appeals, dated September 24, on the same subject as yours to us of that date.

The provision which gives you concern apparently is the following sentence from Chapter 200 of the Acts of 1949, which, incidentally, has been in the law since Chapter 354 of the Acts of 1939:

“A copy of any regulations adopted by the Commission shall be mailed to the Clerk of the Circuit Court who shall make a record thereof and cause the same to be posted in front of the Court House of the County.”

It seems clear to us that the minimum requirement imposed upon the Clerk of the Court is to post a copy of the regulation in front of the Court House and to file a copy of the regulation in a permanent file available for inspection during the Clerk's office hours to the general public. Of course, there are various mechanical means by which the Clerk may, in his discretion, comply with the statutory requirement. One of them is to record regulations of the Commission in permanent books similar to those in which land records are recorded. Another may be to bind copies of the regulations in permanent books. A third may be to keep copies of such regulations filed in an orderly fashion in loose-leaf binders. In any event, it seems to us that the

statute requires that complete and accurate copies of such regulations be permanently kept by the Clerk, available for inspection. It would certainly be desirable, too, that an index of the regulations be kept by the Clerk so that they may be easily found.

We do not mean to imply that failure on the part of the Clerk to comply with the statutory requirement would necessarily give a defendant charged with violation of a regulation a valid defense.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW

CONSTITUTION—HOUSING AND SLUM CLEARANCE—CONSTITUTIONAL AMENDMENT DESIRABLE TO AUTHORIZE POLITICAL SUB-DIVISIONS TO DEVELOP SLUM AND BLIGHTED AREAS AND USE FEDERAL FUNDS THEREFOR.

January 23, 1951.

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

You have asked us whether a draft of an Act prepared by the Housing and Home Finance Agency in Washington, which would permit cities, towns and counties to plan and redevelop their slum and blighted areas, and to participate in available Federal aid, violates any of the restrictions of the Constitution of the State of Maryland.

In *Matthaei v. Housing Authority*, 177 Md. 506, the Court of Appeals held that it is within the constitutional power of the Legislature to provide for slum clearance and to authorize local authorities to provide decent and sanitary living accommodations for low income individuals. In this case, decided in 1939, the program was to be accomplished through a governmental agency. However, when the Baltimore Redevelopment Commission was proposed, it was thought necessary in 1943, by many of those who considered the problem, that a constitutional amendment should be passed so that property acquired by a governmental agency could safely be re-conveyed to private corporations or persons for redevelopment and rebuilding, in accordance with appropriate standards to be set by the Commission.

The draft of the law which you have sent with your letter is at least as comprehensive in its delegated authority as that permitted by Article XIB of the Maryland Constitu-

tion. It is my view, therefore, that you could not proceed safely upon the assumption that legislation such as that now proposed would be held constitutional without an amendment to the Maryland Constitution, similar to Article XIB.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW—BILL DESIGNED TO EXTEND RIGHT
OF FRANCHISE TO PERSONS RESIDING ON FEDERAL
RESERVATIONS IN ONLY ONE COUNTY WILL BE UNCON-
STITUTIONAL IF ENACTED.

March 13, 1951.

Hon. John Grason Turnbull,
State House.

Re: Senate Bill No. 197

I have your letter of February 28th with which you enclosed Senate Bill No. 197. This Bill is designed to add a new section to be known as 14A to Article 33 of the Code and, under the provisions of that section, all persons residing on property lying within the physical boundaries of Cecil County but on property over which jurisdiction is exercised by the United States by virtue of the 17th clause of the 8th Section, First Article of the Constitution of the United States, and Sections 31 and 32 of Article 96 of the Code, will be considered as residents of Cecil County and will be permitted to register and vote at all elections hereafter held if they meet the other requirements of law. You have asked my opinion in connection with this Bill.

In my view, this Bill is unconstitutional for two reasons. The first is that Article I, Section 1 of the Constitution of Maryland, title "Elective Franchise", provides that every citizen of the United States of the age of 21 years or upward, who has been a resident of the State for one year, and of the legislative district of Baltimore City or of the county in which he may offer to vote, for six months next preceding the election, shall be entitled to vote in the ward or election district in which he resides. The qualifications so prescribed may not be altered except by an amendment to the Constitution itself.

In *Lowe v. Lowe*, 150 Md. 592, the Court of Appeals said that the acquisition of land under the provisions of Clause

17 of Section 8 of Article I of the Constitution of the United States transfers to the Federal Government exclusive dominion and jurisdiction thereover for all purposes with the single exception of the right of the State to serve civil and criminal process on such reservation.

Lowe v. Lowe involved the right of a person living on the reservation at Perry Point in Cecil County to maintain a bill for divorce in the Circuit Court for that County. The statutory provisions then in force conferred jurisdiction upon courts of equity upon a bill of complaint filed in the court "either where the party-plaintiff or defendant resides". In holding that residents of Federal reservations were not residents of the State of Maryland within the meaning of the divorce law, the Court of Appeals said, at page 600 of 150 Md., as follows:

"The great weight of authority is to the effect that lands acquired in accordance with the provisions of the federal constitution cease to be a part of the state, and become federal territory, over which the federal government has complete and exclusive jurisdiction and power of legislation. It is therefore clear that persons residing upon the government reservation at Perry Point are not residents of the State of Maryland *for the purpose of exercising the right of franchise*, for taxation purposes, or for school purposes, for the reason that they reside upon territory belonging to the United States and not the State of Maryland; and in our opinion, for the same reason, they are not such residents of the state as would entitle them to file a bill for divorce in any of the courts of the state. * * *" (Emphasis added.)

In view of the flat holding of the Court of Appeals, the residents of Federal reservations are not residents of the State of Maryland. For purposes of the elective franchise, it seems abundantly clear that the Legislature cannot adopt

a definition making them residents or, to put it another way, the Legislature cannot effect an amendment of the Constitution of Maryland, save with the consent of the people of the State.

There is, I think, an additional reason why the present bill, if enacted, is unconstitutional. Even if the General Assembly possessed the power to enact legislation affecting the right of franchise of persons residing on land acquired by the United States by the constitutional method, which power, as I have shown, it does not possess, this bill, if enacted, would be in violation of Section 5 of Article I of the Constitution of Maryland. That Section provides that:

“The General Assembly shall provide by law for a uniform Registration of the names of all voters in this State who possess the qualifications prescribed by this Article, which Registration shall be conclusive evidence to the Judges of election of the right of every person thus registered to vote at any election thereafter held in this State; * * *”

Senate Bill No. 197 deals only with persons residing on Federal Reservations acquired in the manner therein specified in Cecil County. There are many other such Federal Reservations in other Counties of the State where persons possessing identical qualifications would still be denied the right of franchise. In *Bangs v. Fey*, 159 Md. 548, the Court of Appeals had before it the constitutional validity of Chapter 578 of the Acts of 1929, which undertook to abolish the requirements of the Declaration of Intention Law, except in Baltimore and Prince George's Counties. In holding the Act invalid because it violated Section 5 of Article I of the Constitution of the State, the Court of Appeals said:

“In the present case we have two rules whereby one voter may be registered and another, with the same qualifications, the same intention, and the

same residence, may be denied a vote. A law which can produce such results at the same time cannot be called 'uniform'."

For the reasons I have stated, I conclude that Senate Bill No. 197, if enacted, will be unconstitutional not only for its failure to observe the uniformity required by Section 5 of Article I of the Maryland Constitution, but also because those to whom it seeks to give the Maryland franchise are not residents of the State and cannot be made so by legislative definition. The end to be achieved by Senate Bill No. 197 can only be achieved, as I see it, by an amendment of the Constitution of Maryland.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW—BUDGET—BILL AUTHORIZING BOND
ISSUE SHOULD NOT BE VOTED ON UNTIL BUDGET BILL
HAS BEEN ENACTED.

March 13, 1951.

Hon. Louis L. Goldstein, Chairman
Finance Committee.

You have asked me whether or not Senate Bill No. 48, authorizing a bond issue of \$5,000,000 for the erection of a State office building at Annapolis, which was introduced by Senator Phipps, is an appropriation bill and, if so, whether or not a favorable report on the Bill of the Finance Committee of the Senate may be acted upon by the Senate without violating the provisions of Section 52 of Article 3 of the Constitution of Maryland.

There can be no doubt that the Bill authorizing the bond issue to be used for the acquisition of a State office building is an appropriation bill. The Court of Appeals flatly so held in the case of the present office building in Annapolis in *Bickel v. Nice*, 173 Md. 1.

Paragraph A of Section 52 of Article 3 of the Constitution of Maryland provides that "every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter mentioned". Paragraph C of Section 52 provides that "neither House shall consider other appropriations until the Budget Bill has been finally acted upon by both Houses".

It is not necessary to speculate as to the breadth embraced by the term "consider" as used in the Constitution, because the Court of Appeals in *Bickel v. Nice, supra*, in answer to the contention that the Constitutional provision was violated by reference to a Committee two days before final

action on the Budget Bill, had this to say of the provision in question :

“* * * We take the purpose of it to be merely to prevent submission of another appropriation bill to a vote before the final action on the budget bill. Voting is the consideration prohibited; and the mere introduction of an appropriation bill, and its reference to a committee for study would not, we think, be a matter of concern under the constitutional provision.”

I take it that the Court of Appeals has decided that it is the final vote in either House on the Bill which is the ban of the Constitutional prohibition. Therefore, I would not hold invalid an appropriation bill on which a favorable report had been brought in and on which the favorable report had been adopted. However, it is not entirely clear and not beyond the realm of probability that the Court of Appeals would say that nothing more could be done than that spelled out in the *Bickel* case. It is drawing a fairly fine line to say that a vote approving a Committee report is not a vote on the bill and the vote on the bill is what the Court condemned. Certainly, therefore, in the interest of safety in looking towards final approval of the appropriation bill by bond counsel and the saleability of the bonds, no action should be taken on any appropriation bill, save its reference to a Committee, until the Budget Bill has been finally acted upon by both Houses.

HALL HAMMOND, *Attorney General*.

CONSTITUTIONAL LAW—VETOED BILLS—BILLS VETOED BY GOVERNOR AND PASSED AT NEXT SESSION OF LEGISLATURE BECOME EFFECTIVE ON JUNE 1ST FOLLOWING, UNLESS IT IS AN EMERGENCY BILL—LEGISLATIVE ACT IMPOSING TAXES MAY BE APPLIED RETROACTIVELY—LAW INCREASING SALARIES OF PUBLIC SCHOOL TEACHERS BECOMES EFFECTIVE WITH THE BEGINNING OF THE NEXT SCHOOL YEAR.

September 24, 1951.

Dr. Carl N. Everstine,
Assistant Director of Research,
The Legislative Council.

You advised me on behalf of the Legislative Council Sub-Committee on Teachers' Salaries that the group is considering the possibility of a recommendation that the General Assembly override the Governor's veto on House Bill 610 of the 1951 Session. In connection with its deliberation and ultimate conclusion, the Sub-committee wishes to know when the Bill would become effective if passed over the veto.

This question seems clearly answered by Section 17 of Article II of the Constitution, as amended by Chapter 714 of the Acts of 1949, and approved by the people in the 1950 Election. The Constitution now provides:

“* * * If the bill is passed over the veto of the Governor, it shall take effect on June 1 following, unless the bill is an emergency measure to take effect when passed.”

House Bill 610, as passed, is to take effect on July 1, 1951. It seems entirely clear, therefore, that if House Bill 610 is passed over the veto, it will take effect June 1, 1952.

Secondly, the Sub-committee would like a ruling as to the date when the increase in corporate income tax, provided by House Bill 610, would become effective—that is,

would the increase be retroactive to take effect in the taxable year beginning after December 31, 1950, in accordance with the specific provisions of the Bill. As passed, as I have said, the Bill was to take effect July 1, 1951 but was retroactive in terms, as far as the increase in corporate income tax was concerned, to January 1, 1951.

There is no constitutional objection to making a tax increase retroactive. In *Diamond Match Co. v. State Tax Comm.*, 175 Md. 234, the Court said, at pages 240, 241:

“The levy of a tax by the State is not within the inhibition of the Federal Constitution merely because the statute which imposed it made it retroactive in its operation. (Citing cases.) * * * Nor is there in the Constitution of Maryland any provision against retrospective laws, except those which relate to the imposition of a criminal penalty.”

Corporate taxpayers in the State were put on notice of the possibility of an increase in taxes as of January 1, 1951 when House Bill 610 passed both branches of the Legislature. When the Governor vetoed the Bill, that warning was continued by the terms of the Constitution which permitted his veto to be overridden, and which set the effective date of the Bill, if the veto were overridden, at June 1, 1952. Corporations were put on notice, in other words, that it might be necessary as of June 1, 1952, to pay taxes accounting from January 1, 1951. I see nothing in this situation which would infringe any constitutional right of a corporate taxpayer.

Finally the Sub-committee would like to know when the increase in teachers' salaries, which the Bill establishes, would become effective. The Bill itself is silent in this specific respect. However, the original effective date in the Bill as passed, namely, July 1, 1951, is of significance in this connection. Obviously, the effective date was made July 1st to conform to the beginning of the new fiscal year.

Normally a statute is prospective in operation, unless its terms either explicitly or by necessary implication call for a retrospective construction. See *Diamond Match Co. v. State Tax Comm.*, above cited. The Superintendent of Schools tells me that contracts between the local subdivisions and the teachers coincide with the fiscal year and, in every case, this year would begin after June 1, 1952 for the ensuing twelve months. See also Section 92 of Article 77 of the Code. All these matters add up, in my opinion, to the definite conclusion that the additional salaries called for in House Bill 610 would become effective for the school year beginning after June 1, 1952.

HALL HAMMOND, *Attorney General.*

CONSTITUTIONAL LAW—BUDGET—LINE ITEM BUDGET NOW
IN USE MAY NOT BE REPLACED BY A PERFORMANCE
BUDGET WITHOUT A CONSTITUTIONAL AMENDMENT.

November 5, 1951.

*Simon E. Sobeloff, Esq., Chairman,
Commission on Administrative
Organization of the State.*

You recently inquired on behalf of the Commission on Administrative Organization of the State, and particularly on behalf of the sub-committee dealing with budget and related fiscal matters, whether Article III, Section 52 of the Constitution of Maryland permits the use of the form of budget generally known as a performance or program budget wherein appropriations would be made in terms of work programs, rather than a line item budget which has always been used since the adoption of the budget amendment.

The essential difference between the line item budget presently used and a performance budget is set forth succinctly in the report of the Hoover Commission, made in 1949, in relation to the Federal Government. The report in part says:

“We recommend that the whole budgetary concept of the Federal Government should be re-fashioned by the adoption of a budget based upon functions, activities, and projects; this we designate as a ‘performance budget.’

“Such an approach would focus attention upon the general character and relative importance of the work to be done, or upon the service to be rendered, rather than upon the things to be acquired, such as personal services, supplies, equipment, and so on. These latter objects are, after all, only the means to an end. The all-important thing

in budgeting is the work or the services to be accomplished, and what that work or service will cost.”

In other words, a line item budget stresses items such as salaries, supplies and equipment without indicating the use to which they are to be put, and the performance budget stresses grouping of services to be rendered uncluttered by details.

In considering whether Section 52 in its present form would permit the change, we have reviewed carefully the report of the Goodnow Commission which prepared the original budget amendment, as well as explanations of the budget amendment and its purposes, by Judge Pearce, Mr. Philip Laird, Mr. William Milnes Maloy, Judge Parke, Mr. Joseph D. Baker, and Mr. Howell Griswold and Dr. Goodnow, himself. We have also considered a criticism of the Maryland budget law, entitled “Serious Defects of Maryland’s Budget Law”, prepared and distributed by the Budget Division of the Institute for Public Service of New York, and a review of the administration of the Maryland Executive Budget System by Mr. Hooper S. Miles, and of course such general law, on the subject, as there is.

It is our considered opinion that the change from a line item budget to a performance budget cannot be made safely from a constitutional point of view, in the light of the wording and history of the Maryland budget law. I shall not detail all the reasons which have led us to this conclusion. Suffice it to say that, since the adoption of Section 52 of Article III of the Constitution, the budgets which have been prepared and adopted under it have been line item budgets. In 1947 the Legislature proposed an amendment to Section 52. At that time the line item budget had been used for some thirty-one years.

The 1947 amendment proposed to change the language in sub-paragraph Second of Paragraph B of Section 52—the part of the budget section dealing with mandatory

appropriations—which, as it then stood, required in the Budget submitted by the Governor, “an itemized estimate of the appropriations” for the General Assembly, for the Executive Department, for the Judiciary Department, for the payment of the debt of the State of Maryland, for the payment of the salaries required by the Constitution and laws of the State, and for the public school system, and such other purposes as the Constitution requires. In place of the quoted language, the 1947 budget amendment, as introduced in the Legislature, said that the Budget in relation to the mandatory items “shall embrace an estimate of all appropriations *in such detail as the Governor shall determine, or as may be prescribed by law.*” The language last quoted was stricken from the amendment in its passage through the Legislature and in place of it, there was repeated in what is now paragraph 4 of Section 52 of Article III as finally passed by the Legislature and approved by the people, what had formerly been in sub-paragraph Second of paragraph B first above quoted, namely, “an itemized estimate of the appropriations” (the mandatory items). The significance of this retention of the language under which a line item budget had always been used is further enhanced by the fact that, in sub-paragraph Third of paragraph B, the part of the budget section dealing with the budget Bill (as distinguished from the Budget submitted), the words, in use prior to 1947 in relation to the budget Bill saying that it must be “clearly itemized and classified” were stricken by the 1947 amendment as introduced and as passed and approved, and in their place was included the following:

“The Governor shall deliver * * * a bill for all the proposed appropriations of the budget classified and *in such detail as he shall determine or as may be prescribed by law.*”

In other words, the Legislature and the people refused to include in the language dealing with the Budget the same latitude in preparation and presentation that they did

permit for the form of the budget Bill. In the Budget paragraph, the requirement is that the various classifications required shall be described by "an itemized estimate", whereas, in the budget Bill paragraph, the requirement is only that the appropriations "be classified and in such detail as the Governor shall determine, or as may be prescribed by law". It is impossible to brush aside the distinction thus made and the retention of the language connoting a line item budget. Some significance must be given to this action and the most logical significance is to conclude that in retaining the old language requiring itemization, there was retained the concept and the requirement of a line item budget. It might be possible that the present Constitution, in Section 52, requires a line item Budget but permits a performance budget Bill. Such conclusion would neither be legally sound nor essentially practical. The Budget and the budget Bill should both embrace the same concept and form of preparation.

A second reason which has led us to decide that the change could not be made safely without a constitutional amendment is the decision of the Court of Appeals in *Board of Education of Prince George's County v. The County Commissioners of Prince George's County*, 131 Md. 658. There a statute required "an itemized and detailed school budget, showing the amount of money needed for permanent improvements and repairs, and for current repairs, furniture for old buildings, maintenance and support of the schools during the succeeding school year". The budget, as prepared in that case, included items, for example, such as incidentals, including janitors' salaries, \$7,500, repairs to old buildings, \$5,000. The Court said:

"These items certainly cannot be said to contain a *detailed* statement of the particulars that go to make up the total amounts of the items, and we concur in the conclusion of the learned Court below that the budget furnished by the petitioner was not a compliance with the terms of the law."

The Court further said:

“* * * it is quite clear, that the terms ‘itemized and detailed’ do not mean that the budget is to show only the *total* amount needed for permanent improvements and repairs, the *total* amount for current repairs, the *total* amount for furniture for old buildings and the *total* amount needed for maintenance and support of the school, during the succeeding school year.”

It is clear, of course, from the wording and the purpose of the statute involved in the Prince George’s County case, and for many other reasons, that the case is not controlling, but there is a sufficiently close analogy between the requirements of the statute there and the decision of the Court to make one wary of saying that the language of Section 52, as now written, would not cause the Court of Appeals to rule that it did not permit a performance budget. For example, paragraph 4 of Section 52, as it now is, requires “an itemized estimate of the appropriations, as follows:” and then are set forth the various classifications which are in the first quotation of this letter, namely, the General Assembly, the Executive Department, Judiciary Department, and so on. Following the reasoning of the Court in the Prince George’s County case, a mere total for each of these various classifications, or indeed sub-totals which were not fully itemized, would not answer the requirements of the Constitution.

For these reasons, among others, it is our view that the change proposed by the Commission on Administrative Organization of the State from a line item budget to a performance budget may not be made safely without a constitutional amendment.

HALL HAMMOND, *Attorney General*.

CONSTITUTIONAL LAW—BUDGET—DEPARTMENT OF HEALTH
MAY RECOMMEND TO GOVERNOR ADDITIONS TO STATE
AIDED INSTITUTIONS LISTED IN BUDGET.

November 8, 1951.

*Mr. Clemens W. Gaines, Chief
Bureau of Management,
State Department of Health.*

Recently you requested our opinion concerning the power of the Department of Health to amend that portion of the budget dealing with "State-aided institutions", by adding to the list of hospitals therein enumerated, an institution which was not included in the current budget, as enacted by the General Assembly. It was our conclusion that the right to amend the budget did not authorize additions to the list of institutions specifically set forth in the appropriations bill adopted by the General Assembly. See our opinion of September 26, 1951, 36 Op. A. G. (page 114). In that opinion we said, in part:

"In our view, the institutions which receive aid from the State should be determined by the Governor and General Assembly, and we think it is beyond the scope and purpose of the provisions of law dealing with budget amendments to expand the list of hospitals by including therein those which have not been submitted by the Governor in the Budget Bill and approved by the General Assembly."

You present to us now the question whether the Department of Health has the authority to include in a budget request, which is being prepared for submission to the Governor, an institution which has not been receiving State funds under the current or prior budgets. For us to deny the existence of this power to the executive branch of the government will lead to a most unusual result, in that the

list of hospitals which are the recipients of State-aid will be "frozen" as of the current year, and at no time in the future will any other institutions be eligible for aid, no matter how worthy and meritorious their claims to State funds may be. It must be borne in mind that the General Assembly is not empowered, under the provisions of Section 52 of Article III of the Constitution, to amend this portion of the budget "except to strike out or reduce items therein". The Governor has the power to include institutions which are not recommended by the Department of Health, but the knowledge of the officials of the Department of the work being done by the several hospitals throughout the State is such that the Governor would, no doubt, prefer to have your recommendation.

We think it is implicit from an over-all consideration of the budgetary processes that your Department may submit for the Governor's consideration a budget request for institutions which you think should be the recipients of State-aid, without regard to their appearance in the budget for the current year, and that it then becomes the duty of the Governor to determine whether to include them in the budget for the ensuing fiscal year. If your recommendation is accepted by the Governor, it is then within the power of the General Assembly to make the final determination of the policy of the State by authorizing or denying the aid recommended by the Department of Health and the Governor.

J. EDGAR HARVEY, *Deputy Attorney General.*

CONTRACTS

CONTRACTS—DAMAGES FOR BREACH OF CONTRACT.

November 15, 1951.

*Mr. Nathan L. Smith, Director,
State Dept. of Public Improvements.*

You have written us for our views concerning the disposition to be made of potential claims by two contractors now engaged in constructing buildings for the State. They are based upon increased costs of labor and material resulting from delays for which they contend they are not responsible.

It is impossible for us to state what responsibility, if any, the State may have in the premises without full knowledge of the facts. However, there are two well settled propositions to be considered in cases of this sort. The first is that the State's immunity from suit is absolute unless the people through the Legislature declare otherwise. The second is that which springs from Section 35 of Article III of the Constitution, that "No extra compensation shall be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service shall have been rendered, or the contract entered into; * * *." *State v. Dashiell*, Md. —, 75 A 2d 348 may be cited to the contrary. However, it may well be that the *Dashiell* case furnishes no authority for the granting of additional sums of money to the contractors about whom you write, because, in that case, the General Assembly, by Chapter 109 of the Acts of 1950, set up the sum of \$250,000 to satisfy *Dashiell's* claim, "to be paid only in the event of final judicial determination of the legal obligation and legal ability to pay." We know of no legislative action toward that end concerning the matters which you present.

In dealing with the constitutional provision prohibiting the General Assembly from granting "extra compensation,"

the Court of Appeals said that it had no application because Dashiell's claim was for damages for breach of contract and that the term "extra compensation" did not embrace such damages.

If the added costs of construction are the direct result of delays caused by the failure of the State to perform acts which it undertook to perform—and as stated above we express no opinion on this because the facts submitted are not adequate for that purpose—we think the matter should be presented to the Board of Public Works in order for that body to determine the advisability of seeking the additional funds from the General Assembly.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

CORPORATIONS

CORPORATIONS—MINING, MANUFACTURING, ELECTRIC RAILROAD, STREET RAILWAY, TELEGRAPH, TELEPHONE AND EXPRESS COMPANIES REQUIRED TO PAY CERTAIN EMPLOYEES IN CASH AT LEAST SEMI-MONTHLY—TERMINATION PAY THEREOF.

January 31, 1951.

*Mr. Joseph F. DiDomenico,
Commissioner, State Department
of Labor and Industry.*

You ask with respect to Section 150 of Article 23 of the Annotated Code of Maryland (1939 Ed.), the pertinent provisions of which are “ * * * every association or corporation doing business in the State of Maryland employing wage-workers, whether skilled or ordinary laborers, engaged in manual or clerical work, in the business of mining, manufacturing, operating an electric railroad, street railway, telegraph, telephone or express company, shall make payment in lawful money of the United States semi-monthly to said employees, laborers and wage-workers * * *,” whether the statute applies to every association or corporation doing business in the State of Maryland or only to mining, manufacturing, electric railroad, street railway, telegraph, telephone and express companies, whether lawful money of the United States as used in the statute is intended to mean only cash, and whether, in the event an employee is paid on a weekly basis and is dismissed or voluntarily leaves his employment, the employer may legally withhold wages due the employee until the next regular constituted pay day.

In our opinion the statute does not apply to every association or corporation doing business in the State of Maryland. The necessary result, it seems to us, of the enumeration in the manner set forth in the statute of various types

of businesses is that such enumeration negates a construction that the statute has application to every association or corporation, other than those specifically enumerated.

It is also our opinion that "lawful money of the United States," as used in the statute means only cash. From the many authorities collected in "Words and Phrases" (1940 Ed.), under the heading "lawful money," it appears that courts throughout the country have been unanimous in the result that lawful money includes only coin or its equivalent such as treasury notes.

With respect to your last question, you were advised by us under date of August 30, 1949, that an employer may properly, in the event that an employee terminates his employment between the maximum pay periods prescribed by law, withhold payment until the date of the regular pay period, rather than be required to make payment on the date of termination of employment.

We fully realize that to construe Section 150 of Article 23, *supra*, as requiring payment in cash in many instances runs counter to modern day business practices. Statutes such as Section 150 are found in England as early as the 14th Century, and their purpose has been to prohibit the payment of wages to laborers in goods or articles produced by such labor or by script usable at company stores. For a discussion of the historical background of such statutes, see *Peel Splint Coal Company v. West Virginia*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385 (1892), and *State v. Loomis*, 115 Mo. 309, 22 S. W. 350, 21 L. R. A. 789 (1893). That the purpose of such statutes can adequately be served without prohibiting payment by check or order upon a banking institution for eventual payment in cash money cannot be denied. However, the command of the State of Maryland, as contained in Section 150 of Article 23, is clear and unequivocal. It states that payment shall be in "lawful money," and as before stated, we have been unable to find any authority which construes such a phrase as meaning

anything other than actual cash. Accordingly, we can only suggest, if our premise that this opinion runs counter to modern day business practice is true, that an immediate appropriate amendment be undertaken to Section 150 of Article 23 to permit payment by check or order upon a banking institution.

HALL HAMMOND, *Attorney General.*

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

COURTS

COURTS — JUVENILE JURISDICTION — CHAPTER 458 OF THE ACTS OF 1951 DOES NOT AFFECT JURISDICTION OF CIRCUIT COURT, DIVISION OF JUVENILE CAUSES.

December 5, 1951.

*Colonel Beverly Ober,
Police Commissioner of Baltimore City.*

You wish to know whether the procedure of referring complaints involving offenders against the law under sixteen years of age, to be charged as delinquents and sent to the Division of Juvenile Causes, has been superseded in any way by the provisions of Chapter 458 of the Acts of 1951.

It seems entirely clear to us that no such result has occurred. As you know, since you sponsored Chapter 458 of the Acts of 1951, it, as planned and as introduced in the Legislature, was designed only to provide a special place for trials involving automobile fatalities and of women and children. In the latter case, the effort was to be sure that they were incarcerated and tried in surroundings which would not bring them in contact with the ordinary run of offenders.

During the passage of the bill through the Legislature, it was suggested that there might be an apparent conflict between the provisions of the bill as drawn and the Juvenile Court law, or some ambiguity. Therefore, Chapter 458 was amended to strike from the title of the Special Court the words "and children's" and to insert in the bill Section (D). The effect of these amendments was to make it very plain that children "arrested upon any criminal charge" must mean only children charged with a crime which the law permits them to be charged with; namely, any offense for which the penalty is death or life imprison-

ment, as provided in Section 240 of the Baltimore City Charter (1949 Edition). In all other instances, any child taken into custody under provisions of law before Chapter 458 was passed and under the contemplation of Chapter 458, as is spelled out by Section (D), must be charged only with being a delinquent and be treated according to the provisions of Section (D).

Chapter 458 of the Acts of 1951 was passed on the assumption, which is commonly accepted in statutory construction, that the terms used refer to existing procedures. In other words, the reference to a child charged with crime can only be one charged with a crime which the law permits, and the reference to a child taken into custody as a delinquent means those so taken into custody under the existing procedures. Rare as it is, there are instances where children are accused of murder or other crime where the penalty is life imprisonment or death. They are the only ones covered under the provisions of Section (c) of Chapter 458. In all other instances, a child who is apprehended is treated in conformity with the provisions of the City Charter, enacted as Chapter 818 of the Acts of 1943, with the modification provided by Chapter 458 that the place of confinement is to be the station house designated by the Police Commissioner as the "Women's Court."

HALL HAMMOND, *Attorney General.*

DEAD BODIES

DEAD BODIES—BEFORE AUTOPSY IS PERFORMED ON ILLEGITIMATE CHILD WHOSE MOTHER IS AN INFANT AND WHOSE FATHER IS UNKNOWN, AUTHORIZATION SHOULD BE OBTAINED FROM ADULT NEXT OF KIN AS WELL AS FROM MOTHER.

July 27, 1951.

Dr. Russell S. Fisher,
Chief Medical Examiner,
State Department of
Post Mortem Examiners.

You have asked us to advise you if the mother of an illegitimate child may sign a permit for an autopsy after its death when the mother is a minor and the father is unknown.

While generally speaking there is no such thing as a property right in a dead body, as property rights are generally understood, the nearest relatives of the deceased do have a quasi-property right arising out of their duty to provide interment. 15 Am. Jur. 831. *Painter v. U. S. F. & G. Co.*, 123 Md. 301. We know of no decision of the Court of Appeals of Maryland upon the question which you present. However, it has been held elsewhere that where the next of kin is a minor, the quasi-property right in the dead body devolves upon the next of kin of full age. *People v. St. Patrick's Cathedral*, 7 Abb N Cas. (N. Y.) 121, 58 How. PR 55; *Wright v. Hollywood Cemetery Corp.*, 112 Ga. 884, 38 S. E. 94. In view of this, therefore, it would seem that, out of an abundance of caution, a careful doctor, before undertaking to perform an autopsy in the case which you mention, would procure the written authorization of the infant mother, as well as that of the next of kin who is of full age.

In your inquiry you state that you are not concerned with autopsies which are made by the Medical Examiners (Code, Art. 22) or by the Anatomy Board of Maryland (Code, Art. 43, Secs. 161A-161D, both inclusive, Chapter 669 of the Acts of 1949). Consequently, the views which we have expressed would not necessarily be pertinent in cases falling within the scope of either of those statutory provisions.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

DEPARTMENT OF LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY—DEPARTMENT HAS
NO POWER TO ARBITRATE LABOR DISPUTES BETWEEN
STATE AGENCY AND ITS EMPLOYEES.

September 18, 1951.

Mr. Joseph F. DiDomenico,
Commissioner of Labor and Industry.

We have given the fullest consideration to your recent request that we advise you whether your Department has jurisdiction in labor disputes between other State Departments and labor unions. We have reviewed the correspondence between your office and the Congress of Industrial Organizations, as well as their letters to the State Roads Commission, urging it to recognize them as the "bargaining agent" of its employees in Allegany County. Further, we have considered thoroughly a written memorandum sent by the Congress of Industrial Organizations which sets forth strongly and cogently its position that the Union is entitled to recognition by the State Roads Commission, and that the Department of Labor and Industry has authority under the law to compel arbitration. It is suggested that the provisions of Sections 4 to 12, inclusive, of Article 89 of the Code (1949 Supp.) encompass and are binding upon the State itself. To buttress this contention, the Congress of Industrial Organizations points to the provisions of Sections 62 to 75 of Article 100 of the Code, dealing with the use of injunctions in labor disputes.

It was a rule of the ancient English law that, "The King is not bound by any act of Parliament, unless he be named therein by special and particular words." That rule has come down to the present day so that it is clear that a restrictive statute, no matter how broad its terms, does not comprehend the government, unless the government is specifically mentioned. This is a rule of statutory construction, not absolute, which will yield if evidence is found that

the Legislature intended in a particular case that the sovereign be bound by the law and that its sovereign immunity has been waived.

In an effort to determine the soundness of the contentions that the Legislature intended the State to be bound by the arbitration law in Article 89, we have examined the sections of the law both in that Article and in Article 100 for evidence of such an intent. We find none. On the contrary, we find many hints that it was the legislative intent not to include the State. In Section 64 of Article 100 is found the following language, which is said to be declaratory of the public policy of the State:

“Negotiations of terms and conditions of labor should result from voluntary agreement between *employer* and employees. *Governmental authority* has permitted and encouraged *employers* to organize in *the corporate and other forms of capital control*. In dealing with such *employers* the individual unorganized worker is helpless to exercise actual liberty of contract, and to protect his freedom of labor * * *.” (Emphasis supplied.)

It is obvious from the reference to governmental control and the use of the word “employer” in the context in which it is found that the government is not intended to be, nor is it, comprehended in the definition of an employer under that Act.

Section 64 of Article 100 and Sections 4 to 12 of Article 89 are in *pari materia*, and the term “employer” as used in one section presumptively would have the same meaning when used by the Legislature in the other sections. Section 64 was enacted in 1935. At that time Sections 4 to 12 of Article 89 were already a part of the law. Those sections were repealed and re-enacted without substantial change, as far as here material, in 1945. Thus, at the time of the enactment of Section 64 of Article 100, the Legislature had

occasion to consider the meaning of the word "employer," as used therein, in relation to its use in Article 89 and, ten years after Section 64 became a part of the law, the Legislature again had occasion to consider the inter-relationship when it dealt with Sections 4 to 12 of Article 89 once more.

Another hint is found in paragraph 5 of Section 2 of Article 89, which was re-enacted at the same time as Sections 4 to 12 of Article 89, all by Chapter 938 of the Acts of 1945. By this provision "all officers and institutions of this State, including officers of the General Assembly," are directed to transmit to the Commissioner of the Department of Labor and Industry, all reports issued by them as soon as published, to aid the Commissioner in collecting statistics and information helpful to him in the discharge of his duties. Thus the Legislature directed its attention to officers and agencies of the State in the same Chapter which dealt with arbitration by employers. It is difficult to conceive that, if the lawmakers had intended the State to be comprehended within the term "employer" they would not have said so when they issued directions to officers and agencies of the State in another particular of the same subject matter.

Furthermore, it is clear that the Legislature itself directly, through the budget Acts, and through delegation of authority and power to the Standard Salary Board and the Employment Commissioner, protects the freedom of labor and the rights of the employees of the State by the use of the Merit System and otherwise. Also, significantly, Sections 77 and 78 of Article 100 of the Code, which follow immediately after the anti-injunction statutes, deal specifically with the hours of work of State employees and of the holidays to be enjoyed by them.

Thus, not only do we have the prima facie rule of construction that the government is not to be included in the provisions of Sections 4 to 12 of Article 89, but in support of this presumption is the relationship between the State

and those who work for it. This support of the negation of the binding of the government by labor laws is pointed out in some detail in *United States v. United Mine Workers of America*, 330 U. S. 258, 91 L. Ed. 884, where the Court said, at page 903 of 91 L. Ed.:

“Everyone of these qualifications in Section 13(a) and (b) we think relates to an economic role ordinarily filled by a private individual or corporation, and not by a sovereign government. None of them is at all suggestive of any part played by the United States in its relations with its own employees. We think that Congress’ failure to refer to the United States or to specify any role which it might commonly be thought to fill is strong indication that it did not intend that the Act should apply to situations in which the United States appears as employer.”

The *United Mine Workers* case, of course, is a late and most authoritative statement of the general rule with which we are concerned. In that case, the Court held that the government was not bound by the limitations of the Norris-LaGuardia Act, saying that in common usage the term “person” and “corporation” does not include the sovereign and the statutes employing those terms would ordinarily not be construed to do so. The Court said at page 902 of 91 L. Ed.:

“There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. * * * the rule has been invoked successfully in cases so closely similar to the present one, * * * that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-La-

Guardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the government in all cases."

See also *Dollar Savings Bank v. United States*, 19 Wall 227, 239, 22 L. Ed. 80, 82.

"The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the sovereign) in the least, if they may tend to restrain or diminish any of his rights and interests."

The Maryland rule is the same as that followed by the Supreme Court. For example, in *State v. Ambrose*, 191 Md. 353, the Court of Appeals, in effect, held that the words "person" and "corporation," when used in a statute would only include the State if the intention to include has been manifest, and that ordinarily they do not include the State. See also *Huffman v. State Roads Comm.*, 152 Md. 566 at 584; *State vs. Rich*, 126 Md. 643, 648, 649.

For the reasons we have set forth at length, it is our opinion that the Department of Labor and Industry has no jurisdiction to enforce arbitration proceedings against other departments or agencies of the State. The arguments of the Congress of Industrial Organizations are far more effective as a statement of what the law should be, in their opinion, than they are as to what the law is under the present wording of the statutes.

HALL HAMMOND, *Attorney General*.

ELECTIONS

ELECTIONS—NO FILING FEES REQUIRED TO BE PAID BY
CANDIDATES NOMINATED BY PROGRESSIVE PARTY.

February 7, 1951.

Mr. James P. Brock,
Administrative Assistant,
Secretary of State.

You have informed us that prior to the last election the Progressive Party filed in the Office of the Secretary of State certificates of nomination of certain candidates together with the fees prescribed by Sections 53 and 55 of Article 33 of the Code. The candidates of the Progressive Party were nominated at a Convention, in accordance with the provisions of Section 37 of the Election Law. The question which you have asked is whether the filing fees were payable by the candidates so nominated.

It is our view that the law requires us to answer your question in the negative. In 1919 the Attorney General ruled that the requirement for the payment of filing fees was applicable to candidates for nomination at primary elections only. 4 Opinions of the Attorney General, 62. Subsequently, in 1930, our predecessors ruled that, "Only those who become candidates subject to the primary election law are obliged to pay a fee * * *." 15 Opinions of the Attorney General, 146. By Section 44 of Article 33, independent candidates are required now to pay the same fees as candidates seeking nominations at primary elections. We ruled recently that candidates nominated by the State Central Committees to run at a special election for the House of Representatives were not required to pay filing fees. 33 Opinions of the Attorney General, 193. We find no specific direction in the law that candidates nominated under the provisions of Section 37 pay any fees.

We conclude, therefore, that the candidates of the Progressive Party were not required to pay the fees which accompanied their certificates of nomination, and that the Secretary of State may take the necessary steps to secure for them refunds from the State Treasury.

J. EDGAR HARVEY, *Deputy Attorney General.*

ELECTIONS—PERSON IS ENTITLED TO BE REGISTERED WHEN HIS RESIDENCE IN THIS STATE IS OF ONE YEAR'S DURATION, ACCOUNTING FROM THE TIME OF THE GENERAL ELECTION.

July 19, 1951.

*Mr. J. Edward Adkins, Jr.,
Chief Clerk,
Board of Supervisors
of Elections of Baltimore City.*

We have your letter of July 16, in which you inform us that it has been the practice, in determining the length of residence in Maryland of a person applying for registration as a voter, to compute the time by counting back one year from the date of the next general election.

That practice is in accord with the rulings of this Department. 23 Opinions of the Attorney General, 189. We see no reason to alter this because of the repeal of the Declaration of Intention Law by Chapter 421 of the Acts of 1949. That law, it will be remembered, did not change the qualifications of voters, it provided merely the evidence required for the purpose of proving the existence of the qualifications. *Pope v. Williams*, 98 Md. 59.

The next general election to be held in this State will be on November 4, 1952, and without undertaking to depart from our former rulings, we may suggest that we think it inadvisable for you to register at this time persons who have resided in Maryland for less than the period of one year required by the Constitution. Our reason for this conclusion is that in the event of a special election between now and November, 1952, it is possible that persons who have been registered prior to the expiration of their year of residence and who, therefore, are not qualified voters, may be permitted to vote therein. Hence, we think that at

this time, more than sixteen months in advance of the next general election, you should proceed with extreme caution in registering applicants whose actual residence in Maryland is less than the required year.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

EMPLOYEES' RETIREMENT SYSTEM

EMPLOYEES' RETIREMENT SYSTEM—ONLY ACTIVE MEMBERS OF SYSTEM MAY OBTAIN RETIREMENT BENEFITS—INACTIVE MEMBERS MAY NOT OBTAIN RETIREMENT BENEFITS.

March 21, 1951.

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

You advise that a former member of the Police Department of Salisbury, Maryland, who is a member of the Employees' Retirement System, became an inactive member of the System on September 11, 1950 by reason of the discontinuance of employment by the Police Department of Salisbury, and has made no contributions to the System since that date. Under date of September 20, 1950, that member made application to the System for retirement effective September 1, 1950, inasmuch as he is 63 years of age and credited with 18 years of service. The explanation which has been offered as a reason for the interim period between discontinuance of active service in the System and application for retirement is that the member thought he would obtain another job with the City. Such a job did not materialize and, thereafter, application for retirement was made.

The other case you present is that of a Trial Magistrate of Prince George's County. He resigned on August 31, 1950 and did not make application for retirement until December 22, 1950. The Trial Magistrate is 73 years of age and has had $4\frac{3}{4}$ years of membership service. You have suggested no reason for the delay between resignation from office and application for retirement.

With respect to both of these cases, you ask if the persons concerned may be permitted to retire under the provisions of Section 7(1) (a) of Article 73B, as amended by Chapter

237 of the Acts of 1949, in view of the fact that, in both instances, application for retirement was made at a considerable interval after the cessation of active membership. You ask also, in the case of the Trial Magistrate, if retirement may be had under the provisions of Section 7(10a) of Article 73B, as amended by Chapter 581 of the Acts of 1949.

To treat these questions in inverse order, it seems obvious that Section 7(10a) has no application to the Trial Magistrate. That Section permits appointed or elected members of the System, who have been appointed or elected for a fixed or indefinite term and are not continued in office, reappointed or re-elected to retire after the completion of 20 years of creditable service. From the facts, we understand that the Trial Magistrate about whom you write has had only $4\frac{3}{4}$ years of service and consequently, without expressing any opinion as to whether Section 7(10a) might otherwise have application, it is obvious that the Trial Magistrate cannot meet the condition of 20 years creditable service.

We consider therefore whether retirement in both cases may be had under Section 7(1) (a). That Section provides: "Any member *in service* may retire upon written application to the Board of Trustees * * * provided that such member * * * shall have attained the age of sixty (60) or shall have rendered thirty (30) years of creditable service as an employee and *notwithstanding that during such period of notification he may have separated from service.*" (Emphasis supplied.) "Service" is defined by Section 1(7) of Article 73B to mean "* * * service as an employee paid for by the State * * *".

Thus Section 7(1) (a) means that any member while an employee of the State may retire upon written application. The use of the phrase "in service", necessarily would indicate that application for retirement must be made at the time that the member has an employee's status and hence that of an active member making contributions,

rather than the status of an inactive member of the System. Such a construction seems mandatory by the use of the language contained at the end of Section 7(1) (a), which indicates that the right to retirement would not be defeated if the application for retirement is not finally acted upon before active service terminates. If it were the intention of the Legislature to permit inactive members of the System to make application for retirement, such language would be entirely unnecessary. On the basis of the foregoing, we can only conclude that the former member of the Police Department of Salisbury, Maryland, and the former Trial Magistrate for Prince George's County may not retire, inasmuch as they made no application for retirement prior to becoming inactive members of the Retirement System.

HALL HAMMOND, *Attorney General.*

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

EMPLOYEES' RETIREMENT SYSTEM—RETIREMENT OF ELECTED OR APPOINTED OFFICIALS NOT CONTINUED IN OFFICE—DEPUTY REGISTER OF WILLS WHO REFUSES REAPPOINTMENT MAY NOT THEREBY OBTAIN SPECIAL RETIREMENT BENEFIT AVAILABLE TO ELECTED OR APPOINTED OFFICIALS.

March 21, 1951.

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

You have asked whether a Deputy Register of Wills in the Office of the Register of Wills for Allegany County may retire under the provisions of Section 7(10a) of Article 73B, as amended by Chapter 581 of the Acts of 1949.

The member has prior service credit for 18 years and 5 months prior to the date of establishment, and more or less continuous membership service credit since the date of establishment. He was appointed Chief Deputy Register of Wills on the first Tuesday of December, 1946. On May 26, 1949 he was taken ill and did not return to his employment until May 1, 1950. On May 14, 1950, he was again taken ill and did not return to his employment until September 1, 1950. Since that date he has lost no time.

This member's full salary of \$291.66 per month was paid until January 1, 1950. On that date, with the consent of the Comptroller's office, his salary was reduced to \$200 per month, and remained at that figure until July 1, 1950. No compensation was paid from July 1, 1950 until September 1, 1950, and on the latter date compensation at the rate of \$200 per month was resumed.

On December 5, 1950 all Deputies in the Office of the Register of Wills for Allegany County received their oath of office. The member about whom you write asked at that time if his salary was going to be restored to its original figure. He was told that it would remain at \$200 a month, and he stated that he would decline to take the oath of office as a Deputy Register of Wills. We understand he has not since taken the oath of office.

Application has been made by the member for retirement effective February 1, 1951 under the provisions of Section 7(10a) of Article 73B. That Section, in so far as pertinent, provides that "if any person, while being a member of the State Employees' Retirement System, has been or may hereafter be appointed or elected to any State office for a fixed or indefinite term and not be continued in office, re-appointed or re-elected, after the completion of twenty years of creditable service, regardless of age, such member may elect * * * to be paid a pension * * *." The Section subsequently provides for computation of the amount of pension and material not here pertinent.

Section 7(10a) has application to persons who are appointed or elected to a State office for a fixed or indefinite term, and not continued in office, reappointed or re-elected. Of course, the provisions about election would have no application to a Deputy Register of Wills inasmuch as he holds an appointive office. However, in so far as the Section relates to appointed offices, we do not believe that it has application to the present case. As we understand the facts, the member about whom you write has specifically declined to qualify as a Deputy Register of Wills on his own motion. We do not understand that the Register of Wills evidenced any refusal or failure to re-appoint the member as one of his Deputies. Under such circumstances, we do not believe that it can be said that the member about whom you write was not continued in office or not re-appointed within the meaning of Section 7(10a).

Accordingly we conclude that the Chief Deputy Register of Wills in the office of the Register of Wills for Allegany County may not retire under the provisions of Section 7(10a) of Article 73B. We express no opinion as to the application, if any, of the provisions of Section 7(1) (a) of Article 73B.

HALL HAMMOND, *Attorney General.*

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

GENERAL ASSEMBLY

GENERAL ASSEMBLY—LEGISLATIVE COUNCIL—A COMMITTEE
OF THE LEGISLATIVE COUNCIL MAY NOT DELEGATE ITS
POWER TO ANOTHER AGENCY.

September 24, 1951.

*Mr. Omar D. Crothers, Jr.,
The Legislative Council.*

You advise me, as Chairman of the Judiciary Committee of the Legislative Council, that you have received a request from the Honorable John F. Lillard, Jr., a member of the House of Delegates from Prince George's County, that the Judiciary Committee appoint the members of the Prince George's County Delegation in the House as a sub-committee of your Committee, with full power of subpoena, interrogation of witnesses, and the right to cite for contempt to the Circuit Court for Prince George's County. You wish to know whether the Legislative Council could appoint a committee of Delegates who are not members of the Legislative Council and invest them with the powers requested.

It is entirely clear to me that this could not be done. In the case of *Browner v. Supervisors*, 141 Md. 588, the Court of Appeals held that the validity of a State-wide law enacted by the Legislature could not be made to depend, by the terms of the law itself, upon a referendum of the voters. The Court of Appeals, in holding that this could not be done, said:

“* * * we rest our conclusion upon two grounds, one, that the people of Maryland, having delegated to the Legislature of Maryland the power of making its laws, that body could not legally or validly redelegate the power and the authority thus conferred upon it to the people themselves; and two, that the people of the State from whom the Legis-

lature itself derives its powers, having prescribed in the Constitution of the State the manner in which its laws shall be enacted, it is not competent for the Legislature to prescribe any other or different way in which its laws may be enacted."

The limitation which the Court sets upon the Legislature itself as to the re-delegation of power, and the reasons for that limitation apply with equal force to a Committee of the Legislature. The general rule is that a legislative committee, which is to function when the Legislature itself is not sitting must have its powers spelled out by a legislative act. *Marshall v. Harwood*, 7 Md. 466. See also 49 Am. Jur. pp. 258, 259. It is there said in regard to such committees:

"The scope of the powers of a legislative committee and the matters which it may investigate are referable primarily to the act or resolution to which it owes its existence."

This is not to say that a legislative body, having a right to do a particular act, even as is true under the general law of agency, cannot select the means within reasonable bounds. Such a body would not be precluded, for example, from re-delegating incidental powers which it, itself, may exercise. Certainly, however, the right to subpoena and to cite for contempt is not merely a re-delegation of an incidental power. It was thought necessary for the discharge of the functions and powers of the Legislative Council to give it the explicit right to "administer oaths, issue subpoenas, compel the attendance of witnesses", and, in case of disobedience, to make it the duty of the Circuit Court for the Counties, and the Supreme Bench of Baltimore City to compel obedience by proceedings for contempt. False swearing by any witness before the Council was constituted and made punishable as perjury. Certainly if a legislative act was required to confer upon a Committee of the Legislature itself the powers we have enumerated, it would take

an act of the Legislature to confer upon individual members of that body similar powers; the Council itself cannot re-delegate the powers which the Legislature has given it to those who are not members of the Council.

The solution to the problem might well be the one you suggest, that is, the appointment of a sub-committee of the Council itself to initiate and carry on any investigation which the Prince George's County Delegation felt was required or appropriate.

HALL HAMMOND, *Attorney General.*

GEOLOGY, MINES AND WATER RESOURCES

GEOLOGY, MINES AND WATER RESOURCES—STATE PERMIT
REQUIRED FOR FEDERAL GOVERNMENT TO CONSTRUCT
DAM AT LITTLE FALLS ON POTOMAC RIVER.

November 15, 1951.

Mr. Arthur B. Stewart,
Chairman, Commission on Geology,
Mines and Water Resources.

I have given thorough consideration to your letters relating to a proposed dam on the Potomac River at Little Falls, Maryland, about one mile northwest of the District of Columbia line, for the expansion of the waterworks in the District of Columbia and environs, as well as the letter from the Corps of Engineers of the United States Army describing the project. I have also checked House Document No. 480 of the 79th Congress, 2d Session, which you furnished me for use in our consideration of the problems raised by your inquiry.

The Government's letter asks as to the need for a permit from the State of Maryland for the building of the dam.

There is no doubt, of course, that the Government has the power under the Constitution to construct an aqueduct for the furnishing of water to the City of Washington. The Court of Appeals of Maryland, in the case of *Reddall v. Bryan*, 14 Md. 444, said, at page 478:

“We are also of opinion that the government of the United States possesses the power, under the Constitution, to construct such aqueduct, drawing its supply of water, if necessary, from within the limits of Maryland, and using and occupying lands for that purpose in Maryland, by the permission and consent of the State. We have not failed to

recognize the force of many of the views presented in the able arguments of the appellant's counsel on this point; and we appreciate the delicacy and importance of questions, involving the exercise by the general government, of powers not expressly granted. We do not undervalue the doctrine which inculcates a jealous and watchful vigilance against any encroachment upon the rights of the State; but we know of nothing to prevent a State from entering into any contract which is not prohibited by the Constitution of the United States or its own fundamental law. We regard the power of the Legislature to pass the Act of 1853, as clearly recognized by the 46th section of the 3rd Article of the State Constitution, and we think the power of Congress to accept the privileges granted under the Act of 1853, and to provide for the construction of the aqueduct, is conferred by the last two clauses of the eighth section of the first Article of the Constitution of the United States."

The State of Maryland has clearly enunciated its policy as to natural resources, including water, by the provisions of Article 96B of the Annotated Code of Maryland. In response to the request of the Government in its letters to you, I set forth the provisions of Sections 4, 5 and 6 of Article 96B:

"4. From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political sub-division of the State, to appropriate or use any waters of the State, surface or underground, without the consent or permit of the Water Resources Commission, in writing, previously obtained, upon written application therefor to the Commission. Nothing in this section shall be construed to apply to the use of water for

domestic and farming purposes or to the use of water for an approved water supply of any municipality; nor shall it apply to any particular use in existence on January 1, 1934, provided such use is not thereafter abandoned.

“5. (a) From and after January 1, 1934, it shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political sub-division of the State, to construct, reconstruct or repair any reservoir, dam or waterway obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in, addition to, or repair of, any existing waterway obstruction; or in any manner to change or diminish the course, current, or cross-section of any stream or body of water, wholly or partly within, this State, except the tidal waters, without a permit from the Water Resources Commission, in writing, previously obtained, upon written application therefor to said Commission. Nothing in this section shall be construed to apply to any dam or obstruction which is ten feet or less in height above the elevation of the stream bed or waterway, nor shall it apply to any reservoir with a storage capacity of less than one million gallons, nor shall it apply to any structure for the impounding of water over non-tidal swamp lands for the propagation of muskrats.

“(b) Nothing in this section shall be construed to extend to or affect in any way ‘farm ponds’ constructed for purposes of soil-conservation, propagation of fish, watering of stock, and fire protection, except as in this sub-section provided. Farm ponds in order to be exempt shall be formed

by the construction of an all-earth dam or embankment with an all-earth spillway; the possible depth of water at the spillway level of the dam or embankment shall not exceed nine (9) feet; the water surface area of the pond at the spillway level shall not exceed 60,000 square feet; the drainage area contributory to or diverted to the pond shall not exceed one hundred acres; the dam or embankment forming the pond shall not be closer than five hundred feet to a place for human habitation or public road so situated as to be endangered by the breaking or failure of the dam or embankment.

“Prior consent in writing for the construction of any such farm pond shall be obtained from all abutting property owners within a distance of five hundred feet downstream from the dam or embankment. Copies of such consents and of the location and construction plans and specifications of the dam or embankment shall be filed with the Commission before the construction thereof is commenced. Any proposed construction or change which would increase the possible depth of water at the spillway level of an existing farm pond, or which would increase the water surface area of any existing farm pond, shall be subject to the procedures and requirements specified in this subsection. Notice of the proposed removal or destruction of any such dam or embankment shall be sent to the Commission at least thirty days in advance thereof.

“6. Each application for a permit required by this Article shall be accompanied by maps, drawings, and specifications of such proposed use or water-way obstruction, or of the said changes, additions, or repairs, proposed to be made, and such other data and information as the Commission may require.”

Sections 7 and 8, as well as the remaining Sections would also be of interest in this connection.

The Potomac River is, of course, wholly within Maryland and at Little Falls is not tidal waters, I take it. The statute, therefore, on its face, would clearly apply.

HALL HAMMOND, *Attorney General.*

GOVERNOR

GOVERNOR—FINES AND FORFEITURES—WHILE THE CONSTITUTION EMPOWERS THE GOVERNOR TO GRANT REMISSIONS OF FINES AND FORFEITURES, THE FAILURE OF A TRIAL MAGISTRATE TO COLLECT A CHECK FOR A FINE DOES NOT JUSTIFY THE EXERCISE OF POWER TO REMIT.

October 3, 1951.

*Mr. Handy B. Truitt,
Trial Magistrate for Worcester County.*

Your letter of September 21st addressed to Governor McKeldin has been referred to us for reply. You state that on August 11th last you imposed a fine of \$200.75 upon a person who was found guilty by you of violating a provision of the motor vehicle laws, and that the fine was paid by a third person who gave his check to you for the above amount. The traverser was then released from custody. You remitted the above sum to the Department of Motor Vehicles and, thereafter, the check was returned to you because payment was stopped by the drawer thereof. You request the Governor to order the refund of the fine so that you may make good your loss.

It is not to be doubted that the Governor has the power to remit fines and forfeitures, Constitution, Article II, Section 20. However, this is a power which ordinarily is exercised sparingly and only for the purpose of preventing a miscarriage of justice. The single reason which you advance as a basis for the remission is the fact that you accepted a check upon which payment was subsequently stopped. Subsection (d), of Section 285 of Article 66½ of the Code provides that:

“Any Justice of the Peace, Committing Magistrate or Police Justice accepting checks, drafts or any other unsecured evidences of debt in payment

of fines, or in lieu of bail, shall do so at his own
risk * * *."

In our view, the facts presented do not justify the exercise by the Governor of his constitutional power to remit the fine.

HALL HAMMOND, *Attorney General.*

INSURANCE

INSURANCE—LICENSES—AGENTS AND SOLICITORS MAY BE GRANTED LICENSES LIMITED TO ONE OR MORE KINDS OF INSURANCE, WITHOUT REGARD TO THE NUMBER OF KINDS OF INSURANCE WRITTEN BY THE COMPANIES THEY REPRESENT.

May 18, 1951.

Mr. Harvey M. Chesney,
Insurance Commissioner.

Your Department recently inquired whether it should issue agents and solicitors licenses which are limited to the insurance lines for which the licensees have qualified, or must each agent and solicitor for a multiple line company be qualified to write all the lines which the company writes with a license correspondingly broad.

The answer to your question is not entirely free from doubt. The language in the definition section of Article 48A of the Code (1947 Supp.), namely, Section 82, could be interpreted to mean that an agent or solicitor is one licensed with authority "to solicit insurance for such company." On the other hand the section most directly concerned with the issuance of licenses, Section 92B of Article 48A, as amended by Chapter 512 of the Acts of 1949, indicates that the applicant for a license must be one who has qualifications adequate for the soliciting of "the kind or kinds of insurance to which the license may extend." There is further language in this section which permits agents or solicitors who had licenses in force on June 1, 1942, and who thereafter were in the armed services, to renew without examination "a license to sell the same class of insurance for which he then had a license." The section goes on to say "nor shall an examination be required for the renewal of any licenses, or for additional licenses covering the same

class of insurance, except in cases where the license has been suspended or revoked as in this Article provided.”

It is my view that on balance, the legislative intent must be held to be that an agent or solicitor may be given a license limited to one or more kinds of insurance without regard to the number of kinds which the company he represents writes.

HALL HAMMOND, *Attorney General.*

INSURANCE—STATE INSURANCE DEPARTMENT MAY REQUIRE
THAT APPLICATIONS FOR LIFE, ACCIDENT AND HEALTH
INSURANCE CONTAIN QUESTIONS THAT ARE SUSCEPTIBLE
OF FACTUAL ANSWERS.

December 3, 1951.

*Mr. M. H. LeVita, Actuary,
State Insurance Department
of Maryland.*

In your recent letter you state that applications for life, as well as accident and health insurance often contain questions which cannot be answered by a factual statement and which, in effect, elicit only the opinion or judgment of the applicant. As an example, you give the question: "Have you ever had heart disease, diabetes, cancer or any other sickness or disease?" It is felt that the answers to these so-called "opinion questions" place the insured in a precarious position unless they are qualified by the words: "to the best of my knowledge and belief." You wish to know whether the authority vested in the Insurance Commissioner, under the provisions of Article 48A, Section 106(3) of the Annotated Code of Maryland (1947 Supp.), permit you to require that this phrase be added in qualification of "opinion questions." Section 106(3) provides:

"(3) The Insurance Commissioner may disapprove any such policy or contract, application, rider, endorsement or certificate, if he finds that the same contains any provision, or has any title, heading, backing or other indication of the contents of any or all of its provisions which is likely to mislead the policyholder, contract holder or certificate holder."

We are of the opinion that an insured could well have been misled by such "opinion questions." The average applicant for insurance would certainly believe that he is

expected to answer such questions only to the best of his knowledge and belief. However, the legal effect of an unqualified answer to such a question has been stated by the Court of Appeals in *Silberstein v. Mass. Mu. Life Ins. Co.*, 189 Md. 182, 187, 55 A 2d, 334, 337, as follows:

“* * * We specifically hold that a material misrepresentation by an applicant for life insurance, in reliance upon which a policy is issued, avoids the policy, regardless of whether the misrepresentation was made intentionally or through mistake and in good faith, because it results in the assumption by the insurer of a risk different from that which the applicant led it to suppose it was assuming. *Bankers' Life Insurance Co. v. Miller*, 100 Md. 1, 59 A. 116; *Aetna Life Insurance Co. v. Millar*, 113 Md. 686, 78 A. 483; *Loving v. Mutual Life Insurance Co. of New York*, 140 Md. 173, 117 A. 323; *Metropolitan Life Insurance Co. v. Samis*, 172 Md. 517, 528, 192 A. 335; *Schloss v. Metropolitan Life Insurance Co.*, 177 Md. 191, 199, 9 A. 2d 244.”

The majority of the courts in this country seem to be in accord with this proposition, as expounded by the Court of Appeals. See the cases collected in Appleman's "Insurance Law and Practice", Vol. 12, Sec. 7305.

However, there is a growing body of authority which holds that, where the questions propounded are subjective in nature so as to require the belief or opinion of the insured, the policy will not be avoided for false representations, unless the insured knew that they were false or was chargeable with such knowledge. *Pacific Mut. Life Ins. Co. v. Cunnningham*, 54 Fed: 2d 927, 930; *Travelers Ins. Co. v. Heppenstall Co.*, 360 Pa. 433, 61 A 2d 809, 811; *Metropolitan Life Ins. Co. v. Urback*, 138 N. J. Eq. 108, 46 A 2d 905, 906; *Nogulich v. Metropolitan Life Ins. Co.*, 317 Ill. App. 411, 46 N.E. 2d 396, 400; *Kay v. Occidental Ins. Co.*,

28 Wash. 2d 300, 183 Pac. 2d 181, 182; *Metropolitan Life Ins. Co. v. Bates Ins. Co.*, 213 So. Car. 269, 49 S.E. 2d 201, 205.

Since Maryland construes such representations against the insured, and strictly, it would seem desirable that the applicant for insurance be protected either by being able to qualify his answer to "opinion questions", or by requiring that the questions be so phrased that the insured can answer with certainty of his own knowledge. The problem remains whether the phrase "to the best of my knowledge and belief" would legally qualify the answer so that the knowledge and good faith of the insured would be the criteria where the insurer desires to avoid the policy for a misrepresentation. That this phrase would have such an effect is indicated by Appleman on "Insurance Law and Practice", Vol. 12, Sec. 7347, where it is said:

"If the answers are certified as being true in so far as they are known to the applicant, he assumes responsibility only for the truth of such statements as are within his knowledge. And where the statements are declared to be true to the applicant's 'best knowledge and belief', only his good faith is thereby warranted, the statements really amounting to representations rather than warranties."

See also *Northwestern Mut. L. Ins. Co. v. Gridley*, 100 U.S. 614, 25 L. Ed. 746; *Aetna L. Ins. Co. v. France*, 94 U.S. 561, 24 L. Ed. 287; *Houghton v. Manufacturers Mut. Ins. Co.*, 8 Met. Mass. 114, 41 Am. Dec. 489. Both insured and insurer would be better protected if the questions were so phrased as to elicit a factual response, rather than one in the nature of an opinion; the insured could then positively answer from his own knowledge. Certainly the insurer should expect no more than this. For example, rather than "to the best of your knowledge and belief, have you ever had heart trouble?", the question could be phrased in this manner; "Have you ever been told by a Doctor or registered

nurse that you have or may have heart trouble?" or "Has a medical examination ever revealed to you indications of heart trouble?" It is our view that a requirement of questions susceptible of only factual answers is the real solution to your current problem.

HALL HAMMOND, *Attorney General.*

A. T. HARTMAN, *Spec. Asst. Attorney General.*

LEGISLATURE

LEGISLATURE—PROCEDURE TO BE FOLLOWED IN CONTEST OF
SENATE SEAT.

January 23, 1951.

*Hon. John Grason Turnbull,
State Senate.*

In your recent letter you ask about the procedure in the matter referred to the Elections Committee of the Senate of which you are Chairman, in the election contest between the Democratic Senatorial Candidate and the Republican Senatorial Candidate of Garrett County. You wish to know the rights of the Committee as to the subpoenaing of witnesses, as to the recounting of ballots, and as to the procedure to be followed in determining the disputed contest.

The right of the Legislature to pass on the matter is, of course, conferred by Section 19 of Article III of the Constitution of Maryland which provides :

“Each House shall be the judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State * * *”

Section 23 of the same Article of the Constitution provides that :

“Each House may punish by imprisonment * * * any person not a member, * * * for obstructing any of its proceedings, or any of its officers in the execution of their duties * * *”

Section 49 of Article III provides that the General Assembly shall have power to regulate by law, “all matters which relate to the Judges of Election, time, place and

manner of holding elections in this State, and of making returns thereof.”

In *Price v. Ashburn*, 122 Md. 514, the Court of Appeals said at page 525:

“The Senate of Maryland, itself, under section 19, Article 3, of the Constitution, is the tribunal which has the sole power to decide and judge of the qualifications of its members, to the exclusion of every other tribunal. It is made the final and exclusive judge of all questions whether of law or of fact respecting such election returns or qualifications, so far or as they are involved in the determination of the right of any person to be a member thereof. We express no opinion, and disclaim all intention to investigate the question of the title to the office of senator in this case. *Covington v. Buffet*, 90 Md. 578.”

Fortunately there is available in the House Journal for 1927 a record of the proceedings in the election contest between the Republican Candidate, Frank Small, Jr., and the Democratic Candidate, Kent R. Mullikin, for the House from Prince George's County. You will find the Petition and Memorial of Mr. Mullikin under date of January 5th on pages 6 to 8 of the Journal. The Journal records the fact that the matter was referred to the Committee on Elections even as in the pending case.

Under date of March 15th on pages 645 to 646 of the Journal, the Elections Committee reported to the House that a decision in the matter required that the ballots cast be recounted by the Committee, and it further recited that:

“Whereas, the Senate of Maryland and the House of Delegates have both established precedents in contested election cases upon facts similar to the one before us in the case of James A. Pearce

vs. Charles T. Westcott, John R. Patterson vs.
Joseph B. Andrews, and Orlando Harrison vs.
Quince Ashburn, and * * *”

And then recites that the Committee has determined to commence a recount on the date named, and requests the passage of an Order of the House of Delegates that the Supervisors of Elections of Prince George's County and the Clerk of the Circuit Court for that County are directed to be present in person or by deputy at the time set, and to produce the ballot boxes, and further requests authorization that the Committee be empowered to appoint two clerks to tally the ballots—one clerk to be named by Mr. Small and the other by Mr. Mullikin.

The Committee requested the further Order that the Speaker be directed to appoint two watchmen, one of whom shall be in actual custody of the ballot boxes and the ballots throughout the contest, except during the hours that the Committee is actually recounting the ballots. Then a further notation in the Journal of March 24th, page 942, that the Committee having counted the ballots found that Mr. Mullikin had received more votes than Mr. Small, and reports that Mr. Mullikin should be returned the duly elected member of the House of Delegates, and the Committee recommended the adoption of a Resolution to that effect.

I take it that the Sections of the Constitution to which I have referred and the citations from the Court of Appeals of Maryland fully justified the procedure in the case of *Mullikin v. Small*, which itself was apparently based upon two previous similar proceedings, and I would suggest that your Committee follow the same procedure.

I think there can be no question that the Senate can pass a resolution requiring the production of such witnesses, documents, ballots, etc. as it shall deem necessary for the use of the Committee and has full power to determine the

procedure to be followed and the result to be decided, pursuant to recommendations of the Committee.

If the Committee should desire our help or advice while it is actually passing on the controversy, I will be glad to arrange to have such help and advice furnished.

HALL HAMMOND, *Attorney General.*

MERIT SYSTEM

MERIT SYSTEM—ACCRUED UNUSED VACATION LEAVE SHALL BE COMPENSATED FOR ON THE BASIS OF WORKING DAYS WHEN RESIGNATION WAS TENDERED AND ACCEPTED PRIOR TO JUNE 1ST, 1951.

June 28, 1951.

*Mr. Russell H. McCain, Chairman,
State Roads Commission.*

You have asked us to advise you what effect Chapter 220 of the Acts of 1951 has upon the earned unused vacation leave due Mr. Leroy W. Kern, Right of Way Engineer of the State Roads Commission, when his resignation becomes effective on July 1, 1951.

I am informed that Mr. Kern advised the Commission on April 23, 1951 of his desire to resign effective as of July 1, 1951. On May 8, 1951, the Commission formally accepted Mr. Kern's resignation, effective July 1, 1951. The records disclose that as of July 1, 1951, Mr. Kern will have an accrued unused vacation leave of thirty-seven working days.

Heretofore, prior to the enactment of Chapter 220 of the Acts of 1951, it has been held that an employee leaving the State service was entitled to compensation for unused vacation leave on the basis of working days, i.e., exclusive of Saturdays, Sundays and holidays.

In 32 Opinions of the Attorney General on Page 251, the Attorney General clearly enunciated this principle in the following language:

“It is our opinion that the interpretation of the complainants is correct. Section 22 of Article 64A of the Code provides that, ‘Every Classified employee shall receive as vacation in each calendar

year a leave of absence with pay for fifteen *working* days . . .' Thus it is clear that the statute contemplates, and we are advised that the practice has been, that an employee is entitled to fifteen working days exclusive of Saturdays, Sundays and holidays. Obviously the granting of an unused vacation allowance upon resignation should be based upon the same theory if it is to be given at all. We see no reason to make 'fish' of an employee who gets vacation allowance while working, and 'fowl' of one who works until the time of resignation, particularly when the strict rule could be easily evaded by the employee taking his vacation and then resigning."

Chapter 220 of the Acts of 1951 which became effective June 1, 1951 provides in part as follows:

"* * * Subject to the exceptions herein before set forth, every classified employee, upon the termination of his service as a classified employee, shall be entitled to receive a sum equivalent to 1/30 of his last monthly compensation, multiplied by the number of days of his unused vacation leave."

The question to be determined is whether or not the provisions of the new statute changed the law that was in existence prior to June 1, 1951 as set forth in the above quoted opinion of the Attorney General, insofar as Mr. Kern is concerned.

It is our opinion that the provisions of said Chapter 220 of the Acts of 1951 do not affect Mr. Kern, since, his resignation was given to the Commission under date of April 23, 1951 and officially accepted by the Commission on May 8, 1951. This was prior to the date that said Chapter 220 became effective.

To hold otherwise would penalize Mr. Kern because of his loyalty and devotion to duty in offering to remain with the Commission until after June 1, 1951, the effective date of the new Act.

It is our opinion, therefore, that Mr. Kern is entitled to receive compensation for unused earned vacation leave, calculated on a working day basis from the last date of his active service.

Inasmuch as the question of the effect of Chapter 220 of the Acts of 1951 on the previous interpretation of the Statute governing this question is not before us for determination, we make no comment as to its effect thereon.

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

MERIT SYSTEM—STANDARD SALARY BOARD—STANDARD SALARY BOARD HAS AUTHORITY TO PROVIDE FOR DEDUCTIONS FROM SALARIES FOR ACCOMMODATIONS FURNISHED TO EMPLOYEES OF DEPARTMENT OF CORRECTION.

September 26, 1951.

*Mr. Enos S. Stockbridge,
Chairman and Director,
State Department of Correction.*

We have your letter concerning the plan adopted recently, whereby employees of the State are paid on a gross salary basis and charges are made against them for maintenance, subsistence and other benefits. You wish a ruling concerning the application of this plan to the Warden and Superintendents of the Maryland Penitentiary, the House of Correction, the Reformatory for Males and the Women's Reformatory, in view of the fact that the statute relating to each provides that, in addition to the salary, the Board may allow subsistence, fuel and dwelling. Code, Article 27, Sections 759, 761B and 766. This plan was adopted by the Standard Salary Board (Code, Article 64A, Sections 15 et seq.) which is authorized to establish the rates of pay for all classes of positions in the State service, both classified and unclassified. In determining salary scales, the Board is directed to "give consideration to experience, the prevailing rates of pay for the services performed, and for comparable services in public and private employment, living costs, maintenance or other benefits received by employees, and the State's financial condition and policies."

In your letter you point out that the official in charge of each institution mentioned is virtually on twenty-four hour duty, is required to live at the institution and, consequently, he has no choice as to his place of residence. You observe that each of the officials accepted his position with the residence provided by the State and has never paid for it, and that you are convinced that the proposed change is a

violation of the spirit and letter of the statutory provision of Article 27 to which we have referred.

The Standard Salary Board was created by Chapter 385 of the Acts of 1939. The purpose of that enactment was, in part, to bring about equivalent salaries for persons doing substantially the same sort of work. Although that Act did not undertake expressly to repeal other laws inconsistent therewith, it cannot be doubted, we think, that it has superseded other laws which are contrary to its provisions. In enacting that law, it was the undoubted intention of the General Assembly to make its provisions applicable throughout all branches and departments of the State, and there is no evidence that it was not intended to include the Department of Correction. It seems to us that it is within the power of the State to change the salary plan, as it has done, whereby the remuneration for a position is fixed and, as an offset against it, a deduction is made for the accommodations which are furnished. In inaugurating this system, the salaries of the Wardens and Superintendents of the several institutions were fixed within the range of \$7,560 to \$9,450 beginning July 1st last. This compares with a salary range of \$5,632 to \$7,042 prior to that time. The maximum and minimum salaries have been increased approximately \$2,000, yet the maximum charge made by the State for living accommodations, according to your letter, is \$720 per year.

It is our opinion that the change which has been brought about as a result of the recommendations of the Standard Salary Board is permitted under the provisions of the statutes which we have mentioned, and consequently we cannot conclude that the plan is an unlawful usurpation of the authority vested in the Board of Correction. If any Department is to be excluded from the operation of the plan, which is State-wide in its application, that result must come, we think, from a change in the rule by the Standard Salary Board, or by an Act of the General Assembly.

In another letter addressed to us, you question the application of the new salary plan to employees of the several institutions under your control. You state that you require employees to eat their meals at their posts of duty, and you fear the consequences if their salaries are reduced by the amount necessary to cover the costs thereof. In this connection we are informed that the salary scale of guards was increased on July 1st, and that it now ranges from \$2,820 to \$3,525 against a scale of \$2,310 to \$2,890 prior to the present fiscal year. We think this plan is binding upon you in respect to employees of the institutions, and that you may be excluded therefrom only by an alteration of the rule by the Standard Salary Board or by an Act of the General Assembly.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

MORGAN STATE COLLEGE

MORGAN STATE COLLEGE—NEITHER THE STATE NOR THE COLLEGE IS LIABLE TO STUDENTS FOR INJURIES SUSTAINED WHILE CARRYING OUT ASSIGNMENTS OF SCHOOL AUTHORITIES.

June 6, 1951.

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

We have your letter in which you seek advice concerning the liability, if any, which may be incurred by the State where students of Morgan State College are injured while carrying out assignments designated by school authorities. The Court of Appeals has held in a number of cases that the State, in carrying on public education, is engaged in a governmental function. *Baltimore v. Schwind*, 175 Md. 60, *Williams v. Fitzhugh*, 147 Md. 384. It is established that neither in contract nor in tort may a suit be maintained against a governmental agency, first, where specific legislative authority has not been given; second, even though such authority has been given, if there are no funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it. *University of Maryland v. Maas*, 173 Md. 554, *Williams v. Fitzhugh, supra*, *State v. Baltimore & Ohio R.R. Co.*, 34 Md. 374, *Weddle v. School Commissioners*, 94 Md. 334.

Chapter 332 of the Acts of 1943, amending Code, Article 65A, Section 3, places the responsibility for the conduct and management of the affairs of Morgan State College in a Board of Trustees but the Statute does not abolish the State's immunity from suit. Funds for the operation of the College are included in the annual budget, but nothing is allocated for the satisfaction of damage claims. In the light of cases cited, it is our view that there is no liability

upon the State for injuries sustained by students in the circumstances mentioned.

However, the immunity of the State from suit does not operate to exempt an officer or agent from liability for his own tort. Thus in *Davie v. Regents of University of California*, 66 Cal. App. 689, 227 Pac. 247, it was held that the immunity of State University Regents from liability for negligence of its servants and agents in its infirmary did not extend to a negligent servant. Maryland has recognized the principle that while a master may not be liable, his agent may be held for negligent acts while carrying out his duties for such principal. *Consolidated Gas Co. v. Connor*, 114 Md. 140.

In view of these conclusions, it may be advisable for the College to consider the propriety of procuring insurance in an appropriate form, to assure its staff against both the cost of litigation and the payment of claims or judgments for damages.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

MOTOR VEHICLES

MOTOR VEHICLES—GROSS WEIGHT OF MOTOR VEHICLES—
PENALTY FOR MOTOR VEHICLE CARRYING OVERWEIGHT
OVER POSTED BRIDGE SHOULD BE IMPOSED AS PRE-
SCRIBED BY CHAPTER 311 OF THE ACTS OF 1951, AND
NOT AS PRESCRIBED BY SECTION 83 OF ARTICLE 89B OF
THE CODE.

August 24, 1951.

Mr. J. Milton Dick,
Trial Magistrate.

You have before you for decision a case wherein a truck was seized and the operator charged with violation of Section 83 of Article 89B of the Code, because the truck, weighing 37,300 pounds crossed a bridge in Allegany County which was posted as permitting a maximum weight of 20,000 pounds only. Section 83 of Article 89B carries as a penalty for violation of its provisions a fine ranging from a minimum of \$25.00 to a maximum of \$100.00. You wish to know whether this penalty is applicable, or whether the heavy penalty prescribed in Section 254 (C) (g) (1) and (2), as enacted by Chapter 311 of the Acts of 1951, is the statutory test of punishment.

We are of the opinion, without reservation, that the penalty provisions of the 1951 Act are those which are in force, and which must be applied if the accused is found guilty. We say this for a number of reasons, among which are these: Section 1A of Article 89B of the Annotated Code (1947 Supp.) provides that the word "road" and the word "highway", both shall include all structures forming an integral part of a road or highway, including "bridges". Chapter 311 of the Acts of 1951, according to its title, gives warning that it relates generally to the "height, width, length and weight of certain motor vehicles operating on the State highways". Section 254 of Article 66½ of the

Annotated Code (1947 Supp.), as enacted by Chapter 311 of the Acts of 1951, specifies the axle loads and the gross weight permitted. Paragraph (d) of Section 254(C) makes it a misdemeanor to operate any of the enumerated vehicles "*on a public highway*" which has a gross weight in excess of the maximum registered weight (provided for in the statute), "or any statutory weight limit allowed under the provisions of this Article, *or Article 89B*." Section 254(C) (e) of Chapter 311 goes on to provide that "A violation of any of the sub-sections of this section or of any section in this Article *or Article 89B*", shall be considered as separate and distinct violations. It then says that "for a violation of the sections pertaining to the weights of vehicles, the violation constituting the greatest excess of weight over the limits imposed *in each instance* shall be the only violation for which the fine shall be imposed."

Paragraph (g) of Section 254(C) makes it mandatory for the Trial Magistrate "upon the conviction for a violation of any of the provisions of this section, Section 74 *and Article 89B*" to impose the following fines:

"(1) For a weight violation of less than 5,000 pounds over the registered weight *or any statutory weight limit*, a fine of 2 cents for every pound of excess weight shall be imposed.

"(2) For a weight violation in excess of 5,000 pounds over the registered weight *or any statutory weight limit*, a fine of 6 cents for every pound of excess weight shall be imposed." (Emphasis supplied.)

To summarize, the Legislature has made bridges a part of the highways and roads of the State. Chapter 311 of the Acts of 1951 makes it a criminal offense to drive an overweight vehicle on any highway which of necessity, therefore, must include driving the vehicle over a bridge. That Chapter further makes it a criminal offense to violate any statutory weight provision of Article 89B, and provides that the penalties shall be applicable to any violation, whether

it occurs by reason of operating a vehicle in excess of its registered weight or in violation of "any statutory weight limit". The Legislature could scarcely have more plainly spelled out the fact that the violation of a weight limit imposed by Article 89B is on the same plane as a violation of a weight provision of Article 66½. The matter is put beyond question by the fact that there is only one weight provision in Article 89B, namely, that imposed by Section 83 which forbids the passage over a bridge of a vehicle weighing more than the figure which the State Roads Commission has posted as a permissible limit. In other words, unless the Legislature meant that the provisions of Chapter 311, including the penalty provisions, were to apply to a violation of Section 83 of Article 89B, its reference to Article 89B in Chapter 311 would be absolutely meaningless, since there is no other Section to which the words could apply.

Chapter 311 contains the customary provision that all laws, or parts of laws, inconsistent with the Act are repealed to the extent of such inconsistency. The effect of Chapter 311, therefore, is to keep the substantive part of Section 83 of Article 89B, i.e. the part which constitutes a violation of law, and to repeal by implication the penalty provisions, making the penalty provisions of the new law in turn applicable to the violation of the part of Section 83 which is not repealed. It would seem that the legislative process is an excellent example of the case where partial repeal by implication is found to exist because a subsequent status takes over completely the regulation of a given subject, and is intended as the complete regulation of such a subject. See *State v. Coblenz*, 167 Md. 523 at 527, and our opinion to the Bank Commissioner, dated July 19, 1951, 36 Op. A.G. p. 107.

You are advised, therefore, in our view, the operator of the overweight truck is subject to the penalties prescribed by Chapter 311 of the Acts of 1951.

HALL HAMMOND, *Attorney General*.

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

MOTOR VEHICLES — LOCAL AUTHORITIES — MUNICIPALITY
MAY NOT REGULATE SPEED OF MOTOR VEHICLES—CON-
STRUCTION OF LAW IMPOSING FINES FOR EXCESS
WEIGHT.

September 26, 1951.

Mr. Theodore L. Miazga,
Trial Magistrate of
Prince George's County.

You have asked us to advise you upon two questions which have arisen in separate cases now pending before you. The first question, if we understand it correctly, relates to the authority of a municipal corporation to regulate the speed of motor vehicles within the corporate limits thereof. The speed at which motor vehicles may be operated in this State is prescribed in Section 157 of Article 661½ of the Code. Sub-section (c), among other things, fixes the speed limits "in the thickly settled or business parts of cities, towns, and villages * * *". The term "public highway" used in Section 157 (c) is defined in Section 2 (57) as including "any highway or thoroughfare of any kind used by the public whether actually dedicated to the public and accepted by the proper authorities or otherwise * * *". It follows, therefore, that the statute restricting the speed of motor vehicles is applicable to streets within the limits of incorporated cities and towns.

Section 1 of Article 661½ of the Code, as amended by Chapter 322 of the Acts of 1949, states that the provisions of that Article are intended to be State-wide in their effect, and that no City, County or other municipal subdivision shall have the right to make or enforce any local law, ordinance or regulation upon any subject for which provision is made in that Article, and that all local and municipal legislation and regulations upon the various subjects with which Article 661½ purports to deal, and all public local laws, ordinances and regulations inconsistent or identical therewith, or equivalent thereto, are repealed.

It is our view, therefore, that municipal authorities have no power to regulate the speed of motor vehicles except in public parks. This power is expressly reserved to them under sub-section (5) of Section 135 of Article 66 $\frac{1}{2}$. If, in the case now pending before you, the accused is charged with violating the speed laws on a public highway, not in a public park, he should be tried before you on a State warrant for violating Section 157, and not on a city warrant for violating an ordinance of the municipality. This change may be accomplished by the arresting officer in swearing out a warrant under the State law, and under the new warrant the trial may proceed to a final determination.

Your second question relates to Section 254 of Article 66 $\frac{1}{2}$ of the Code, as enacted by Chapter 311 of the Acts of 1951, and deals specifically with the penalty provisions set forth in sub-section (g). This sub-section, we think, is entirely free from doubt and uncertainty. It provides penalties for two classes of offenses. In the event a vehicle is less than 5,000 pounds overweight, the fine is two cents for every pound of such excess weight. In the event a vehicle is more than 5,000 pounds overweight, the two cent penalty provision is not applicable at all, but rather the fine is six cents for every pound of overweight beginning with the first pound thereof.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

MOTOR VEHICLES—WEIGHT OF TRUCKS—PUNISHMENT CONFINED TO VIOLATION WHICH CONSTITUTES GREATEST EXCESS OF WEIGHT OR AXLE OVERLOAD.

October 18, 1951.

Mr. George N. Lewis,
Director of Traffic Division,
State Roads Commission.

You have asked our opinion concerning two questions which have arisen under Chapter 311 of the Acts of 1951. This Act amended Sections 74, 249 and 285 of Article 66½ of the Code, repealed Sections 252 to 256, both inclusive, of that Article, and enacted three new Sections to be known as Sections 252, 253 and 254. The Act deals generally with the height, width, length and weight of certain motor vehicles. The first question presented by you is, if the same offense is a violation of subsection (a) of Section 254 and in addition thereto a violation of subsection (b) or (c) or (d) of said Section, may a fine be imposed for each violation. Your second question deals with a case where two or more axle loads of a vehicle are found to be in excess of the limits permitted by Section 254(a), and you ask if a fine may be imposed for each axle which is overloaded.

The answers to your questions depend upon the meaning of Section 254(e), which provides:

“A violation of any of the sub-sections of this section or of any section in this Article or Article 89B shall be considered as separate and distinct violations; provided, however, that for a violation of the sections pertaining to the *weights of vehicles*, the violation constituting the greatest excess of weight over the limits imposed in each instance shall be the only violation for which the fine shall be imposed.” (Emphasis supplied.)

It is to be observed from the quoted subsection that violations of Section 254 are to be considered as separate and distinct offenses, but in the case of a violation of the Sections pertaining to "the weights of vehicles" punishment is to be imposed for the greatest violation and no other. If the term "weights of vehicles" is construed to embrace "axle load", for which provision is made in Section 254 (a), then obviously a violator may not be punished under more than one of the first four subsections of Section 254, for the same offense. On the other hand, if the terms "weights of vehicles" and "axle load" are separate and distinct and have no relation to each other, a person may be punished for overloaded axles and for exceeding the weight limits prescribed under any one of subsections (b), (c) and (d) of Section 254. It is necessary, therefore, for us to examine Chapter 311 in order to ascertain the legislative intent.

The title of the Act states, among other things, that it relates to the "height, width, length and weight of certain motor vehicles" and that it provides for the payment of the expenses in enforcing the statutes relating to the "height, width, length and weight of motor vehicles". There is a complete absence of any reference in the title to axle loads as such. In the body of the Act, provision is made for the issuance of permits by the State Roads Commission for "oversize motor vehicles", for which a charge is imposed "on the weight * * * in excess of that permitted by law". Then follow provisions dealing with the maximum width, height and length of vehicles using the highways.

We come then to Section 254, which contains twelve subsections, the first of which deals merely with axle loads. The next three subsections regulate the gross weight of vehicles. Subsection (e) is quoted at length above. Subsection (f) empowers certain officers to weigh vehicles when they have reason to believe "that the size or weight of a vehicle and load being operated on a public highway is unlawful". Subsection (g) provides the penalty applicable for "a weight violation * * * over the registered

weight or any statutory weight limit" at 2c or 6c per pound, depending upon the extent of the violation, "for every pound of excess weight" and Trial Magistrates are forbidden to suspend or reduce a fine for a violation of any of the provisions "relating to the weight of a vehicle". Subsection (l) confers jurisdiction upon certain Justices of the Peace to hear all complaints "of the violation of any of the provisions of the law relating to truck weights". Finally, Section 285 (e) makes provision for the disposition of the fines after paying salaries and other expenses "in enforcing the provisions of this Article limiting weight, height, width and length of motor vehicles".

Thus, it appears that axle loads are referred to in Section 254(a) only, while the term "weight of a vehicle and load" is mentioned in Section 254(f). In the latter subsection, we think it is clear that the word "load" is used synonymously with the word "cargo". If the terms "weights of vehicles" and "axle load" are separate and distinct and have no relation to each other, it follows that for a violation of the axle load provision Justices of the Peace are empowered by Section 254(h) to suspend or reduce the fine for a charge arising under Section 254(a) but that they have no such power if the charge comes under any one of the three following subsections which deal with the weights of vehicles. It is to be doubted that the General Assembly intended to bestow upon Justices of the Peace the power to suspend fines imposed for violating Section 254(a). Section 254(k) denies that power to a Justice of the Peace where a driver is convicted of refusing to stop his vehicle in order to permit it to be weighed.

Furthermore, the undoubted purpose of the Act was to exact heavy penalties from operators of overloaded trucks, which for years have caused extensive damage to our roads, and to discourage violations by imposing heavy fines. To accomplish that end, the General Assembly seemingly intended to withdraw from the Magistrates the power to suspend or reduce the penalty. It is not readily apparent

why there should be a distinction between the power to suspend a fine for violation of the axle load section and the power to suspend sentence for violation of the gross weight provision, especially when trucks with overloaded axles, as you inform us, do considerably more damage to the highways than do vehicles which exceed the gross weight limits. While the power of a magistrate to suspend a fine exists, if at all, by statute, and the General Assembly may grant or deny the right, and may impose limitations upon the grant, it is relevant for us to consider the result of a total or partial withdrawal of that power in our search for the true meaning of the term "weights of vehicles".

We may observe also that if the terms "axle load" and "weights of vehicles" are entirely unrelated, it may well be doubted if Chapter 311 provides a penalty at all for a violation of Section 254(a) because subsection (g) uses such terms as "weight violation", "registered weight", "statutory weight limit", "excess weight" and the like and nowhere does it speak of "axle load". A construction producing this result should be avoided if it is possible to do so on the ground that the Legislature could not have intended such an obviously unreasonable result.

Considering the enactment in its entirety, we are compelled to conclude that the term "weights of vehicles", as used in Section 254(e), applies not only to axle loads but also to gross weights and registered weights because in the title and throughout the body of the enactment the terms "weight", "weight violation", "weight limit", "weight of vehicle" and "truck weights" are used so that they indicate that they refer both to axle loads and gross weights.

It follows, in answer to your first question that for the same violation a person may be fined under Section 254(a), (b), (c) or (d), depending upon the sub-section under which the greatest violation has occurred, but that he may not be punished for any other violation. And we think this conclusion compels us to construe subsections

(a) and (e) of Section 254 so that if a truck is overloaded on two or more axles, punishment may be imposed for the axle overload which is the greatest and that no other punishment under Section 254(a) may be imposed.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

NURSES

STATE BOARD OF EXAMINERS OF NURSES—BOARD MAY RECEIVE INFORMATION FROM STATE DEPARTMENT OF EDUCATION TO DETERMINE EDUCATIONAL QUALIFICATIONS OF APPLICANTS WHO WISH TO REGISTER AS NURSES.

August 23, 1951.

*Mrs. Angela M. Shipley, Executive Secretary,
Maryland State Board of
Examiners of Nurses.*

We have your letter in which you advised us that for some years it has been the policy of your Board to work in conjunction with the State Department of Education in determining the educational qualifications of applicants desiring to take the examinations to become registered nurses. You informed us that your Board is not in a position to evaluate the educational credentials presented by applicants and, consequently, you inaugurated the policy of obtaining the advice and information of the State Department of Education in relation to these matters. Your policy has been questioned now, you state, by the Director of a non-accredited high school. Your suggestion that an applicant, a graduate of a non-accredited high school, take the high school equivalence examination has been resisted by the Director of the school. You have asked for our advice in the premises.

Article 43, Section 290 of the Code, provides that "It shall be the duty of said Board of Examiners to determine, and said Board is hereby empowered in its sound discretion to determine, the qualifications of all applicants for registration * * *" as nurses. That Section requires, among other things, that applicants furnish evidence that they have "received the equivalent of a high school education * * *". By Section 14 of Article 77 of the Code, the State Board of Education is directed to prescribe rules and regulations

for grading and standardizing all public schools and to fix the minimum requirements for issuing all certificates, diplomas, and academic, collegiate, professional or university degrees. The Section then provides that "No public school shall be officially titled a 'high school' without the consent and approval of the State Board of Education; nor shall any public or private educational institution issue any certificate, diploma or academic, collegiate, professional or university degree without having first obtained the assent of the State Board of Education and approval of said Board of the conditions of entrance, scholarship, and residence upon which said certificate, diploma or degree is issued".

Section 14A requires every private school or educational institution which charges tuition or fees for attendance and which offers a program of college, professional, preparatory, high school, junior high school, elementary, kindergarten or nursery school work, or any combination thereof, or which offers a program of trade or technical education, or both, or which gives pre-employment or supplementary training, or both, in fields of trade or industry, to secure a certificate of approval from the State Superintendent of Schools before it begins to operate in this State. Section 191 of Article 77 directs the State Board of Education, subject to the provisions of that Article, to prepare the course of study to be used by the several groups of high schools and authorizes it to make by-laws for their government. These Sections of Article 77, except Section 14A, which was enacted in 1945 and amended in 1947, have been in force for many years and their undoubted purpose is to maintain the public schools of this State at a high level and to empower the State Board of Education and the State Superintendent of Schools to prescribe the standards necessary to accomplish that end.

By Chapter 150 of the Acts of 1941, the General Assembly enacted what is now Section 191A of Article 77 of the Code. That Section, which was amended by Chapter 81 of

the Acts of 1943 and Chapter 39 of the Acts of 1951, permits a person who has not obtained a high school certificate or diploma and who meets certain qualifications to obtain an equivalent certificate. Examinations are given by the State Board of Education in the usual high school subjects and those passing the examinations are awarded certificates which are "the legal equivalent of a high school diploma and which in addition shall be accepted as meeting the State requirements of a high school education for admission to the study of the various professions and vocations".

When these Sections and Section 290 of Article 43 are considered together, we think that your policy in submitting to the State Board of Education the evidence of the educational qualifications of applicants to take your examination is not only sound, but indeed it is well within the contemplation of the several legislative enactments. The courses of study conducted in the various high schools are subject to the approval of the State Board of Education and, of course, it follows that that body is the agency for determining the status of high schools in so far as accreditation is concerned. When a person presents himself to you for an examination, it is our view that you may accept evidence from the State Board of Education on the question of the applicant's having "received the equivalent of a high school education". If, in your consideration of all the facts, you find that the applicant has not graduated from an accredited high school, we think that the next step for you to follow is to defer the examination for registration as a nurse until such time as evidence of requisite educational qualifications has been furnished. One way, of course, in which this may be done is by the applicant's obtaining a certificate from the State Board of Education under Section 191A of Article 77.

In following the procedure outlined, we think the Board of Examiners is discharging properly its statutory duty of determining the qualifications of applicants. Section 290

does not enjoin the Board from seeking advice from another State agency, with all the means at its disposal to supplement the information furnished by applicants. It is upon the basis of all the evidence that the Board of Examiners makes its determination of the qualifications of applicants.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

NURSES—BOARD OF EXAMINERS—BOARD HAS NO POWER TO
EXAMINE AN APPLICANT BEFORE GRADUATION.

December 13, 1951.

*Mrs. Angela M. Shipley, Executive Secretary,
The Maryland State Board
of Examiners of Nurses.*

We have your letter informing us that you have been requested by one of the local schools of nursing, operated by a hospital, to admit to examination Senior students who have completed a course of thirty-two months. The students will continue their training course for the remainder of the three years required by law. The reason the school has presented the request to you is that many of the student nurses whom it trains have attended college and they are, therefore, eligible for credit toward their nursing training course. Since college students are permitted to complete their nurses training courses in 32 months, while those who began their nurses training courses upon graduation from high school are required to continue for three years, or an additional four months, it is urged upon you that you permit all the members of a class to take the examination at the same time, and require those without college work to receive an additional four months of instruction before granting them their certificates as registered nurses.

While there may be practical considerations weighing heavily in favor of this plan, we are met at the outset with a clear and positive statutory requirement which we have no power to circumvent or ignore. Code Article 43, Section 290 provides, among other things, that:

“* * * each applicant shall furnish evidence satisfactory to said Board of Examiners that he or she is twenty-one (21) years of age, is of good moral character, has received the equivalent of a high school education, and has graduated from a training school connected with a general hospital

where three years of training with a systematic course of instruction is given in the hospital, or has graduated from a training school in connection with a hospital of good standing supplying a systematic three years' training corresponding to the above standards, which training may be obtained in two or more hospitals; * * *."

The Section then provides that credit may be given by the State Board of Examiners of not more than eight months of the three years of hospital training upon the applicant's furnishing evidence that he or she has received a scientific or practical education or training in some school, college, public health or similar organization, which course is approved by the Board.

Section 289 of Article 43 of the Code, as amended by Chapter 323 of the Acts of 1947, requires the Board of Examiners to meet at least once each year "* * * to examine all applicants for registration under this sub-title, to determine their fitness and ability to give efficient care to the sick." The applicants to be examined are those who possess the qualifications prescribed by Section 290, and it will be observed that one of these qualifications is graduation from a training school.

We think that an applicant's promise to continue as a student at the training school until graduation falls far short of being the equivalent of having graduated, as the statute requires. In our view, the provision of Section 290, which authorizes a credit of not more than eight months on the three-year course will not meet the problem, because those with whom your request is concerned are students who have no college credits, and to whom the unbending requirement of graduation from a training course of three years is applicable. We think it is beyond your authority to accept an applicant for examination unless she meets the requirements of law, including, of course, graduation from a nurses' training school. If the course which you

have been requested to pursue is to be adopted at all, it will have to be done as the result of an amendment of the law by the General Assembly, rather than through our attempt to place upon the law a construction which we think is contrary to the intent which it expresses.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

ORPHANS' COURT

ORPHANS' COURT—WILLS—PROCEDURE WHERE WILL IS
FILED AND AFFIDAVIT IS MADE THAT TESTATOR LEFT
NO PROPERTY.

July 12, 1951.

Mr. J. Walter Grumbine,
Register of Wills
for Carroll County.

You wish an official opinion as to the validity of variations of the practice of the Orphans' Court of Carroll County or the Register of Wills, to receive wills presented to them by an attorney or by an executor named in the will, together with an oath of the executor that the decedent died without any real or personal property subject to administration. Many times wills are presented in sealed envelopes and the request is made that they be not opened. At other times the request is made that the will be sealed or, if sealed, that it be kept sealed and that no "uninterested party shall have access to said will or no copies are to be made for any purpose."

Section 355 of Article 93 of the Code makes it a criminal offense to "wilfully neglect to deliver" a will or codicil in the custody of any private person to the Register of Wills of the County where the decedent resided or to some executor named in the will. Section 354 of the same Article provides that any private person who has custody over the will or codicil after the death of the testator shall immediately, after reading it to interested persons, "deliver the same to the register of wills of the county, *whose duty it shall be to keep the same safe until proceedings may be had for the probate thereof in the said office, or until it be demanded by an executor or other person authorized to demand it for the purpose of having it proved according to law*".

One further Section should be noted, namely Section 278 of Article 93, which provides for keeping a full and accurate record by the Register of Wills.

It seems plain to me the proper practice to be followed by the Orphans' Court or the Register of Wills in receiving a will which is not to be probated is as follows: The will should not be accepted in a sealed envelope nor should it be sealed while it remains in the custody of the Register of Wills. It should be kept safely, ready for delivery on demand of the executor "or other person authorized to demand it" for the purpose of probate. In the absence of the demand for it by the executor or other interested person, it should not be exhibited or permitted to be copied.

A note should be made in the proceedings or other appropriate docket that the will has been received with an affidavit of no estate, or, if the parties request it and are willing to pay for it, the will may be recorded with the notation that it is not to be probated.

I may say that the practices I have outlined as the correct ones are those which have been followed by the Orphans' Court and Register of Wills of Baltimore City for many years. They seem to me to be amply supported by the statutes.

HALL HAMMOND, *Attorney General.*

PHYSICAL THERAPY

PHYSICAL THERAPY—PERSONS HOLDING LICENSES TO PRACTICE PHYSICAL THERAPY MAY NOT USE THE TERM “DOCTOR”.

June 27, 1951.

*Mr. Clemens W. Gaines,
Secretary, Board of
Physical Therapy Examiners.*

You ask our opinion on the question whether Physical Therapists are entitled to designate themselves as Doctors. The practice of Physical Therapy is regulated by Chapter 906 of the Acts of 1947, Code Article 43, Secs. 531 et seq. Section 539 provides, in part:

“All persons licensed as Physical Therapists under the provisions of this sub-title, and no others, shall be known as Physical Therapists and shall be entitled to use the abbreviation ‘P.T.’ or any other words, letters or symbols which indicate that the person using the same is a licensed Physical Therapist and authorized to practice as such in this State. * * *”

The use of the term “Doctor”, and other words of similar import is somewhat restricted by our statutes. Section 139 of Article 43 of the Code provides, among other things, that any person shall be regarded as practicing medicine, within the meaning of the Medical Practice Act, who shall append to his or her name the words or letters “Dr.,” “Doctor,” “M.D.,” or any other title in connection with his name, with the intent thereby to imply that he or she is engaged in the art or science of healing, or in the practice of medicine in any of its branches. Among those excluded from the provisions of the Medical Practice Act, however, are masseurs and other manual manipulators who use no other means to treat patients. Another restriction upon the use

of the word "Doctor" appears in Section 368 of Article 43 of the Code, dealing with optometrists, in which Section it is provided that any person holding a license to practice optometry who shall attach to his name or use the title "M.D.", "Surgeon", "Doctor", "Physician", "Eye Specialist", "Eye-Sight Specialist", "Occulist", "Ophthalmologist", "Doctor of Ophthalmology", "Doctor of Optometry", "Doctor of Optics", or any title containing the word "Doctor", or the abbreviation "Dr.," or any word or abbreviation that will or can convey the impression that he is engaged in the treatment of diseases or injuries of the human eye, or make use of drugs, medicine or surgery, in the practice of Optometry, shall be guilty of a misdemeanor. From the provisions of this Section are exempt practitioners of optometry holding the degree of Doctor of Optics or Doctor of Optometry, who are permitted to use the title of Doctor of Optics or Doctor of Optometry in connection with their names.

In dealing with Section 139 of Article 43 of the Code, the Court of Appeals said, in *Crider v. Cullen*, 191 Md. 723, that:

"* * * Section 139 regards as 'practicing medicine' any person who shall operate on or prescribe for any ailment of another, but this provision is not applicable 'to masseurs, other manual manipulators who use no other means'. These exceptions, among others, have been in the statute since it was first enacted in 1902. *Cf. Watson v. State*, 105 Md. 650, 658, 66 A. 635. Thus, long before practice of osteopathy or chiropractic was licensed, practice of those callings was excluded from unlawful practice of medicine, not by declaring it to be lawful practice of medicine without a license, but by declaring it not to be regarded as practice of medicine at all."

While Section 139 does, in terms, exclude from its provisions masseurs and other manual manipulators who use no other means, we do not believe that it authorizes the use

of the term "Doctor" by persons engaged in the practice of Physical Therapy, because Section 539, quoted above, states expressly that they "shall be known as Physical Therapists and shall be entitled to use the abbreviation 'P.T.' or any other words, letters or symbols" which indicate that they are licensed to practice Physical Therapy. The use of the term "Doctor" would tend to convey the idea that the holder may be a physician or surgeon.

In *Scholle v. State*, 90 Md. 729, the Court of Appeals was dealing with the validity of the Acts passed in 1892, 1894 and 1896, regulating the practice of medicine. In dealing with them, the Court of Appeals said:

"Here the purpose of the Acts in question was the protection of the public from the consequences of ignorance and incapacity in the practice of medicine and surgery. As a means of effecting this they exact from the persons proposing to engage in the business a certain degree of skill and learning, to be evidenced by a certificate upon which the public may rely. If the conditions surrounding all persons who desired to practice were alike, there could be no differences made as to the terms upon which a certificate could be obtained. But if there are differences as to conditions and situations, by which it becomes reasonable that greater precautions are required in some cases than in others, classes may be formed by which certificates can be granted to some without examination, and by which others may be exempted altogether from the burden of being registered. But these classes must be created upon considerations only that are promotive of the public interests; and if they are so created, they do not constitute an unlawful discrimination and do not impair the 'equal right which all can claim in the enforcement of the laws'."

See also *Watson v. State*, 105 Md. 650; *Dvorine v. Castenberg*, 170 Md. 661. In the latter case, the Court of Appeals

held that optometry was a mechanical art rather than a learned profession, and it was observed that the purpose of the statute was to protect the public from harm which may result "from the hurtful ministrations of quacks and charlatans fraudulently pretending to be qualified optometrists. It recognized the fact that one qualified to serve as an optometrist might nevertheless be incompetent to render the service which might be required of a physician or surgeon; it therefore prohibited optometrists from using the title 'Doctor', 'Physician', 'Eye Specialist', or any title containing the word 'Doctor', or any word or abbreviation conveying the impression that the optometrist is engaged in the treatment of injuries to or diseases of the human eye, or that he may make use of drugs, medicine or surgery in the practice of optometry, * * *"

In our view, the provision of Section 539 authorizing Physical Therapists to use the abbreviation "P.T.", or any other words, letters or symbols which indicate that they are licensed Physical Therapists, is exclusive, and if the General Assembly had intended to bestow upon them the right to use the word "Doctor", it would have shown some evidence of it in the statute. Generally only such rights or powers exist as are granted by a statute and the rights which it does not grant must be concluded to have been withheld intentionally by the Legislature. 2 Sutherland Statutory Construction (3rd Ed.) Sec. 4915.

In view of the authorities as cited, it is our conclusion that persons granted licenses by the State Board of Physical Therapy Examiners may use the abbreviation "P.T.", or other words, letters or symbols which indicate that they are licensed to practice as Physical Therapists, but that they may not use the word "Doctor", or any other word which may have a tendency to create the impression that they are engaged in the practice of medicine or surgery.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

POST MORTEM EXAMINERS

POST MORTEM EXAMINERS—COMMISSION MAY MAKE RULE TO PROHIBIT THE PRESENCE OF UNAUTHORIZED PERSONS AT POST MORTEM EXAMINATIONS.

February 7, 1951.

Dr. Russell S. Fisher,
Chief Medical Examiner,
State Department of
Post Mortem Examiners.

You have informed us that occasions have arisen in which you deemed it advisable to restrict the entry of the general public to the autopsy room and other parts of the Baltimore City Morgue, and you have suggested the advisability of the adoption of a rule and regulation by the Department of Post Mortem Examiners under the authority conferred upon it by Section 3A of Article 22 of the Code, which provides that: "The said Commission is hereby authorized to adopt and promulgate such rules and regulations not inconsistent with law as it may deem necessary to make effective the provisions of this Article." You call to our attention the fact that the Baltimore City Morgue is a public building owned by the Mayor and City Council of Baltimore, and that the adoption of the rule and regulation proposed by you will apply, if enforceable, to members of the staffs of newspapers, as well as other members of the general public. You ask if, in our opinion, the following rule is permissible under the law:

"No person other than an authorized member of the Medical Examiner's staff, a Funeral Director or, on specific occasions, a relative of a decedent, may enter the storage room and/or the autopsy room while work is being carried on there."

We think it is quite clear that the Commission has the right to promulgate rules and regulations in order to enable

it, and the Medical Examiners and others whom it employs, to discharge their functions without being obstructed or disturbed by the presence of persons who in no way are contributing to or aiding the work which is in progress. It cannot be conceived that members of the general public have the right of access to the operating rooms in hospitals while surgeons are at work there, and the fact that the morgue is a city-owned building, in our opinion, does not extend greater rights to the public. We do not wish to be understood as intimating that the activities of the Post Mortem Examiners should be clothed with secrecy, or that its findings should be withheld from publication in so far as is proper, because we have ruled that your records are public and are open to inspection at reasonable hours (24 Opinions of the Attorney General, 650), but we do believe that you are entitled to have your examiners perform their work under less trying conditions than those which may exist if the public is permitted to be present when post mortem examinations are being conducted.

We suggest an alteration in your proposed rule and regulation, because we think the deleted language may have been uncertain in some of its applications. The rule in the form suggested by us is:

“No person other than a member of the Medical Examiners staff may enter the storage room or the autopsy room while work is being carried on there, except with the permission of the Medical Examiner performing said work.”

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

PUBLIC BUILDINGS

PUBLIC BUILDINGS—STATE NOT REQUIRED TO HAVE ELECTRICAL WIRING IN A PUBLIC BUILDING INSPECTED BY LOCAL AUTHORITIES

December 7, 1951.

*Mr. Nathan L. Smith, Director,
State Department of
Public Improvements.*

You have furnished us with a copy of a Resolution passed by the County Commissioners of Prince George's County dealing with the inspection of electric wiring, and you have asked if its provisions extend to buildings constructed by the State of Maryland in that political subdivision.

By Chapter 542 of the Acts of 1937, Sections 556 to 574, both inclusive, of the Code of Public Local Laws of Prince George's County (1943 Ed.) were enacted. Numerous sections were amended by Chapter 776 of the Acts of 1947, and Section 573 was amended by Chapter 522 of the Acts of 1951. The Act of 1951 provides that, after June 1, 1937, no electric light or power company shall attach its power lines to any property within the County unless the building was wired before June 1, 1937, or the work has been installed by a master electrician licensed under the provisions of the local law, and until a meter cut-in certificate has been issued "by whatever agency is approved or established by the Board of County Commissioners". The "agency" is authorized to issue the meter cut-in certificate which shall contain a record of the amount of fees collected by it. Section 2 of the Regulations is quite similar to Section 573 of the Public Local Laws of Prince George's County, as amended by the Act of 1951, except that the regulation goes a step further and designates the Prince George's County Department of Electrical Inspection as the agency to issue the meter certificate.

You inform us that it is the practice of the State, through the Department of Public Improvements, to have all electric wiring in State-owned buildings inspected and certified by the Maryland Fire Underwriters Rating Bureau, and that the Bureau will not accept the inspection of the Prince George's County Department of Electrical Inspection. Consequently, if the Prince George's County Regulation is applicable to State-owned property, the result is that the State is compelled to have electrical wiring in that County inspected twice, or to abandon the practice which prevails in all the other political subdivisions of the State of using the services of the Maryland Fire Underwriters Rating Bureau. The ultimate question is whether Sections 556 et seq., as amended, of the Code of Public Local Laws of Prince George's County, and the regulations made pursuant thereto, are binding upon the State of Maryland.

In 1934 our predecessors held that the requirements of the Code of Public Local Laws of Baltimore County relating to building permits were not applicable to the State of Maryland in order to enable it to construct a boys' dormitory at the Rosewood State Training School. 19 Opinions of the Attorney General, 406. Subsequently, it was held that the Local Laws of Anne Arundel County required the State to procure a plumbing permit in order to install new plumbing in a State institution located in that County, "but its plumbing work is not subject to the inspection and approval of the Commission after the permit has once been issued". 23 Opinions of the Attorney General, 399. Later, it was held that the State was not required to obtain a plumbing permit in Baltimore County. 23 Opinions of the Attorney General, 400. In 1945 the question was presented concerning the obligation imposed upon the State Roads Commission by the State-wide zoning law, Code Article 66B, and it was held that the Commission was not required to treat zoned districts in any different manner from unzoned districts. 30 Opinions of the Attorney General, 134. On June 20, 1950, in an opinion to Mr. John B. Funk, then Chief Engineer of the State Department of Public Im-

provements, it was held that the zoning laws of Baltimore City had no application to buildings constructed by the State on land owned by it at Morgan College. 35 Opinions of the Attorney General, 273.

It may be observed that there is nothing in the language of the local law under consideration which indicates an intention on the part of the State to surrender its power to regulate its own property, and the manner in which improvements upon it are to be constructed. We should be reluctant to conclude that the State has surrendered its sovereignty to this extent, especially in view of the well recognized rule of construction that a restrictive statute does not limit the activities of the State unless the State is expressly mentioned. See opinion to Mr. Joseph F. DiDomenico, Commissioner of Labor and Industry, 36 Op. A.G. page 154).

In view of these rulings, and the authorities cited in them, we conclude that Sections 556 to 574, both inclusive, of the Code of Public Local Laws of Prince George's County, as amended, and the rules and regulations adopted pursuant thereto, have no application to the State of Maryland, and that the State is free to provide such electrical inspection as it deems adequate, as if the local law and regulations did not exist.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

RACING COMMISSION

RACING COMMISSION—PAYMENTS TO STATE FAIR BOARD BY
OPERATORS OF MILE TRACKS UNALTERED BY CHAPTER
696 OF ACTS OF 1951.

June 5, 1951.

*Mr. P. C. Turner, Chairman,
Maryland State Fair Board.*

You asked for an official opinion as to whether the four licensees who operate mile running race tracks in Maryland are still required, now that House Bill 435 has become Chapter 696 of the Acts of 1951, to pay to the Maryland State Fair Board the sum of \$4,000 each under the provisions of Section 14 of Article 78B of the Code (1947 Supp.).

I find nothing in Chapter 696, nor do I know of any other provision of law which changes the application of Section 14 as to the mile track licensees either expressly or by necessary implication.

You also asked whether the Harford Agricultural and Breeders Association, which operates Havre de Grace, is required to make the \$4,000 payment. It is our view that it is. Havre de Grace's racing days were utilized by it, as a corporate entity and as a licensee at Laurel and Pimlico, and as long as it is a corporate entity operating under the benefit of the racing law, it is liable for the payment required by Section 14.

All this adds up to the fact that the Fair Board is entitled to receive \$16,000 annually, as it has heretofore, in addition to other moneys provided for the Board by the last Legislature.

HALL HAMMOND, *Attorney General.*

SOIL CONSERVATION

SOIL CONSERVATION—ELECTION OF SUPERVISORS—MAIL
BALLOTS MAY NOT BE USED—WRITE-IN PRIVILEGE NOT
APPLICABLE.

November 13, 1951.

Mr. G. M. Cairns,
Dean of Agriculture,
Maryland State Soil
Conservation Committee.

We have your letter in which you present questions relating to the law concerning soil conservation districts. This law, which was enacted by Chapter 437 of the Acts of 1937, is now contained in Sections 45 to 59, both inclusive, of Article 2A of the Code.

The first question which you present is whether the District Supervisors, whose election is provided for by Section 50 of Article 2A of the Code, may be voted for by ballots which are signed by the eligible voters and sent in through the mail. The State Soil Conservation Committee is required by Section 50 to pay all the expenses of elections, supervise the conduct thereof, and prescribe regulations governing their conduct. The Committee is likewise directed by the statute to “* * * give due notice of an election to be held for the election of three supervisors for the district.” “Due notice” is defined by sub-section (5) of Section 47 of Article 2A as:

“notice published at least twice, with an interval of at least 7 days between the two publication dates, in a newspaper or other publication of general circulation within the appropriate area, or if no such publication of general circulation be available, by posting at a reasonable number of conspicuous places within the appropriate area,

such posting to include, where possible, posting at public places where it may be customary to post notices concerning county or municipal affairs generally.”

We have found no other pertinent provision which points to the answer to the question which you present. It seems to us that if the General Assembly had contemplated the use of mail ballots, there would be little occasion to require newspaper publication of the notice of the election, because we presume that the Committee, if that procedure were followed, would have a form of ballot prepared and mailed, or otherwise delivered, to each eligible voter. It seems to us that that of itself would be sufficient notice to the recipients of the ballots that an election was approaching, and there would be little to gain by following that with two publications in a newspaper or other publication of general circulation in the area. It is our conclusion, therefore, that mail ballots are not within the contemplation of the law regulating the elections of Supervisors of Soil Conservation Districts.

In enacting Chapter 261 of the Acts of 1941, the General Assembly was more specific in providing for the election of members of public drainage associations. That law, which is Code Article 25, Sections 39 et seq., provides in Section 57 for a meeting of the landowners for the purpose of electing a Board of Managers, and requires ten days' previous notice to be given thereof. We think that a meeting for the election of the Supervisors of a Soil Conservation District is the proper method of procedure.

Your next question is whether the write-in privilege applies to elections of Soil Conservation District Supervisors, as it does for the election of public officers, under Article I of the Constitution of Maryland. There is nothing in the Soil Conservation Districts law which discloses an intention to do more than elect three Supervisors from those nominated in the manner provided in Section 50,

which directs that nominating petitions to nominate candidates for Supervisors shall be filed with the State Soil Conservation Committee, and that no such nominating petition shall be accepted unless it is subscribed by 25 or more occupiers of land within the boundaries of the District. Ballots and voting machines used in elections held under Article I of the Constitution are required to provide spaces for voters to write-in the names of persons for whom they wish to vote, even though they have not been nominated (*Jackson v. Norris*, 173 Md. 579), but the basis upon which this requirement rests is constitutional and has nothing to do with elections of Soil District Supervisors, and we think it would have been entirely competent for the General Assembly to provide for their appointment by the State Committee, or their designation in some manner other than by election of the land occupiers. Hence, we conclude that the write-in privilege does not exist.

Your final question is whether the Committee is required to advertise that an election is to be held, and that nominations are in order. Referring again to Section 50, the statutory requirement is that within thirty days after the issuance by the Secretary of State of the certificate of organization, nominating petitions may be filed with the State Committee, which shall have authority to extend the time within which said petition may be filed. We find no requirement of notice concerning nominations. However, we think that the Committee should notify all the land occupiers, as that term is defined by Section 47, that nominations may be made by a given date, and inform them of the manner in which such nominations are required to be made, in order that the fullest opportunity may be given to them to select qualified candidates for Supervisors.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

STATE INDUSTRIAL ACCIDENT COMMISSION

STATE INDUSTRIAL ACCIDENT COMMISSION—SELF-INSURED
EMPLOYERS—COMMISSION IS UNDER NO DUTY TO DIS-
CLOSE THE NATURE AND AMOUNT OF SECURITIES
PLEGGED BY A SELF-INSURER.

May 29, 1951.

Mr. Emanuel Gorfine,
Chairman, State Industrial
Accident Commission.

You have informed us that an attorney, who represents injured employees of an employer qualified as a self-insurer under the provisions of the Workmen's Compensation Law, has requested permission to inspect the records of the State Industrial Accident Commission, for the purpose of ascertaining the nature and amount of securities which have been posted under the requirements of that law. It appears that the claims of the employees for compensation have not been heard or determined by the Commission, so that we are not confronted with the situation where the employer has failed to pay an award.

In *Pressman v. Elgin*, 187 Md. 446, it was said:

“We realize that the right of a private citizen to inspect public records, while theoretically absolute, is in actual practice limited by the basic principle that mandamus is not demandable *ex debito justitiae* but is granted only in the sound discretion of the Court. In other words, the writ is not issued as of mere course, but will be granted only where the Court is satisfied that it will serve some just or useful purpose. *George's Creek Coal & Iron Co. v. Allegany County Com'rs*, 59 Md. 255, 259; *Lee v. Leitch*, 131 Md. 30, 40, 101 A. 716. So, if a petitioner's purpose in desiring to see certain

public records is merely to satisfy idle curiosity, the writ will not be granted.”

While the above statement of the law is undoubtedly binding upon us, the question arises at once whether it is applicable to the situation which you present. Sub-section (3) of Section 15 of Article 101 of the Code, as amended by Chapter 463 of the Acts of 1949, relating to self-insurers, permits employers to furnish satisfactory proof of their financial ability to pay compensation and empowers the Commission at any time and from time to time, in its discretion, to require from them the deposit of securities, such as are accepted by the equity courts of Baltimore City for the investment of trust funds, and in such amounts as are determined by the Commission to secure the liability of employers to pay the compensation specified by law. The sub-section provides further that, in order that the Commission may be informed concerning the continued financial responsibility of such employers, it may require reports from them annually or at such other times as the Commission may deem necessary or advisable, and may examine such employers under oath, or make such other examination of their business as the Commission determines. Upon the failure of any self-insured employer to furnish evidence of its continued financial ability to pay compensation, the Commission is authorized to require it to insure the payment of compensation as is provided elsewhere in Section 15. In this connection, we think it is pertinent to observe that Section 4 of Article 101 of the Code, as amended by Chapter 258 of the Acts of 1949 provides, among other things, that all proceedings of the Commission shall be shown by its record of proceedings, which shall be a public record, and shall contain a record of each case considered, and the award paid or allowed to any employee of the Commission, or to any other person for services. The Section then provides that no person in the employ of the Commission shall divulge any information secured by him in respect to the transactions, property or business of any person, firm or corporation to any person other than the

members of the Commission and, if he does so, he shall be guilty of a misdemeanor and subject to fine or imprisonment, and thereafter shall be disqualified for holding employment with the Commission.

Upon consideration of these statutory provisions, it is our view that the Commission, in the case which has been presented to us, is under no duty to divulge the nature and amount of the securities which it has accepted from the employer in question. The provisions of Section 4, to which we have referred, relate, we think, to the record, or docket, of proceedings in which compensation has been allowed or denied under the Workmen's Compensation Law. The attorney for an injured employee, whose case has not been determined by the Commission, is given no right under the provisions of Article 101 of the Code to compel an employer to furnish additional security. That power is lodged with the Commission, and notwithstanding the conclusion which we have stated, in our view, it is not only the right, but also the duty, of the State Industrial Accident Commission to inquire into the sufficiency of the security which a self-insured employer has filed and to require that it be adequate to gratify the requirements of the Workmen's Compensation Law. The power of the Commission to do this is not limited to cases where self-insured employers have defaulted in carrying out the provisions of awards made by the Commission, but it may be done at any time and if, in the present situation, there has been an occurrence which has resulted in severe injuries to several employees, with the consequent result that awards of compensation may likely be made in their behalf and that the amounts of such awards will involve a considerable sum of money, we believe the Commission should at once undertake to satisfy itself beyond all reasonable doubt that the securities deposited with it are sufficient to insure that the employer's liability under the law will be met promptly.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

STATE ROADS COMMISSION

STATE ROADS COMMISSION — WHEN RECONSTRUCTION OF STATE HIGHWAY NECESSITATES THE REMOVAL OF PIPE LINE WITHIN STATE ROADS COMMISSION RIGHT OF WAY, COST OF REMOVAL MUST BE BORNE BY UTILITY COMPANY.

March 29, 1951.

Mr. William F. Childs, Jr.,
Chief Engineer.

This is in reply to your inquiry of January 8, 1951.

The position of the State Law Department regarding this type of question has been repeatedly made clear. Typical is the following, found in 27 Opinions of the Attorney General, p. 341:

“The Commission has previously taken the position that where a utility is given the right to establish its lines, either of pipes or underground conduits, within the limits of the right of way, and subsequent improvement of the road necessitates the relocation of these lines, that the obligation is upon the utility to relocate the same at their own expense, and I feel that the same rule should apply to municipalities that have established their water or sewerage system within the limits of the right of way.

“Present day traffic makes it necessary to relocate and reconstruct many of our highways, and I can find no precedent or see no reason why a corporation which has a permissive right to use a part of the highway for its own purposes should not be required to cooperate and bear its proportionate expense made necessary by the reconstruction of any road.”

The same position has been taken in 28 Opinions of the Attorney General, 209; 21 Opinions of the Attorney General, 680, and 32 Opinions of the Attorney General, 378.

In reviewing the correspondence, I see no extenuating circumstances which would justify our taking a position other than that established by the above Opinions.

J. B. RUSSELL, *Special Attorney.*

STATE ROADS COMMISSION—STATE CONTRACTS—VALIDITY
OF BID—CHANGE IN BID.

July 3, 1951.

State Roads Commission.

At your request, I have reviewed the bid made by the General Motors Corporation, G. M. C. Truck and Coach Division, (hereinafter called G. M. C.), dated June 14, 1951, to determine whether or not that bid is valid.

In a letter attached to the bid, dated June 14, 1951, and made a part thereof, the following language was used:

“Prices given on your inquiry form is a quotation and not to be construed as a definite offer. Prices shown in this quotation are tentative only and will be adjusted in proportion to any change in list prices effective at time of delivery.”

After the bids were opened, it was determined that G. M. C. was the lowest bidder, subject to the quoted condition. Subsequently on the same day, G. M. C., by letter amended the condition in the original bid by deleting all of the quoted language.

The question now to be determined is whether or not the bid as qualified is a valid bid in view of the subsequent letter withdrawing the condition.

The obvious reason for bid proposals and secret bidding is to prevent any possibility of fraud in the awarding of a contract. If the agency inviting bids can properly allow a bidder to change the terms of his bid after all bids have been opened, any advantage that might be obtained through the purchase of property and the awarding of contracts by secret bids would be destroyed.

In the present case, it appears obvious that the price stated by G. M. C. in their bid, as originally opened, was not a firm price but was subject to a condition. That condition may conceivably alter the price at the time of the delivery of the equipment. To allow a bidder to make a change in any bid after the bids were opened that would in any way affect the price quoted, would, as stated above, destroy the advantages of secret bidding and not give every bidder a fair and equal chance to obtain the contract.

It is, therefore, our opinion that the bid of G. M. C., in this case, is irregular and, therefore, invalid because of the condition attached. The Attorney General has authorized me to say that he concurs in this finding.

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

STATE ROADS COMMISSION — STATE HIGHWAY — TRAFFIC
SIGNALS WITHIN CORPORATE LIMITS—STATE ROADS
COMMISSION JURISDICTION.

July 12, 1951.

*Mr. George N. Lewis, Jr.,
Director, Traffic Division.*

On June 30, you wrote us that local authorities of the town of Smithsburg, in Washington County, have requested a permit to install certain traffic signals along the State Highway that runs through that town. You state that some time ago this Commission made a survey and determined that traffic did not justify the expenditure necessary to install traffic signals, and you asked what redress the Commission might have if it refuses to issue such a permit.

Section 130b of Article 66½, Code, 1947 Supplement, provides as follows:

“No local authority shall place or maintain any traffic control device upon any highway under the jurisdiction of the State Roads Commission except by the latter’s permission and in accordance with the direction of the Commission.”

Section 282 of the same Article provides that anyone found guilty of violating this section shall be punished by a fine of not more than \$100. Under the provisions of this Section we could, of course, request the State’s Attorney to institute criminal action against the town officials if they insist upon installing the signals without a permit.

However, I suggest that where the device is to be erected within the corporate limit the permit should be granted unless the device is of a type not approved by the Commission, or unless its erection would materially impede traffic upon the State highway.

A similar conclusion was reached by Robert E. Clapp, Jr., Esq., former Special Assistant Attorney General, in an opinion found in 32 Opinions of the Attorney general, 363.

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

STATE ROADS COMMISSION—STATE CONTRACTS—CONTRACTOR CANNOT REVISE BID UPWARD BECAUSE OF ERROR MADE IN COMPUTING SAME.

August 14, 1951.

State Roads Commission.

You advised me that when sealed bids were opened for certain improvement and construction in connection with the East Approach Causeway to the Chesapeake Bay Bridge, that Baltimore Contractors, Inc., was the low bidder, their bid being \$275,596. You further advised that you are now in receipt of a letter from Baltimore Contractors, Inc., in which they state that a mathematical error was made in calculating their bid, and that the sum of \$275,596 should be increased because of this mistake. The error occurred in computing the cost of stone delivered to the site. Because of the mathematical error, the stone was quoted at \$6.70 per ton, whereas it should have been quoted at \$13.20 per ton. Based on the unit quantity involved, the total difference between these two figures is approximately, \$39,000.

Baltimore Contractors, Inc., have submitted with their formal request for correction of the mathematical error photostatic copies of their work sheet, which tends to show that a mistake in multiplication occurred, and which would substantiate their position that they intended to quote \$13.20 per ton instead of \$6.70 per ton. You ask me to advise you whether or not, under these circumstances, the Commission would be justified in increasing the bid price of this contract from \$275,596 to approximately \$314,596.

The answer to this question appears to lie not only under the wording of Section 7 of Article 89B, but upon precedent based upon a ruling of the Attorney General's Office. That section as so construed provides for the method of bidding in which there is no discretion left to the Commission other than that sealed bids must be accepted and the award made to the lowest responsible bidder.

Judge John B. Gray, Jr., when he was Special Assistant Attorney General to the State Roads Commission, in an opinion found on page 463 of 18 Opinions of the Attorney General, discussed this question at length. There involved was whether or not the Commission would allow the American Oil Company to correct certain mathematical errors that had been made in the computation of a bid for oil. In this opinion Judge Gray advised the Commission that the request of the Oil Company to change its bid price after bids were opened, was impossible. The following is a quotation from the above referred to opinion:

“Subsequently, the Company advised the Commission in detail as to the discrepancy and pointed out a series of errors in the net bids. It seems clear to me that the Company bid will have to be considered on the basis of the bids submitted, and which were before the Purchasing Agent at the time the bids were opened. It seems obviously improper to allow a bidder to submit different and corrected figures after the bids have once been received and opened. The fact that errors of a purely mathematical nature were involved in the original bid, as contended for by the Oil Company in this case, makes no material difference.”

In view of the above, it is my opinion that it would be improper for the Commission to allow Baltimore Contractors, Inc., to revise their bid upward to compensate for a mathematical error made by them in computing their bid prices.

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

STATE ROADS COMMISSION — EMPLOYEE OF COMMISSION
DOES NOT HOLD OFFICE OF "PROFIT AND TRUST" AND
MAY THEREFORE HOLD ADDITIONAL POSITION WITH
COUNTY.

October 5, 1951.

State Roads Commission.

You asked me to look into the problem of whether or not an inspector of the State Roads Commission could accept a county appointment as a road supervisor for Queen Anne's County. It is understood that if the appointment is accepted, the employee will receive a salary from Queen Anne's County in addition to the salary presently being paid him by the State Roads Commission.

I am unable to find any Public General Law which would prohibit the holding of both of these positions simultaneously. Thus, if there is no Public Local Law prohibiting such a situation, Article 35 of the Declaration of Rights will control. Article 35 is as follows:

"That no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State."

Among the many opinions of the Attorney General explaining what is meant by the words "office of profit" are:

- 30 Opinions of the Attorney General, 132
- 20 Opinions of the Attorney General, 595
- 20 Opinions of the Attorney General, 581
- 19 Opinions of the Attorney General, 208
- 14 Opinions of the Attorney General, 232
- 11 Opinions of the Attorney General, 100

The phrase "office of profit" was likewise defined in some detail in the case of *State Tax Commission vs. Harrington*, 126 Md. 157.

Two opinions of the Attorney General have specifically held that an employee of the State Roads Commission does not have an "office" within the meaning of the Constitution.

25 Opinions of the Attorney General, 412

23 Opinions of the Attorney General, 278

It is, therefore, my opinion that the employee in question may hold both positions simultaneously, if there is no Public Local Law to the contrary, and if the State Roads Commission has no objection.

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

STATE ROADS COMMISSION—CONDEMNATION—COMMISSION
 LIABLE FOR COSTS FOR TWELVE JURORS—FEES FOR BAIL-
 IFFS AND SHERIFF ARE NOT PROPER CHARGES.

November 13, 1951.

Mr. Joseph W. Alton, Jr.,
Sheriff of Anne Arundel County.

You have forwarded to us a bill for court costs in two condemnation cases instituted by the State Roads Commission in the Circuit Court for Anne Arundel County. You state that the Commission has taken exception to the charges for jurors, bailiffs and the sheriff, and you ask our advice in the premises.

In the first case, the disputed items are:

25 Jurors @ \$6.00	\$150.00
2 Bailiffs @ \$7.00	14.00
Sheriff @ \$20.00	20.00

In the second case, the disputed items are:

25 Jurors @ \$6.00	\$150.00
2 Bailiffs @ \$7.00	14.00
Sheriff @ \$20.00	20.00
12 Jurors @ \$6.00	72.00
2 Bailiffs @ \$7.00	14.00

The trial of the second case began on one day and ended on another, consequently, this accounts for the seeming duplication in charge for jurors and bailiffs.

Section 16 of Article 33A of the Code, in dealing with costs in condemnation cases, provides that:

“* * * the petitioner shall pay all the costs in the lower Court to be taxed as in ordinary actions at law, and also the usual *per diem* to the jurors

in the trial of the case which shall be taxed along with the other costs in the case.”

Except for Section 16 of Article 33A of the Code, the per diem of jurors would not be taxable as costs in condemnation cases. 10 Opinions of the Attorney General, 260. We have been informed by the State Roads Commission that in no other political subdivision is it charged for any more than the 12 jurors who are actually sworn in the case, and it is our view that the law does not contemplate the payment of the per diem to the entire 25 jurors from whom the panel is selected. If the General Assembly had intended otherwise, we believe it would have given some indication of it in the statute. On the other hand, the requirement is merely that the petitioner shall pay the usual per diem to the jurors “in the trial of the case”, and certainly only 12 jurors were so used. It is our opinion, therefore, that in so far as the bill relates to the per diem of the 13 jurors who were stricken, it is erroneous.

Coming now to the question of the bailiffs’ and sheriffs’ fees, we think these items are improper. Section 16 states that the costs shall be taxed “as in ordinary actions at law”. In such actions, costs are taxed for services rendered by the sheriff in serving the process of the Court. There is no provision of law, and we know of no usage or custom, authorizing the inclusion of the fees for bailiffs. Indeed, it is a novel proposition that the compensation of the sheriff and bailiffs be recovered from the litigants. It seems to be well settled that no officer may demand a fee for an official service unless he has been authorized to do so. 14 Am. Jur. p. 35. In the absence of statute, therefore, we conclude that the charges for the bailiffs and sheriff should be deleted in their entirety.

HALL HAMMOND, *Attorney General.*

J. EDGAR HARVEY, *Deputy Attorney General.*

STATE ROADS COMMISSION—OVERSIZE VEHICLES—OWNED
BY STATE AGENCY—STATE ROADS COMMISSION MUST
CHARGE FOR PERMIT.

December 10, 1951.

Mr. Russell H. McCain, Chairman.

By letter of November 23, 1951, you asked advice as to the legality of issuing permits to the Maryland Soil Conservation Committee to operate oversize vehicles on the State highways without making a charge for such permits.

It is my opinion that under the Motor Vehicle Law, the State Roads Commission must charge the \$10.00 fee for all permits granted for the operation of oversize vehicles, regardless of the ownership of such vehicles. The language of Section 74 of Article 66 $\frac{1}{2}$, which provides for the fee is, in my opinion, mandatory and permits no exceptions. Moreover, Chapters 311 and 411 of the Laws of 1951 by amendment to Section 285(e) of Article 66 $\frac{1}{2}$ provide that the money obtained from the permits is to be used to defray the expenses of certain specified State agencies other than State Roads Commission itself. If the fees for the permits are not collected, irrespective of who owns the vehicles, then the various State agencies for whose support these fees are used would have justified complaint against the State Roads Commission.

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

STATE ROADS COMMISSION—BRIDGES—OVER NAVIGABLE
WATERS—PERMIT FROM STATE ROADS COMMISSION.

December 11, 1951.

*Mr. William F. Childs, Jr.,
Chief Engineer,
State Roads Commission.*

This will acknowledge receipt of your communication of December 4, 1951, in reference to permits for the construction of bridges over navigable waters of the State of Maryland.

Section 157 of Article 23 of the Annotated Code of Maryland (1939) provided that the Legislature must authorize the construction of bridges over navigable rivers of Maryland.

The Court of Appeals of Maryland in construing this section in the case of *Dundalk, etc. Ry. Co. v. Governor Smith*, 97 Md. 177, treated all navigable waters as covered by this section.

In 28 Opinions of the Attorney General, page 205, it was held that Spesutia Narrow was covered by this section.

By Chapter 124 of the Acts of 1945, Section 157 of Article 23 was amended, so as to require a permit from the State Roads Commission to construct a bridge over a navigable stream.

Therefore, in the light of the construction placed on the aforesaid Section 157 of Article 23 by the Court of Appeals, and 28 Opinions of the Attorney General, 205, I am of the opinion that a permit is required for the construction of the bridge in question.

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

STATUTES

STATUTES—THE WORD “URBAN” IN A STATUTE ORDINARILY MEANS AN AREA WHICH IS BUILT UP, RATHER THAN ONE DEVOTED TO AGRICULTURE.

October 5, 1951.

Mr. Louis J. DeAlba,
Trial Magistrate.

We have your letter in which you ask our opinion concerning the interpretation of the word “urban”, as it is used in Chapter 516 of the Acts of 1951. That Act, which became effective on June 1st last, is a local law, adding Section 600A to Article 2 of the Code of Public Local Laws, applicable to the Fifth District of Anne Arundel County. It requires persons owning lots “located in an urban part” of the District to keep them free from weeds, brush, trash and debris of all kinds.

It is our understanding that you feel that “urban”, as used in the Act, requires that property affected be in an incorporated town. On the other hand, the civic associations of the areas involved have made the point that the Act covers any area which has been platted as a town, even though it is not actually in existence, except on paper. As we see it, neither of these views is correct. The term “urban”, as used in the Act, we think describes an actual state of affairs without reference to legal technicalities. It connotes a built-up neighborhood, as distinguished from a country area. The word “urban”, of itself, of course, stems from the Latin word for city, and still holds that meaning and connotation.

In *P.B. & W.R. Co. v. Mayor and City Council of Wilmington*, 57 A 2d 759, the Court of Chancery of Delaware said:

“In determining the meaning of the statute, we must bear in mind that the word ‘rural’ means the

country; 'of or pertaining to the country, as distinguished from a city or town; belonging to or characteristic of the country.' Cent. Dict.; Webster's Inter. Dict., 54 C.J. 1113. It is the antithesis of 'urban' which means 'of or belonging to a city or town'. Cent. Dict."

Some help may be given you in the discharge of your duties by several cases in the Court of Appeals interpreting the Foutz Act, which applied to territory annexed to Baltimore City by the Act of 1888. The Court of Appeals in the case of *Baltimore City v. Schafer*, 107 Md. 38, discusses the meaning of the words "urban property" in the light of the Act. The Court there said:

"* * * It was intended to exempt the property in the annexed territory from the full city rate, until the conditions were similar in important respects to those within the old city limits."

One of the tests laid down in the Act which the *Schafer* case is interpreting is that areas are not to be considered urban until streets have been opened and paved, nor until there shall be upon every block of ground at least six dwellings or storehouses.

In the case of *Hiss v. Baltimore City*, 103 Md. 620, there was a block containing two dwellings, two churches, a cobbler's shop, a factory, and a shed. It was urged that this was not urban property because it did not contain six dwellings or storehouses. The Court of Appeals held that it was clear from the facts that this was urban property, saying:

"* * * It is improved city property; similar to other property within the old city limits * * *."

I cite these cases only with the idea that they may be helpful as giving you some rough yardstick by which you can measure in any given case the extent to which an area

has been improved or built up with streets and buildings. If an area in popular and normal understanding and acceptance is a built-up area, similar to those found in cities, I think it is an urban area within the meaning of the local act of Anne Arundel County. The question is one of fact to be determined in each case.

HALL HAMMOND, *Attorney General.*

TAXATION

TAXATION—INHERITANCE TAX—INTERVIVOS TRUST CREATED
BEFORE 1936—SPECIAL POWER OF APPOINTMENT.

January 16, 1951.

*Mr. James G. Pazourek,
Deputy Register of Wills for
Baltimore City.*

This will answer your inquiry concerning the deed of trust of Katherine Keys Patterson.

It appears that on May 16, 1906, settlor executed an irrevocable deed of trust to Safe Deposit & Trust Company to pay her the income for life with power, if the trustee "should deem the same beneficial to her", to pay her from time to time unlimited portions of the corpus. If, upon her application, the trustee should refuse to make corpus payments, the settlor had the right under the deed to petition an equity court to require them "if the Court shall believe the same to be for the benefit of the petitioner".

Settlor reserved to herself power to appoint the remaining corpus "among her children and descendants, or in trust for their benefit in such manner, in such proportions and upon such trusts as she may by * * * will declare." In default of appointment, the remainder was to "vest in and become the property of" settlor's children and descendants *per stirpes* living at her death.

Settlor died June 19, 1950, survived by a son and daughter born before 1936 and no descendants of deceased children. She left a will appointing the property in further trust for her children and descendants living from time to time until twenty-one years after her death, when the trustee is to divide and distribute the property among her children and descendants then living.

There is no question but that the inheritance tax law in effect at settlor's death is in terms applicable to the transmission of the trust corpus remaining at settlor's death. Section 111 of Article 81 of the Code (1947 Supplement) contains this sentence:

“The reservation of a beneficial interest in favor of the decedent * * * or of a power of appointment by will or otherwise, in or over any property passing subject to the tax imposed by this sub-title, shall be deemed to constitute dominion within the meaning of this section.” (Emphasis added.)

The only question is whether such application would in this case be unconstitutional.

Mr. H. H. Bauer of the Safe Deposit and Trust Company argues forcefully that immediately upon the respective births of settlor's children, their remainder interests vested, subject only to conditions subsequent: that the testamentary appointment did not and could not divest these interests but only determined their quantum and nature. See *Allder v. Jones*, 98 Md. 101, 103; Miller, “Construction of Wills”, Section 255, and cases cited in notes 1 and 2 therein; 31 Opinions of the Attorney General, 260. As both children were born before the effective date of Chapter 124 of the Special Session of 1936 (wherein the above-quoted sentence of Section 111 first appeared), Mr. Bauer contends that to impose the tax would be unconstitutional. *Safe Deposit v. Bouse*, 181 Md. 351.

That case, following *Coolidge v. Long*, 282 U. S. 582, 75 L. Ed. 562, held that the direct inheritance tax could not apply constitutionally upon the succession to possession of a remainder which had vested in interest before the effective date of the taxing Act. But there, the creator of the interest retained no control whatever over its disposition. Here, the creator retained not only a conditional power to invade corpus, but a limited power of appointment over

the remainder which she in fact exercised after the passage of the taxing Act. (A will speaks from death.) We think the assertion of such power affords a constitutionally taxable occasion. See *Mylander v. Connor*, 172 Md. 329; *Saltonstall v. Saltonstall*, 276 U. S. 260, 72 L. Ed. 565; *Reinecke v. Smith*, 289 U. S. 172, 77 L. Ed. 1109; 33 Opinions of the Attorney General, 363, 400; 27 Opinions of the Attorney General 443; 26 Opinions of the Attorney General, 434; 24 Opinions of the Attorney General, 909; 22 Opinions of the Attorney General, 722.

Assuming (without conceding) that the children's remainder interests were technically vested before 1936 and were not divested by exercise of the power, the quantum and nature of those interests were determined—changed, if you will—by a testamentary act in 1950. See 26 Opinions of the Attorney General, 434.

We do not believe the fictional doctrine of "relation back", whereby the estate created by exercise of a power is for some purposes considered to have taken effect by the instrument creating the power (Miller, "Construction of Wills", Section 260), has any place in the molding of constitutional result. In the words of Mr. Justice Sutherland upholding the Federal Estate Tax as applied to property held by the entireties, "the power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law". *Tyler v. U. S.*, 281 U. S. 497, 503, 74 L. Ed. 991, 998. Cf. *Third National Bank v. White*, 45 F (2d) 911, affirmed 287 U. S. 577, 77, L. Ed. 505, upholding the estate tax as applied to the full value of property held by the entireties where the deed creating the tenancy antedated the original Estate Tax Act.

True, the Maryland inheritance tax does not impinge upon the exercise, as such, of a power of appointment. *Connor v. O'Hara*, 188 Md. 527. But it does impinge, where constitutional, upon certain transmissions of property subject to appointment by the grantor. We have here such a transmission; and if the grantor's assertion of her power removes the constitutional barrier the statute must apply.

It may be that the same result is attainable on the theory that settlor died "seized and possessed" of the property within the meaning of the law in effect at the time of execution of the trust (1904 Code, Article 81, Section 117). See *Darnall v. Connor*, 161 Md. 210; *Lilly v. State*, 156 Md. 95; and *Smith v. State*, 134 Md. 473. But the view we have taken makes it unnecessary to decide that question. We also deem it unnecessary to decide what would have been the result had settlor failed to exercise her power of appointment. Likewise it is unnecessary to decide the effect, standing alone, of such limited power to invade corpus as settlor here enjoyed.

HALL HAMMOND, *Attorney General*.

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

TAXATION—SALES AND USE TAX—OUT-OF-STATE SALE TO
MARYLAND BUYER BY VENDOR WITH LOCAL AGENT—
PROPERTY NOT READILY OBTAINABLE IN MARYLAND.

January 18, 1951.

Mr. James L. Benjamin,
Office of Comptroller.

There is here involved a sale by Dravo Corporation to Bethlehem Steel Company of an ore unloader. Is there a sales or use tax payable?

It appears that Dravo is a Pennsylvania corporation with its main office at Pittsburgh. It is organized into three separate divisions, one of which is engaged in general contracting, one in manufacturing and selling heavy machinery and equipment and the third in manufacturing and selling small machinery. The corporation is qualified to do business in Maryland and has a Baltimore agent. The agent's only authority, however, is to solicit and sell for the third (small machinery) division, the principal office of which is located at Philadelphia.

In 1949 Bethlehem Steel Company negotiated at Pittsburgh and there executed a \$329,353 contract with Dravo for the manufacture and purchase of an ore unloader to be delivered f.o.b. Pittsburgh. It was to be installed by Bethlehem at Sparrows Point, Maryland. Under Dravo's internal set-up the second (heavy machinery) division was the only one connected with the transaction. The Baltimore agent had nothing to do with it and in fact had no authority to contract for, or even to solicit, this type of business.

The contract was performed, the unloader was delivered to a common carrier at Pittsburgh, shipped to Sparrows Point and there erected by Bethlehem. During erection, difficulties developed. Dravo sent engineers from Pittsburgh to Sparrows Point from time to time to give advice in ironing out these difficulties.

The unloader was not readily obtainable in Maryland unless the presence of Dravo's agent here, and its qualification to do business in Maryland, made it so.

We think under Sales and Use Tax Rule 64, the Sales Tax does not apply. This rule is an effort, necessary and effective to define the point at which the Sales Tax becomes unconstitutional. See Article 81, Section 261(f), Code (1947 Supp.) The rule seeks to tax the sale of goods shipped into the State if two conditions exist:

“(a) The contract of sale is entered into either conditionally or unconditionally in this State by or on account of a non-resident seller who has a place of business from which sales are made or a sales office, or is represented by a distributor who has a place of business or office in Maryland; and

“(b) The delivery of the goods to be sold is made by the seller to the purchaser in this State.”

Even though delivery to a common carrier at the seller's place of business for transportation into the State is expressly considered to be a delivery “in this State”, the first condition is here not met. The contract was made in Pennsylvania. The implication is that unless both conditions are met, the sale will not be taxed:

The rule continues:

“To the contrary, if a Maryland purchaser orders goods directly from a non-resident vendor who maintains no place of business in this State, the sales tax does not apply to goods sold pursuant to the order if they are shipped into Maryland from points outside thereof. * * *”

This language would clearly forbid the tax but for the qualification: “who maintains no place of business in this State”. But as here applied, the qualification is meaningless. The place of business maintained in Maryland by the vendor had nothing to do, nor could it have had anything

to do, with the sale in question. Dravo's Maryland representative was in fact as isolated from this transaction, and all others like it, as if he had been the representative of some other manufacturer. We think the words "no place of business in this State" mean "no place of the kind of business involved in this State". The fact of the single corporate identity is, we think, under the facts here involved not significant.

We construe the rule as a whole to exempt the sale in question.

It may be that Dravo's Maryland activities (including the presence of its engineers to advise in the erection of the unloader) would sustain a wider application of the tax than the rule permits. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565; *McGoldrick v. Felt & Tarrant*, 309 U. S. 70, 84 L. Ed. 585; *Jagels v. Taylor*, 255 App. Div. 965, 8 N. Y. Supp. (2) 456, affirmed per curiam 280 N. Y. 766, 21 N. E. (2) 565, affirmed per curiam 309 U. S. 619, 84 L. Ed. 983, rehearing denied 309 U. S. 695, 84 L. Ed. 1035. But as title and delivery passed without the State pursuant to a contract negotiated and made without the State, unassociated with any business in the State, the validity of such application would be extremely doubtful. *McLeod v. Dilworth Co.*, 322 U. S. 327, 88 L. Ed. 1304. See Opinion of Attorney General of North Carolina, reported in C. C. H. Interstate Sales Tax Reporter, p. 3616. In view of the doubt, the scale must be tipped in favor of the rule. Section 301(a) gives the Comptroller power "to make, adopt and amend such rules and regulations as he shall deem necessary to carry out the provisions of this sub-title and to define any terms used herein."

True, *Norton Company v. Department of Revenue*, 405 Ill. 314, 90 N. E. (2) 737 (1950) upheld the Illinois retailers occupation tax as applied to somewhat similar facts. There, a Massachusetts corporation, with an office and warehouse

in Illinois from which its products were customarily sold, shipped goods from Massachusetts direct to Illinois purchasers on the purchasers' orders direct to the Massachusetts home office. But unlike the case before us, the local office and warehouse customarily sold, or took orders for, the articles purchased—a point which the Illinois Court stressed (90 N. E. (2) at 741) :

“* * * Appellant's business, as conducted within Illinois, comes within this last definition of a taxable business under the Retailers' Occupation Tax Act. It has an office and warehouse in Chicago from which it fills any orders made directly to that office, if the product is in the Chicago warehouse. If all, or a portion, of the items are not available at Chicago, the order is sent to appellant's home factory in Massachusetts. This is a business engaged in in this State. It is true that appellant does not complain about the tax on the orders filled in the Chicago office, but we cannot make the same distinction as does appellant on obligations under the Retailers' Occupation Tax Act.”

To have held otherwise would have opened a convenient route to circumvention of the tax, but not so here. The ore unloader could not be bought through a Maryland agency.

The *Norton** case is on appeal to the Supreme Court (No. 133, 1950-1951 Term) where it was argued December 6, 1950. The forthcoming opinion may suggest amendment of Rule 64. But unless and until such course is indicated by an authoritative decision, we think the rule as presently written ought to be adhered to.

Do Dravo's qualification to do business in Maryland and the presence here of its representative take the case out of the Use Tax exemption in favor of property “not readily

obtainable in Maryland" (Article 81, Section 310(f)). On this, Rule 62 includes as "not readily obtainable", "property that cannot be ordered by one of the following persons located in Maryland: a retailer, distributor or agent of an out-of-State manufacturer or producer who in the regular course of business customarily takes orders for such property for delivery in Maryland in the quantity ordered by the purchaser." Here, Dravo's representative not only did not in the regular course of business customarily take orders for ore unloaders, but he had no authority to do so. His only authority extended to the solicitation and sale of an entirely different class of product. The transaction is therefore not reached by the rule. And we think it is not taxable under the statute. The mere presence in Maryland of an agent for an entirely different purpose did not in fact affect the obtainability of the article. To hold otherwise would be to indulge in a fiction.

The Supreme Court of Iowa, construing similar language in the Iowa Use Tax Act, has held that the article must be kept in the State for sale as distinguished from being obtainable by giving an order to a local agent for delivery from without. *Dain Mfg. Co. v. Iowa*, 22 N. W. (2) 786. Though we think this construction unduly narrow, we feel that to impose the Use Tax in the case before us would stretch the pertinent language far beyond its natural meaning.

*On February 26, 1951, the Supreme Court affirmed, in all essentials, the judgment of the lower Court. 95 L. Ed. 517.

HALL HAMMOND, *Attorney General*.

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

TAXATION — INHERITANCE TAX — COMPUTATION OF TAX
WHERE LIFE TENANT HAS POWER TO CONSUME CORPUS.

February 5, 1951.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

I have reviewed the letter of the Union Trust Company, trustee under a deed of trust from Lillian B. Bond, late of Baltimore City, as well as a copy of the deed of trust, both having been enclosed with your recent letter.

Mrs. Bond, the decedent, transferred to the trustee on March 7, 1950, the date of the deed, cash and other property having a value of approximately \$46,000. Mrs. Bond's daughter, Mrs. Rosenberger, also assigned to the trustee, in accordance with the provisions of the deed, three annuity contracts issued to the daughter by an insurance company, pursuant to which the company was obligated to pay the daughter \$144.59 per month for life.

The purpose of the mother in establishing the trust and the purpose of the daughter in adding the annuity contracts to the trust fund was to protect both mother and daughter in the event that they, respectively, should become in such poor health that they could not properly administer their affairs.

The deed of trust directs the trustee to add all income to principal and from the principal to pay to the decedent and her daughter, or either, such amounts as the decedent might direct from time to time. Continuously from the time of the creation of the trust, the trustee applied to the benefit of the daughter amounts in excess of those received under the annuity contract, and as the deed directs will continue to do so.

The trustee submits that no inheritance tax should be paid on the amount received by it under the annuity contracts and further submits that the daughter's interest in the trust estate is not that of a life tenant entitled to income since, at the present time, only a relatively small part of the income is actually being used for the daughter, most of her support coming from principal. The trustee suggests that an equitable method would be for the trustee to report annually, dating from the death of the decedent the actual amount expended by the trustee for her support and maintenance, and to subtract from such amount the aggregate amount of payments received by the trustee from the annuity contracts and to pay an inheritance tax of 1% on the difference.

The trustee suggests further that it is undisputed that at the death of the decedent's daughter, the entire estate in the hands of the trustee will be distributable to collaterals and so subject to the Maryland inheritance tax at the rate of 7½%.

It is our view that the method of handling the tax problems of this estate, suggested by the trustee, are reasonable and legal and follow closely the procedure approved in 24 Opinions of the Attorney General, 936. We suggest that you adopt them.

HALL HAMMOND, *Attorney General.*

TAXATION—RECORDATION TAX—DEEDS BY WHICH TWO PERSONS EXCHANGE REAL ESTATE ARE SUBJECT TO TAX BASED ON THE VALUE OF THE LAND EXCHANGED.

February 5, 1951.

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

A conveyed property for which it has paid \$125,000 in cash that same day to B. B, in turn, conveyed other fee simple property to A and, in addition, paid A \$25,000. A difference of opinion has arisen as to whether recordation tax stamps should be affixed to each of the deeds. It is contended, on the one hand, that the stamps on the deed from A to B be based on \$125,000, and the stamps on the deed from B to A on \$100,000, and, on the other hand, that stamps should be affixed only to the deed from A to B, and be figured on a \$25,000 value, the actual cash involved in the transaction, with no stamps being affixed to the deed from B to A.

The recordation tax statute, Section 220(a) of Article 81, imposes a tax on "every instrument of writing conveying title to real or personal property * * * offered for record and recorded in this State." Paragraph (b) of that Section provides that the tax shall be at the rate of 55 cents for each \$500.00 or fractional part thereof for the actual consideration paid or to be paid".

In *Pittman v. Housing Authority*, 180 Md. 457, at 462, 463, the Court pointed out that, "the tax imposed upon the recording of a deed, even though computable upon the amount of the consideration, is not a tax on property *but a privilege tax imposed upon the privilege of recording the deed.*" The measure of the value of this privilege is the consideration. In this case, the reciprocal considerations were the other respective properties. The value of those

considerations is easily ascertainable because A had paid \$125,000 in cash for the first property on the very day he conveyed it, and B conveyed his property in exchange for that of A plus \$25,000 in cash. It seems clear that the fair market value of the property each received is the consideration to him for the transfer of his own property. This view of the realistic effect and consequence of an exchange of property is that held by the Federal tax law and interpretations. The Federal income tax statutes treat the amount realized from the sale or other disposition of property as the sum of money received "plus the fair market value of the property (other than money) received". I.R.C. 111(b).

It is our opinion therefore that the stamps must be affixed to both deeds based on the consideration of \$125,000 on the first, and \$100,000 on the second.

HALL HAMMOND, *Attorney General*.

TAXATION—INHERITANCE TAXES—WHERE PROPERTY IS CONVEYED TO GRANTEE FOR LIFE, WITH POWER TO DISPOSE OF IT BY WILL, THE RATE OF TAX IS TO BE DETERMINED BY THE LAW IN FORCE AT THE DATE OF THE CONVEYANCE OR THE GRANTOR'S DEATH.

February 6, 1951.

Mrs. Ruth R. Startt,
Register of Wills
for Talbot County.

By deed dated January 25, 1899, one Mary E. Fleming conveyed certain real estate to her daughter Julia P. Goldsborough for life with power to dispose of the same in fee simple by her last will, and in the event she failed to dispose of the property, then at her death, to the surviving children and the descendants of deceased children of the said daughter.

Under the terms of her last will, the daughter, Julia P. Goldsborough devised the property to three of her children. You wish to know whether, by virtue of the power of testamentary disposition which she exercised, the property should be appraised and the tax collected on each or any part of it, and if so, at what rate.

In Maryland, the donee of the power of appointment has no property in the subject matter of the power which is the property of the donor, at least in cases where the donor and donee are not the same person. In the situation considered in our opinion of January 16, 1951, 36 Op. A.G. p. 248, the donor and the donee were the same person and there was a reservation of the power of appointment as distinguished from the creation of such a power by one person in favor of another.

Inheritance taxes are not taxes on property, but on the right to receive, payable by the beneficiary. In Maryland

the rule for inheritance tax purposes is the same as that applicable for other purposes, viz., the property passes by exercise of a testamentary power of appointment, not from the donee of the power but from the donor. *Connor v. O'Hara*, 188 Md. 527 at 530, 531. In Maryland also, by virtue of legislation and of opinions of the Court of Appeals, property passing under the power of appointment has been considered like other contingent remainders. *Connor v. O'Hara* at page 532. See also *Safe Deposit and Trust Co. v. Bouse*, 181 Md. 351.

Thus in the instant case, the property passing by virtue of the exercise of the power of appointment of Mrs. Goldsborough is considered as having come from her mother, Mary Fleming, direct to the three children who take it. Inasmuch as the deed which passes the property under this legal theory was executed in 1899 at a time when there was no direct inheritance tax, it follows that no tax is now payable since the law in effect at the time of the creation of the power governs. In *Safe Deposit and Trust Co. v. Bouse*, above cited, the Court of Appeals held that a taxable event occurred when a contingent remainder vested, and that the law then in effect controlled. However, after that decision, the Legislature by Chapter 573 of the Acts of 1943 provided that the laws increasing the collateral inheritance tax and the law imposing the direct inheritance tax which are now codified as Sections 109, 110 and 111 of Article 81 of the Code, so far as they change or increase liability for inheritance taxes, or change the rate of said taxes, were "intended to apply to and affect only the estates of persons dying after the effective dates of the said Acts, respectively". Said acts were passed from 1935 to 1941. It is clear, therefore, that the transmission of property from Mrs. Fleming in the instant case is governed by the law in effect at the time of the deed or at her death and not at the time of the vesting of the contingent remainder under the power.

HALL HAMMOND, *Attorney General*.

TAXATION—INHERITANCE TAXES—BANK ACCOUNT IN THE NAME OF AUNT, AND NIECE AND HER HUSBAND AS JOINT OWNERS, IS PRESUMED TO BE HELD BY THEM INDIVIDUALLY IN EQUAL SHARES.

February 9, 1951.

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

Your letter of November 24th discusses the tax status of a bank account in the name of Lillie E. Stair, Mary C. Smith and Raymond L. Smith, her husband, joint owners, subject to the check of either, etc. Lillie E. Stair has died. Before her death she had opened the account in this form for her niece Mary S. Smith and her husband Raymond. You suggest that previous rulings of this office would indicate that the tax is due on one-half the amount of the deposit, the husband and wife taking that half as tenants by the entirety, inasmuch as Lillie E. Stair had a half interest, and the husband and wife the other half as tenants by the entirety.

You will recall that on November 3rd, 1950, Mr. Coe wrote you referring to the case of *Kolker v. Gorn*, 67 A 2d 258, a recent case in the Court of Appeals, which was discussed by me in an opinion to the Register of Wills of Baltimore City, (35 Op. A.G. p. 198), copy of which was sent to you. That opinion led to the conclusion in my opinion as follows:

“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."

Under this holding, each of the parties to the bank account took as individual joint tenants, and the ordinary rule would apply as if Mary and Raymond were not husband and wife unless, as in the *Kolker* case, a mistake can be shown and reformation effected.

HALL HAMMOND, *Attorney General*.

TAXATION—INHERITANCE TAXES—LIFE ESTATE WITH
POWER OF INVASION—TAX APPLICABLE UPON EXERCISE
OF POWER.

February 9, 1951.

Mr. R. Glenn Prout,
Register of Wills
for Anne Arundel County.

Your letter of December 11th in regard to the Estate of Samuel D. Hecht puts the case of a widow to whom has been left a life estate with remainder to four nephews. The Will directs that in addition to the income, the widow may be paid such amounts of corpus as, in the discretion of the Trustees, is necessary for her comfort and welfare.

A direct inheritance tax of three-tenths of 1% was paid at the time of the approval of the administration account in 1948. The Federal estate tax as filed shows 80% credit of the basic tax applicable to Maryland of \$3,965.32; but \$2,365.75 has been paid in inheritance tax, including the sum of \$677.06, representing the three-tenths inheritance tax on the widow's life estate.

Your question is whether the Executors may now pay 1% of the entire corpus, and upon the termination of the trust, pay 7½% on the then remainder less said 1%, which they now wish to pay.

It is our opinion that this may not be done. The statute permits credit for the tax paid on the interest of a life tenant if, within the time therein prescribed, the remaindermen have the value of their interest ascertained, and pay the tax so found to be due. It is only by this procedure that the credit for the tax paid by the life tenant can be obtained.

The situation you present is similar in all basic aspects to that presented and considered in an opinion found in 33

Opinions of the Attorney General, 360. It was there held that the interest of the widow must be valued as an ordinary life estate without regard to the power of invasion, it being further held that should the widow exercise the power to invade, an additional tax would be required as to the amount paid over as if that had been left in fee. The mere existence of a potential right to receive corpus does not transform a life estate into a fee, either legally or for purposes of taxation.

The situation is then that the executors must at this time file the Maryland estate tax showing a liability for the difference between the inheritance tax paid and the 80% credit permitted by the Federal estate tax. If in the future corpus is paid to the life tenant, the tax must be paid thereon and at her death a tax will be payable by the nephews at $7\frac{1}{2}\%$ on the value of the property at that time on the assets then passing to them.

HALL HAMMOND, *Attorney General.*

TAXATION—LAND OWNED BY UNITED STATES AND LEASED
TO A PRIVATE CORPORATION FOR A TERM OF YEARS FOR
THE CONSTRUCTION OF HOUSING FACILITIES, SUBJECT
TO STATE AND LOCAL TAXES.

February 15, 1951.

Mr. Marvin I. Anderson,
Attorney for County Commissioners
of Anne Arundel County.

You have inquired of us as to the taxability of a tract of land, a part of the original Camp Meade, which has been leased by the Secretary of the Army under pertinent permissive Federal statutes to Meade Heights, Inc., so that this corporation may erect thereon a housing project of some three hundred and fifty units. The lease is for a term of seventy-five years and provides that title to all improvements constructed on the leased land shall remain during the term of the lease in the lessee. At its termination, the lessee shall either elect to remove the improvements, and restore the premises, or permit them to become the property of the government, without compensation. The apartment units must first be let to military personnel or government contractors' employees; but, if demand is not promptly made by the government for available apartments, they may be rented to any one. During the term of the lease, the improvements are to be insured against fire with the proceeds being payable to the lessee and any mortgage as interests appear. In addition, the lease specifically provides that the lessee shall comply with all applicable State, county and municipal laws, ordinances and regulations as to construction, sanitation, licenses, permits to do business "and all other matters". It further provides that the lessee shall pay to the proper authority "all taxes, assessments and similar charges which at any time during the time of this lease may be taxed, assessed or imposed upon the government or upon the lessee with respect to or upon the leased property".

The lessee is a Maryland corporation having its principal place of business in Maryland and outside the leased area.

The land now under consideration was acquired by the Federal Government as part of Camp Meade in 1919 by purchase from private individuals. At that time the consent of the State of Maryland to such acquisition was given by Sections 31 to 33 of Article 96 of the Code, enacted by Chapter 743 of the Acts of 1906. Section 32 provides that exclusive jurisdiction is ceded to the United States for all purposes, "but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands". Section 33 provides that "so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State".

By virtue of Article 15 of the Declaration of Rights, before its amendment of 1914, it was clear, under the decisions of the Court of Appeals, that ordinary taxes are levied not on things but on the owners of things and that the value of the things owned fixes the measure of the owner's liability to contribute in taxes toward the support of the government. *Monticello Company v. Baltimore City*, 90 Md. 416, at 425; *United States Electric Power and Light Company v. State*, 79 Md. 63; *Appeal Tax Court v. Patterson*, 50 Md. 354. The 1914 amendment to Article 15 of the Declaration of Rights changed its language but not its effect or the conclusions of the Court of Appeals as to this basic and fundamental theory of personal liability under the tax laws of Maryland. See *Knights of Pythias v. Baltimore*, 157 Md. 542; *Tax Commission v. B. & O. Railroad*, 179 Md. 125, at 151-152. The Supreme Court has recognized and adopted the principle that taxation in Maryland is upon the individual and not upon the property, the latter serving merely as the measure of the liability. See *Carstairs v. Cochran*, 193 U. S. 10, 48 L. Ed. 596; *Hannis Dis-*

tilling Co. v. Mayor and City Council, 216 U. S. 285, 54 L. Ed. 482; *Corry v. Baltimore*, 196 U. S. 466, 49, L. Ed. 556..

Section 3(c) of Article 81 of the Code of Maryland (1947 Supplement) authorizes the State Tax Commission to determine by regulation, in what class or classes of cases a person in possession or control of real or personal property shall or may be treated as the owner of such property for the purposes of ordinary taxation. Pursuant to this authority, the Tax Commission has adopted a regulation (Number 1) that the owner of a term of years in real or personal property shall be treated as the owner of such property for purposes of ordinary taxation. This regulation, adopted September 30, 1941, was duly filed with the Clerk of the Court of Appeals and the Bureau of Legislative Reference, as required by Section 7A of Article 41 of the Code.

The matter comes then to the point that Meade Heights, Inc., a domestic corporation, must be subject to ordinary State and local taxes, measured by the value of the improvements erected by it on the land leased from the Federal Government and owned by it under the lease, plus the value of the interest it owns in the land supporting these improvements, unless the fact that the United States is the landlord bars the right of the State and County to impose the tax on the lessee.

Decisions such as *Johns Hopkins v. County Commissioners*, 185 Md. 614, and *United States of America and Mesta Machine Company v. County of Allegheny (Pa.)*, 322 U. S. 174, 88 L. Ed. 1209, make it plain that government-owned property, to the full extent of the government's interest therein, is immune from taxation either as against the government itself or as against one who holds it as officer, agent or contractor. In the *Hopkins* case, the title to the real property was in the Hopkins University but it was a bare legal title only and the equitable owner was the government. In the *Mesta* case, the government

owned the machinery in the Mesta plant, although it was leased to the corporation which was using it and its use was solely for governmental purposes. The decision was that an officer, agent or contractor of the government may be taxed on the advantage he realizes by way of profit, benefit or personal use of government property, but that neither he nor the government may be taxed for the government's property interest.

On the other hand, there are the cases where local taxation is permitted even though the government has an indirect or bare legal title in the taxed property and where the taxes are not directly or immediately on the government's interest or on the government's property. See *Baltimore Shipbuilding and Drydock Company v. Baltimore City*, 97 Md. 97. There, a lot of ground and a drydock at Locust Point were conveyed by the United States to a private corporation, the land having formerly been a part of Fort McHenry. The grant was a conditional one in that the Drydock Company was required to construct, within two years, a certain type of drydock of a certain length and to accord to the United States the right to the use forever in said drydock for examination and repair, free of charge, of vessels of the United States. If at any time the property conveyed should be diverted to any other use or if the drydock were unfit for use for a period of six months or more, the property reverted to and became the absolute property of the United States. The Court pointed out that the Drydock Company took an estate limited to a particular use and one liable to be defeated upon a mis-user or non-user and yet it took a valuable interest in the land of which it was in full possession and enjoyment. The Court of Appeals said:

“We hold that the conditional interest or estate of the appellant in this land, subject to the rights of the United States therein, constitutes property within the meaning of Sec. 2 of Art. 81 of the Code, and is taxable by the State and the City of

Baltimore. In view of the fact that the situation of the title to the land is such that the absolute fee therein cannot be taxed and therefore could not be sold for non-payment of taxes, the assessment books should be so modified as to show that the estate assessed is subject to the right and interests of the United States in the land and improvements.”

This case was affirmed by the Supreme Court in 196 U. S. 375, 49 L. Ed. 242. See also *Wisconsin Central R. R. Co. v. Price County*, 133 U. S. 496, 33 L. Ed. 687, which involved the grant of part of the public domain to private corporations for railroad purposes. The Court pointed out that legal title in the United States usually determines both the fact and the right of ownership. However, if the private corporation enjoys an equitable right to use and enjoyment of the property, the mere retention of naked legal title in the government will not exempt it from taxation. The Court said:

“* * * in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right of property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation.”

See also on this point *New Brunswick v. United States*, 276 U. S. 547, 72 L. Ed. 693.

There are several more statutes which are pertinent—one State and the others Federal. Section 41 of Article 96 of the Code (1947 Supplement) provides that, notwith-

standing any other provisions of the law, the State of Maryland, as to all lands acquired by the United States after the passage of the statute in 1943, reserves as to all property, persons and transactions, jurisdiction and authority "to the fullest extent permitted by the Constitution of the United States and not inconsistent with governmental uses, purposes and functions for which the land was acquired *or is used*". The Section further provides that its passage shall not be deemed or construed to restrict jurisdiction, and authority over any lands theretofore acquired. Here is a clear indication, taken together with the provisions of Sections 31 to 33 of the same Article, that the Maryland policy, as made effective by the Legislature, is to tax property on Federal reservations to the extent that the Constitution permits.

The lease to Meade Heights, Inc., was executed pursuant to authority given by the Congress by two Acts; first, is Section 1270 of Title 10, U. S. C., the other is the so-called Wherry Act, Public Law 211 of the First Session of the Eighty-first Congress, which amends the National Housing Act, 12 U. S. C., Section 1701, et seq., by the addition of a new title, headed "Military Housing Insurance". Paragraph (d) of Section 1270 of Title 10 provides that the lessee's interest in the leases therein authorized is to be subject to State and local taxation. The Wherry Act, in Section 807, provides: "Nothing in this Title shall be construed to exempt any real property acquired and held * * * under this Title by the Commissioner from taxation by any State or political subdivision thereof, *to the same extent, according to its value, as other real property is taxed.*" While this language applies in terms only if the mortgage is in default and the Commissioner takes over the property, nevertheless, it is clear Congressional intent that the property is subject to tax on the same basis as if it were held without regard to Federal interests therein.

It is entirely clear to us, therefore, that under the language of the Maryland cession Acts to which we have

referred, the government does not own the land here involved nor does it retain it as its property for the period of the lease. The value of the improvements on the land in question and the value of the lessee's leasehold interest therein is properly subject to State and local taxation. Under the doctrine of the *Baltimore Shipbuilding* case and the language of the Federal statute, there must be an elimination from the tax base of the government's residual interests. However, there can be no question but that the value of the improvements are fully taxable as if the government were not in the picture, without any deduction for the mortgage encumbrance on the property. This is made plain by the fact that the Congressional approval was given to the taxation of the lessee's interest and that interest is no different from that of any individual owner of similar apartment property. And, in addition, the language of the Wherry Act that the property is to be taxed "to the same extent, according to its value" as is other real property puts the matters beyond speculation.

The tax records, as suggested in the *Baltimore Shipbuilding* case, should carry the notation that the enforcement of any delinquent taxes could not involve any jeopardy to the residual rights and interests of the government.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX— $\frac{1}{2}$ REMAINDER INTEREST
CREATED BY A DEED OF TRUST IS ASSET OF ESTATE OF
NAMED BENEFICIARY EVEN THOUGH DISTRIBUTION HAD
NOT BEEN MADE TO BENEFICIARY AT TIME OF HIS
DEATH—METHOD OF EVALUATING INTEREST DETER-
MINED.

March 2, 1951.

Mr. Edward L. Fontaine,
Register of Wills
for Somerset County.

You put to us the case of a resident of Somerset County who died owning a vested remainder created by a deed of trust executed by a non-resident of Maryland in 1947. By the terms of the deed, the income from the trust estate is to be paid to the grantor for life and at her death it is to be paid to her issue surviving in equal shares "until the youngest of said issue shall have attained the age of twenty-five years."

The creator of the trust has died survived by only one child who will become twenty-five in 1956. The deed of trust provides further that when the youngest child becomes twenty-five, the principal of the trust fund and any accumulated income shall be divided into four equal parts and paid over to named beneficiaries who are given the rights to will the property, in default of which it goes unto "their legal heirs". One of the named beneficiaries was the deceased resident of Somerset County. By his last will and testament, he devised all of his estate unto his widow.

The questions put to us are two: (a) Is the interest of the decedent formerly a resident of Somerset County in the trust estate an asset of his estate, and, if so, what is the proper valuation thereof? (b) Is an inheritance tax payable on the interest?

The answers to your questions may be found in an opinion in 32 Opinions of the Attorney General, 422, where we said:

“At the time Mrs. McCormick died it is clear that her estate consisted of a remainder interest in the trust established by Charles B. Houston. That the passing of such an interest occasions the inheritance tax and the tax on commissions is now well settled. 19 Opinions of the Attorney General 491, 21 Opinions of the Attorney General 692. Accordingly, the remainder interest should have been valued at the date of Mrs. McCormick’s death and an inheritance tax should have been paid on the portion of the interest which passed to the decedent’s collateral descendants. A similar valuation should have been made for the purpose of the tax on commissions.”

The valuation of the remainder interest presents little difficulty. The present value of the estate is known so that one-quarter of it is obviously and easily ascertainable. The present value of a dollar to be received in 1956 can be determined by actuarial and interest tables such as those contained in the Federal Estate Regulations. The table to be found in “Inheritance Tax Calculations” by Wolfe, Second Edition, at page 87, shows the present value of a dollar at the end of six years, at various interest rates to be as follows:

3½%	.813501
4%	.790315
5%	.746215
6%	.704961

It is clear, therefore, that the entire value of the remainder interest is a taxable asset of the estate of the deceased resident of Somerset County, and that there should be collected a tax on its value ascertained as above suggested, as well as a tax on commissions on such valuations.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—WHERE NON-RESIDENT SETTLOR EXECUTED A DEED OF TRUST APPOINTING A LOCAL BANK AS TRUSTEE TO ACCUMULATE AND RE-INVEST INCOME OF HIS ESTATE AND UPON HIS DEATH TO PAY THE INCOME TO HIS WIDOW FOR LIFE AND UPON HER DEATH TO HIS DAUGHTER UNTIL SHE REACHES A PRESCRIBED AGE, AT WHICH THE TRUST TERMINATES AND THE PROPERTY VESTS IN HER, THE ESTATE IS SUBJECT TO INHERITANCE TAX.

March 29, 1951.

Mr. R. Glenn Prout,
Register of Wills
for Anne Arundel County.

I am sorry to have delayed so long in answering your letter concerning the estate of James Harry Lovell, a British subject and a resident of England at the time of his death, who in 1933 had created a trust, under the terms of which the income was to be accumulated and reinvested during his life, and at his death to be paid to his widow for life and then to his only daughter until she attained the age of twenty-five, when she was to receive the estate free of trust. The daughter was born in 1928 prior to the passage of pertinent Maryland inheritance tax statutes in 1935 and 1936.

The trustee of the trust at the time of its creation was and now is a Baltimore trust company. You wish to know whether the property passing at the death of Mr. Lovell for the benefit of his wife and daughter is subject to tax.

The answer to your inquiry would seem to be given by an opinion of this office, 36 Op. A.G., p. 248, to the Register of Wills of Baltimore City involving the estate of Katherine Keys Patterson. If names and dates are changed, with the further change to a limited power of revocation in the instant case from a limited power of appointment in the

Patterson case, the legal situation and problems to be dealt with are substantially identical. It was our view in the Patterson case, as it is here necessarily, in reliance on that opinion, that the death of the creator of the power was a taxable occasion under the law now in effect. I enclose a copy of this opinion for your guidance. See also 33 Opinions of the Attorney General 363; 27 Opinions of the Attorney General 443; 24 Opinions of the Attorney General 855; 23 Opinions of the Attorney General 633; 22 Opinions of the Attorney General 750.

It is more or less conceded by the counsel for the estate, as we think it must be, that Section 137 of Article 81 is not available under the facts to prevent the imposition of the Maryland tax. See opinion of the Attorney General, 35 Opinions of the Attorney General, 292, involving intangible personal property of an Austrian decedent. See also 27 Opinions of the Attorney General 413; *State v. Dalrymple*, 70 Md. 294; and *Curry v. McCannless*, 307 U.S. 357; 83 L. Ed. 1339.

It would seem the tax is payable in Anne Arundel County where ancillary administration is being held on the local estate of Mr. Lovell.

HALL HAMMOND, *Attorney General*.

TAXATION—TAX ON COMMISSIONS—TAX IS CALCULATED ON AMOUNT OF GROSS SALE PRICE OF LEASEHOLD PROPERTY, REGARDLESS OF EXISTENCE OF MORTGAGE—ON SALE OF SECURITIES AT LESS THAN APPRAISED VALUE, TAX IS COMPUTED ON PROCEEDS OF SALE.

May 3, 1951.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

You ask whether, for purposes of the State tax on commissions without regard to whether the executor or administrator claims commissions or not, there can be deducted from the sales price of leasehold property the amount of a mortgage due thereon. In other words, you wish to know whether the tax on commissions is figured on the gross sale price or on the net left to the estate after the liens are paid.

The Court of Appeals in the case of *York v. Maryland Trust Company*, 150 Md. 354, has answered your question. It was there said that:

“* * * And finally, the Orphans’ Court in its opinion says that ‘it is the long established practice of this court to approve and ratify inventories where the whole estate is returned regardless of the liens and claims against any or all of its assets and to fix commissions based on the inventory’.

“There is nothing in this practice at variance with our statutes, and in fact the provisions requiring the listing of all assets and of all debts would seem to indicate that this is the correct practice, at least so far as assets within the State of Maryland are concerned.”

The tax on commissions provided by Section 104 of Article 81 fixes the tax on commissions, regardless of

whether or not the executor or administrator waives commissions, at a stated percentage "of the estate". It is clear under the *York* case that the law imposes the tax on the gross estate which comes into the hands of the personal representative and not merely on the net estate.

Your second question is whether the tax on commissions is on the appraised value of securities or on the net amount received on the sale thereof at a loss. The practice has long been in stating an administration account to start with the inventory value and to add thereto any increases resulting from sales and to deduct therefrom any losses resulting from sales, so that the estate in the hands of the personal representative reflects both profits and losses, before the amount subject to the tax on commissions is finally determined. To use the words of the Court of Appeals in the case of *York v. Maryland Trust Company*, "There is nothing in this practice at variance with our statutes, * * *". The answer to the second question, therefore, is that the tax on commissions is figured on the net value in the case of the sale of securities at a loss. See *Downes v. Safe Deposit & Trust Company*, 164 Md. 293, at 301-303.

HALL HAMMOND, *Attorney General*.

TAXATION—INHERITANCE TAX—FULL ACCOUNTING OF ALL
ASSETS IN MARYLAND IS REQUIRED.

June 20, 1951.

Miss Ruth R. Startt,
Register of Wills for Talbot County.

You put to us the matter of one William Sterner, a resident of Talbot County for many years, who died while in Philadelphia on a visit. He left a substantial deposit in cash in a bank in Easton and an automobile titled in Maryland. The nephew of Mr. Sterner filed a petition in the office of the Register of Wills of Philadelphia County and therein swore that his uncle was a resident of Philadelphia County at the time of his death. On this petition, the nephew was appointed administrator in Pennsylvania.

You ask what procedure you should follow. I believe that the opinion found on page 238 of Volume 30 of our opinions will answer your question. We there held that there can be no doubt that the intangible assets—or the tangible assets within the State—of a decedent are taxable by the State of domicile, which, of course, in this case was Maryland. We further held:

“No action of the District as to the intangible assets of a Maryland decedent can affect Maryland’s right to require full accounting in its courts of those assets and to exact a tax on the full value of those assets.

“The executors should charge themselves in Montgomery County with the full amount of the assets. Commissions should be allowed on the basis of the gross estate so to be accounted for, and the tax on commissions calculated on the same basis. In fixing the amount of the commissions, the Orphans’ Court will no doubt, in exercising

its discretion within the statutory limits, take into account the commissions which the executors have previously received in the District of Columbia.”

Sections 131 and 132 of Article 81 of the Maryland Code seem to furnish a method for requiring administration upon the estate if other methods fail.

HALL HAMMOND, *Attorney General*.

TAXATION—INHERITANCE TAX—PROPERTY PASSING TO THE
ADOPTED SON OF TESTATRIX'S DAUGHTER, IS SUBJECT
TO TAX AT 1%.

June 27, 1951.

Mrs. Agnes Phelps McAllister,
Register of Wills
for Dorchester County.

You advise us that Eliza Jane Clemons died in 1950 leaving a will, which was probated in Dorchester County, under which there passed to one Randle R. Williams, an adopted son of a daughter of Mrs. Clemons, real estate appraised at \$2,500.

The adopted son has paid collateral inheritance tax on the appraised value of the real estate and has filed a claim for refund alleging that as the adopted child of the daughter of the testatrix he should be required to pay only a direct inheritance tax.

By Chapter 599 of the Acts of 1947, there was passed a new adoption law for the State of Maryland. Included therein were nineteen new Sections which were added to Article 16 of the Code; one of these being Section 85K. This Section is headed "Legal Effect of Interlocutory Decree of Adoption". It may be found at page 261 of the 1947 Supplement to the Code. Note particularly paragraph (a) of this Section, which is, in part, as follows :

"Except as otherwise expressly provided in this section, the person adopted shall be, to all intents and purposes, the child of the petitioner or petitioners; unless and until such interlocutory order of adoption is revoked the person adopted shall be entitled to all the rights and privileges and subject to all the obligations of a child born in lawful wedlock to the petitioner or petitioners." (Emphasis added.)

See also paragraph (c) of the same Section, which provides that the term "child" in a will or other instrument shall be held to include "any adopted person, unless the contrary plainly appears by the terms thereof". This changes the prior law, which, of course, held, as you point out under the principle of *Eureka Life Ins. Co. v. Geis, et al*, 121 Md. 196, that the term "child" in a deed or will applied only to the adopted child of the grantor or testator.

In an article in 10 Maryland Law Review, there is a discussion of Section 85K, as well as of Section 139A of Article 93, dealing with distributions, which concludes (pages 50-51) :

"Thus it is that under the new law, an adopted child could take as a grandchild to inherit the property of the adopting parent's own parents, or as a niece or nephew, to inherit the property of the brother or sister of the adopting parent, if such die intestate. This was not so under the older law.

"Similarly, under the provision of Section 85K, part C, the adopted child would take from such a grandparent or uncle or aunt under a will or deed or other document which had merely left property to the 'child' of the one who had adopted. This is different from the older law, in that the older law interpreted 'child' as including an adopted child only as to instruments executed by the adopter. Now, the opposite is true, and it is presumed that the draftsman of the instrument meant to include adopted children, unless the contrary be clearly shown, so that today an adopted child is equivalent to a natural child for purposes of taking under a written document using that word."

The Court of Appeals on May 23, last, decided the case of *Gutman v. Safe Deposit and Trust Company* (81 A 2d,

207), in which it held that under a will probated in 1923 the principles we have just quoted from the Maryland Law Review were not applicable inasmuch as Chapter 599 of the Acts of 1947 was entirely prospective and not retrospective in its operation. The inference seems to me clear that in instruments taking effect after the effective date of Chapter 599 the new law prevails. See *Bartlett v. Ligon*, 135 Md. 620.

Section 110 of Article 81 of the Code (1947 Supplement) imposing the collateral inheritance tax, exempts "lineal descendants" of the decedent. As the new adoption law treats adopted children as natural children "to all intents and purposes" and as an adopted child is entitled to "all the rights and privileges" of a natural child, he is, we think, entitled to be treated as a natural child for tax purposes as for all other. It follows that he is entitled to the same rate of tax as a natural child, whether the decedent be his adopting parent, or such parent's parent. This conclusion is in line with former opinions of this office construing the prior adoption law (Article 16, Section 81, Code, 1939 Edition) to entitle an adopted child to the inheritance tax privileges of a natural child *when taking from the adopting parent*. 31 Opinions of the Attorney General 209, 29 Opinions of the Attorney General 224, 25 Opinions of the Attorney General 600, 23 Opinions of the Attorney General 644, and 21 Opinions of the Attorney General 695. The law then read:

"The effect of such decree of adoption shall be to entitle the child so adopted to the same rights of inheritance and distribution *as to the petitioner's estate*, * * * as if born to such petitioner in lawful wedlock, * * *." (Emphasis added.)

The case of *Connor v. O'Hara*, 188 Md. 527, 535, moreover, held that under this Section a natural child of an adopted child is entitled to the direct inheritance tax rate when taking from the adopting parent.

For the reasons we have given, it would seem, therefore, that Mr. Williams' claim for refund is justified since he is considered in law a direct descendant of his adoptive grandmother, Mrs. Clemons.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—CLAIM FOR REFUND MUST
BE SUPPORTED BY ADEQUATE PROOF.

July 3, 1951.

Mr. Raymond L. Pickett,
Register of Wills for Howard County.

You ask our opinion as to how you should respond to a request for refund of Maryland inheritance tax heretofore paid on property passing to a husband, under the exercise of a power of testamentary appointment granted his deceased wife by deed made in 1906. The tax was paid this year by the Safe Deposit and Trust Company of Baltimore, the trustee under the deed, upon the strength of an opinion given it by its counsel.

In 1906, the property in Howard County, known as "Farmlands", was conveyed by its then owner, Theodor G. Lurman and his wife to the Safe Deposit and Trust Company of Baltimore, trustee, on the following trusts:

1. To permit Frances D. Lurman (a niece of Theodor G. Lurman), during her lifetime to occupy, manage and enjoy the property or the rents, and profits thereof. There was a power of sale conferred upon the trustee, the proceeds of sale to remain upon the trusts set up for the property originally conveyed. This power of sale could be exercised only with the concurrence of the late Mr. Redmond C. Stewart or, upon his death or inability to act, with the concurrence of such person as he should by will or deed appoint.

2. Upon the death of the said Frances D. Lurman, the property was to go outright to her then living descendants, if any. If she left no descendants, the net income from the property or its avails was to be paid equally to Elizabeth DeV. Beale and Katharine Lurman, sisters of Frances D. Lurman, during their joint lives. Upon the death of

either, leaving issue, such issue were to take one-half of the principal; the net income from the other half, or all the net income, if the first to die left no issue, was to go to the surviving sister and, at her death, the principal then in trust passed outright to her surviving issue.

3. If all of the sisters died without issue, the property was then to go "as the survivor of the said Frances D. Lurman, Elizabeth DeV. Beale and Katharine Lurman may by last will direct".

All of the sisters died without issue and the last to die was Frances D. Lurman, who, not long before her death, married Dorsey M. Williams. As has been said, as Mrs. Williams she exercised the power of appointment and bequeathed and devised all of the trust estate to Mr. Williams, who survived her.

The Maryland inheritance tax was paid by the trustee on advice of its counsel on the assumption, as stated by him in his opinion that:

"On the facts stated, clearly Theodor G. Lurman was merely a seller to Miss Frances Lurman of the real estate covered by the deed, and apparently the deed of trust was executed directly by him to the Safe Deposit, as trustee, to avoid the necessity of a deed first from him to Miss Lurman and then from her to the trustee. We all think, therefore, that the deed of trust should be treated as though executed directly by Miss Lurman and conveying property then owned absolutely by her."

If the facts are as assumed and stated, undoubtedly the conclusion that the tax was payable is sound and correct, either under the law in effect at the time of Mrs. Williams' death in 1950 or under the law in effect in 1906, when the deed was made. Now Section 111 of Article 81 of the Code treats as taxable property "over which the decedent re-

tained any dominion during his lifetime" and says that the reservation of a beneficial interest in favor of the decedent "of a power of appointment by will or otherwise * * * shall be deemed to constitute dominion within the meaning of this sub-section". If the question is thought to depend upon the law at the time of the execution of the deed, it seems clear under the case of *Darnall v. Connor*, 161 Md. 210, that Mrs. Williams died "seized and possessed" of the property involved, if it was hers at the time of the execution of the deed. In our opinion, however, clearly the law in effect at the time of the death of Mrs. Williams controls as to taxability and rate of tax, if a tax is due at all.

The fact that the deed was direct from Theodor Lurman to the trustee, rather than from him to Frances Lurman and then from her to the trustee, is immaterial, if the consideration for the conveyance was in fact and in law actually hers. 30 Opinions of the Attorney General, 198; *Lilly v. State*, 156 Md. 95, 101, 102, and 31 Opinions of the Attorney General, 231.

On the other hand, in support of his contention that no tax is due, Mr. Williams says that the true facts are these: Theodor G. Lurman in 1906 was in straightened financial circumstances. Pressed by his creditors, he was anxious to clean up his obligations and yet to preserve "Farmlands" in the family for the benefit of his nieces, Mrs. Williams, Mrs. Beale and Miss Katharine Lurman. The Lurman family had a friend in New York who had considerable wealth. He was anxious to assist Theodor Lurman in his financial plight and, at the same time, to insure the saving of "Farmlands" for the Lurman nieces. He was in the fortunate position to be able to, and in fact, did, put up the \$40,000 which represented the purchase price of "Farmlands". However, he did not give the money to Miss Frances Lurman, but paid it to Theodor Lurman, upon the condition that the deed of trust be executed in the form which would pass the property to the then Miss Frances Lurman for life and then her children, if any, and if she had no

children, to her two sisters and their children, thus looking to the passing down of the property to the Lurman family as far along the line as might be practicable. If none of the sisters had children, then the survivor of them, not Miss Frances alone, unless she happened to be the survivor, was to have the power of appointment by will.

It is suggested that the facts which I have just set forth were told to Mr. Williams by his late wife. The officials of the Safe Deposit and Trust Company, who have dealt with this estate for many years, have believed and now believe—some of them by reason of conversations with Theodor Lurman—that the \$40,000 had been given outright to Miss Frances Lurman by the New York benefactor of the family, and that she had then purchased the property with the money.

If the version of the facts which is furnished by Mr. Williams is correct, it is our view that no inheritance tax would be payable. The generous donor who furnished the \$40,000 and brought about the creation of the deed of trust, would neither have died seized and possessed of the property since he had disposed of it absolutely, nor would he have retained any dominion over it. Maryland did not tax gifts in 1906, nor does it do so now. The situation would be analogous with that presented to the Court of Appeals in the case of *Prince de Bearn v. Winans*, 111 Md. 434. The Court of Appeals, in the *Darnall and Connor* case, *supra*, pointed out the difference between the facts in the *de Bearn* case and those in *Darnall* by showing that in the first case, the grantor in the deed parted once with all incidences of ownership, retaining neither benefit for life nor power of disposition beyond. In the first case "the benefits for life were given another, and the power to make further disposition was also parted with, and left to be completed by that other." The court went on to say, "There is no conflict in the decision on those facts (*de Bearn* and *Downs v. Safe Deposit*, 157 Md. 87) with the present holding that the original grantor, having reserved to herself the power to

dispose by will, was at death, for the first time, exercising one of the rights of original ownership not included in the conveyance, and not affected by it." See also *Connor v. O'Hara*, 188 Md. 527, where Judge Markell distinguishes *de Bearn* and *Downes* from *Darnall*, and concludes on page 534, as follows:

"The transaction in *Darnall v. Connor* bears little resemblance to the exercise by B by will of a power of appointment previously conveyed by A by will."

See also 24 Opinions of the Attorney General, 847.

It is apparent that whether or not a tax is payable depends upon the facts. We are unable to determine what the true facts are. The burden of proof would certainly be upon the claimant for refund. If he can convince you that his version of what occurred in 1906 is the correct one, through the production of such proof as he is able to adduce (in addition to the terms of the deed itself which certainly are slanted his way), you would be justified in approving the claim for refund under the provisions of Section 162A of Article 81 of the Code (1947 Supp.). It may well be, however, that you could not be convinced. In such case, my suggestion would be that a proceeding be brought in court, looking to a determination by appropriate judicial authority that the facts are as Mr. Williams believes them to be. If he cannot convince you or the court that he is right, the tax is properly paid and refund should be denied.

HALL HAMMOND, *Attorney General*.

TAXATION—GASOLINE TAX—MARYLAND MOTOR CARRIERS'
RECIPROCAL TAX IS APPLICABLE TO CARRIERS DOMICILED
IN WEST VIRGINIA.

July 25, 1951.

Mr. Joseph O'C. McCusker,
Chief Deputy Comptroller.

We have your letter with which you enclose Gasoline Tax Regulation No. 3 (Revised), issued by the State Tax Commissioner of West Virginia. This Regulation provides, among other things, that an operator of a motor vehicle, equipped with fuel tanks containing more than 25 gallons of gasoline, when entering that State, must file an importer's gasoline return and pay the excise tax of 5c per gallon on the quantity of gasoline so imported in excess of 25 gallons and used to operate the motor vehicle upon the public highways and streets of that State. The number of gallons to be included in the measure of the tax is to be determined by deducting the quantity of 25 gallons from the quantity contained in the fuel tanks at the time of entry. An operator may elect to purchase gasoline in West Virginia in quantities commensurate with the mileage traveled in that State, in lieu of filing the return and paying the tax mentioned.

You direct our attention to Chapter 676 of the Acts of 1951, enacting Sections 348 to 353, both inclusive, of Article 81 of the Code, under the sub-title "Motor Carriers' Reciprocal Tax". The question which you present is whether the provisions of the Act of 1951 are applicable to motor carriers domiciled in the State of West Virginia.

Our Act provides that every motor carrier, with exceptions which are unimportant here, domiciled in any State which imposes a similar tax on motor carriers domiciled in Maryland, shall pay a road tax equivalent to the rate of the State Gasoline Tax calculated in the amount of gaso-

line or motor fuel used in its operations within this State. Credits are allowed for gasoline purchased in Maryland. While it is true that the West Virginia regulation is in the alternative, namely, a tax is imposed on gasoline imported in excess of 25 gallons or, in lieu of that, operators may elect to purchase gasoline in the State in quantities commensurate with the mileage traveled there, the fact remains, we think, that the purpose of the Regulation is essentially the same as that of the Act of 1951, which is to require non-resident motor carriers to contribute to the cost of maintaining the highways by exacting from them the tax on the quantity of gasoline necessary to operate their vehicles over the highways of the State.

Accordingly, we conclude that Chapter 676 is applicable to motor carriers domiciled in the State of West Virginia. The Act provides that such non-resident carriers "shall pay a road tax equivalent to the rate of the State gasoline tax calculated in the amount of gasoline or motor fuel used in its operation within this State". That is the measure of liability of all persons against whom the law is directed and the formula provided for the amount of the tax is plain. There are, of course, certain permissible credits which are enumerated in the law, and these should be taken into account, when applicable, in determining the amount which is ultimately payable.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

TAXATION—INHERITANCE TAX—BEQUESTS FOR FUNERAL EXPENSES, AND TO EXECUTOR AND ATTORNEY FOR THEIR SERVICES IN SETTLING ESTATE—WHEN TAXABLE.

August 27, 1951.

Mr. Robert L. Wheeler,
Register of Wills
for Harford County.

This is in answer to your letter of July 11th concerning inheritance taxes in the estate of Martha Roth.

(1) The first question concerns a bequest of \$1,525 to McComas & Son for funeral expenses and the opening of the grave. We assume McComas & Son are undertakers. If they performed the burial, and if the bequest is reasonably worth the services they actually performed (which must be determined by the Orphans' Court), and if the Orphans' Court allows the full \$1,525 as funeral expenses, the amount is not subject to inheritance tax. If these conditions are not met, however, the excess going to the legatee over and above reasonable funeral expenses as allowed by the Orphans' Court will be subject to the 7½% tax.

(2) The second question concerns bequests to Alex Frey and his wife for his services as Executor. This question has been answered in 9 Opinions of the Attorney General, 251 and 25 Opinions of the Attorney General, 684. It was there held that "the Orphans' Court should determine the portion of the bequest 'which fully and under the usual practice represents commissions' and that the inheritance tax would be payable on the excess." Of course, if the executor receives commissions fixed by the Orphans' Court independent of the legacy, and receives the legacy in addition to commissions which he would ordinarily have received without the legacy, the legacy will be taxable in full.

(3) Your third question concerns a bequest to an attorney "as full payment for his services as counsel to the Executor in the settlement of my estate." This is clearly taxable, unless the attorney performs legal services for the executor (over and above the normal duties of the executor), for which the Orphans' Court allows a fee in addition to commissions. *Mudge v. Mudge*, 155 Md. 3; *Gradman v. Brown*, 183 Md. 634. Then any excess of the legacy over the fee as allowed will be taxable, and of course if the attorney accepts both in full, the entire legacy will be taxable. See 8 Opinions of the Attorney General, 379; 14 Opinions of the Attorney General, 282; 31 Opinions of the Attorney General, 234.

HALL HAMMOND, *Attorney General*.

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

TAXATION—SALES AND USE TAX—MATERIALS CONSUMED IN
CLEANSING RAGS TAXABLE WHEN SERVICE IS PER-
FORMED FOR OTHERS; EXEMPT WHEN RAGS ARE OWNED
BY TAXPAYER AND PROCESSED FOR RESALE.

August 27, 1951.

Mr. John G. Hisky,
Retail Sales Tax Division.

We are sorry for the delay in answering your letter of May 29, concerning the sales or use tax liability of Allied Wiping Materials Company. From the brief submitted by Mr. Webster Blades, attorney for the taxpayer, it appears that the Company is engaged in the business of processing waste materials, principally dirty rags. The rags are sorted into various grades, trimmed and processed to remove dirt and poisons. In the process quantities of soaps, chemicals, detergents and other ingredients are consumed—more than in ordinary laundering or cleaning. Before such processing, the rags average in value about 6 cents per pound. After processing, they average in value about 19 cents per pound.

As we understand it, the question is whether the purchase or use of the materials consumed in the cleansing process is subject to the sales or use tax.

During the period in question, about 25% of the raw materials (that is rags) were purchased by the taxpayer and resold after processing; and the other 75% were owned by third parties who sent their rags to the taxpayer for such processing at an agreed price.

Clearly the purchase or use of the materials consumed in processing the 75% not owned by the taxpayer, is subject to the sales or use tax. In performing these services, the taxpayer is no different from a laundry. Sales and Use Tax Rules and Regulations, Rule 44. We cannot see that the degree of filth or poison on the rags, or the amount of soap,

chemicals or detergents necessary to cleanse them, is of any legal significance.

The materials used in processing the 25% of the rags purchased by the Company for resale, present a more difficult question. However, we think Sales and Use Tax Rule 63 answers it. This rule construes that part of Section 259(f) of the Sales Tax Act which exempts sales "in which the purpose of the purchaser is * * * to use or incorporate the property so transferred, as a material or part, of other tangible personal property to be produced for sale by manufacturing, assembling, processing or refining." Section 308(d) (2) of the Use Tax Act contains practically identical language.

The rule is in part as follows:

"Tangible personal property shall be considered to be consumed in such operations if that property is materially changed in form and character, or consistency by reason of its use. Tangible personal property shall not be considered to be consumed in such operations if its value as property is ordinarily dissipated through the gradual wear or tear incident to its use. For example, the sale of coal for use in manufacturing, assembling, processing or refining is not taxable. Machinery and small tools for use in manufacturing, assembling, processing or refining are not taxable."

Although processing the rags, and thereby more than trebling their value, may not be "manufacturing", it is surely "processing or refining". We can see no difference in principle between the consumption of soap in such processing and the consumption of coal in manufacturing. The Comptroller has power "to make, adopt and amend such rules and regulations as he shall deem necessary to carry out the provisions of this sub-title and to define any terms used" therein. Section 301(a).

We conclude, therefore, that the soaps, chemicals and detergents consumed in cleaning rags purchased by the taxpayer for resale are exempt from the Sales and Use Taxes.

HALL HAMMOND, *Attorney General.*

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

TAXATION—SALES AND USE TAX—EQUIPMENT PURCHASED
OUT OF STATE BY NON-RESIDENT CONTRACTORS AND
USED ON MARYLAND JOBS—WHEN SUBJECT TO USE TAX.

September 4, 1951.

Mr. Edward F. Engelbert,
Retail Sales Tax Division.

Your letter of May 14th states that Nance and Vivadelli, Virginia contractors, presumably a partnership, have been doing considerable work in Maryland since August, 1947. In this work, they have used equipment purchased by them in Virginia. The question is whether the Use Tax is applicable to this equipment.

Section 310(e) of the Use Tax Act (Code, Article 81) exempts:

“Tangible personal property purchased or acquired prior to coming into this State by a person a non-resident thereof for his, her, its or their own use or enjoyment while temporarily in this State, or for such other use as the Comptroller may by regulation specify.”

Rule 76 of the Rules and Regulations promulgated by the Comptroller is as follows:

“Equipment of Non-Resident Contractors

“A non-resident contractor may bring into Maryland any equipment which he acquired before coming into this State without incurring the Use Tax liability thereon. He must, however, pay the Use Tax on all equipment which he acquires while in this State at the time such equipment is brought into Maryland.

“This rule is not intended to limit or define other exemptions contained in the Use or Sales Tax Acts.”

Assuming (without conceding) that the contractors are non-residents within the meaning of the statute and the rule, we do not believe Section 310(e) helps them. They have been far more than “temporarily in this State” within the meaning of that Section. Exhibit “A” submitted with your letter shows that they were working in Maryland on three separate jobs for a total of about three months in 1947; that they were out of the State for a year thereafter; that they returned November 1, 1948, and have worked here almost continuously ever since. During the latter time, they have been engaged on nineteen different jobs.

This schedule establishes a regular and progressively expanding pattern of business, at least since November, 1948. Since then the taxpayers have been carrying on a regular business in this State and their activities have been in no sense transient or temporary. See *Edgewater Realty Co. v. Tennessee Coal Co.*, 49 F. Supp. 807 (D. C. Md.); *Davidson Transfer & Storage Co. v. Christian*, — Md. —, 79 A (2) 541; Code (1947 Supp.) Article 75, Section 157. If incorporated, they would no doubt be required to register with the State Tax Commission and would be amenable to process here. Acts of 1951, Chapter 135, Sections 83, 85, 86, 88; see *Johns v. Bay State Abrasive Products Co.*, 89 F. Supp. 654 (D. C. Md.); Reiblich, “Jurisdiction of Maryland Courts over Foreign Corporations,” 3 Md. L. Rev. 35.

It may be argued that these taxpayers come within the words of Rule 76 in that they are “non-resident contractor(s)” who have brought “into Maryland * * * equipment which (they) acquired before coming into this State”. But the rule applies only to such contractors who are “temporarily in this State” within the meaning of Section 310(e). That Section gives the Comptroller power “by

regulation to specify * * * other use" of property (in addition to the uses set forth in the statute)—not other classes of persons. So neither Section 310(e) nor Rule 76 affords any exemption as to any property used in Maryland since November 1, 1948.

As to equipment purchased in Virginia and used in Maryland, *only in 1947* (and not brought back to Maryland later), we think the exemption afforded by Rule 76 applies. The taxpayers were herein that year for a total of only three months comprising two separate periods. Thereafter they were absent for a full year. We conclude that their presence in Maryland on those occasions was merely temporary and within the express language of both the statutory exemption and the rule.

Section 310(d) of the Use Tax Act has no application. That Section exempts from the tax property "upon the sale of which or upon the gross receipts received from the sale of which an excise tax has been imposed under the laws of any state * * *." Virginia has a license tax imposed upon wholesalers for the privilege of doing a wholesale business in the State, measured by the amount of purchases made during the preceding year. Virginia Code (1950), Title 58, Chapter 7, Article 6, Par. 58-305.

Nance and Vivadelli are not wholesalers, so they of course, did not pay any Virginia tax measured by their purchase of the property. Whether the exemption found in our Section 310(d) would apply to one who had paid the Virginia tax, we need not decide.

Finally, the tax must be measured by the purchase price of the property when purchased by the taxpayers. Use Tax Act, Section 309. Of course, any property purchased before July 1, 1947, is expressly exempt under this Section.

HALL HAMMOND, *Attorney General.*

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

TAXATION—INCOME TAX—CORPORATION LIABLE FOR TAX
ON INTEREST FROM MORTGAGES AND INSTALLMENT CON-
TRACTS OF SALE OF REAL ESTATE EARNED IN THE CON-
DUCT OF ITS BUSINESS.

September 5, 1951.

Mr. Frank W. Forestell,
Income Tax Division.

Your letter of August 28th concerns a Maryland corporation in the real estate business. Apparently it collects rents for others on commission. Apparently also it buys, rents and sells real estate on its own account. Sales are made both by means of installment contracts and by means of fee simple or leasehold conveyances. In the latter instances, the corporation itself frequently finances the purchases by retention of purchase money mortgages. Apparently, too, it often retains ground rents upon the properties which it sells.

Your question is whether the corporation's income from all of these sources is subject to the 4% corporation income tax imposed by Section 230(d) of Article 81 of the Code, or whether any part of its income is exempt under Section 223(1) of said Article. Section 223(1) exempts:

“Amounts received by corporations * * * from interest and dividends on intangible personal property to the extent that the same are included within the definition of investment income under this subtitle, * * *.”

Investment income has been defined by Section 222(n) of Article 81 to mean:

“* * * that portion of the gross income which is derived from dividends, ground rents, annuity income and interest, but shall not include interest earned in the conduct of a business on (1) loans

made under the provisions of Article 58A of the Annotated Code of Maryland, (2) business accounts and notes receivable, or (3) installment contracts.”

Section 223(1) clearly does not exempt gains on sales, commissions on rents, rents themselves or ground rents, for none of these constitute “interest” or “dividends”, nor are they the fruit of “intangible personal property”.

We put aside, as not necessary to determine, the question of whether interest on mortgages and interest derived from installment contracts of sale of real estate constitute “interest * * * on intangible personal property”, and pass to whether these sources of income are “included within the definition of investment income” as required by Section 223(1). We believe not. Section 222(n) expressly excludes from the definition of investment income “interest earned in the conduct of a business on * * * (2) * * * notes receivable, or (3) installment contracts.” We think that interest received in the conduct of a business (to assume in passing what we finally decide as a fact) on a debt secured by a mortgage is interest on “notes receivable” whether the debt is evidenced by a separate paper writing commonly called a note or only by a recital in the mortgage document itself. See Section 26 of Article 66 of the Annotated Code of Maryland (1939 Ed.). Installment contracts are “installment contracts”, whether for the sale of chattels or land. Finally, as you state the facts, the interest earned by the taxpayer in question on mortgages and installment contracts is earned in the conduct of its business.

HALL HAMMOND, *Attorney General.*

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

TAXATION—SALES TAX—TIMONIUM FAIR IS ENTITLED TO EXEMPTION.

September 10, 1951.

*Mr. Frank A. Shallenberger,
Assistant to the Comptroller,
Retail Sales Tax Division.*

You advised me that in your opinion the Maryland State Fair and Agricultural Society, Inc. is not entitled to exemption from the Maryland retail sales tax. You base your opinion in this respect, in part, on the fact that the predecessor corporation held an exemption certificate "only because the old Corporation was exempt by statute from any and all taxes which may be imposed by the State of Maryland", plus the fact that the charter of the new corporation indicates that stock has been issued and in no way indicates that the corporation is a "charitable, religious or scientific" one.

It is my opinion that the Maryland State Fair and Agricultural Society, Inc. is entitled to exemption under the Maryland Sales Tax Act. The predecessor corporation has been exempt since the sales tax has been in effect in Maryland. I have examined its charter and I have talked to counsel for the Company and neither of us has been able to find any statutory exemption from taxation. I think perhaps what you are thinking of is the charter of the Maryland Agricultural and Mechanical Association (which conducted a fair at Pimlico in the old days), which was incorporated in 1867 by an Act of the Legislature, which did contain an exemption from taxation to which I will refer later. The Timonium Fair, under whatever corporate form it recently has been conducted, had no statutory exemption from taxation but was exempted by the taxing authorities.

The charter and by-laws of the Maryland State Fair and Agricultural Society, Inc. make it plain that it is a non-profit organization. It was incorporated by a large group

of public spirited citizens whose interest was not profit but merely to save the State Fair for the benefit of Maryland farmers, breeders and those interested in the conservation of natural resources, as well as of the general public and the citizens of the State. Any stock in the corporation which was subscribed for, along with the subscription to the bonds, must be offered for sale to the corporation before it can be disposed of elsewhere.

There are a number of cases throughout the country which hold that a State or County Fair is an educational institution or organization. I have found no legal authority to the contrary.

Two judicial decisions directly in point involve Federal Social Security taxes. In each of these cases a public fair was held exempt from Social Security taxes because organized exclusively for educational purposes. *Oklahoma State Fair and Exposition v. Jones*, (1942) W.D. Okla., 44 F. Supp. 630, and *Southeastern Fair Ass'n v. United States* (1943), Ct. of Cl., 52 F. Supp. 219. On the basis of these decisions the old Timonium corporation was exempt from Social Security taxes as an educational organization, although I understand that the new corporation has elected to participate in Social Security for its employees under the 1950 amendment of the Act.

In the *Oklahoma State Fair and Exposition* case, the opinion indicates that the Government recognized the Fair as an educational organization but contended that it was not operated "exclusively" for educational purposes because of the amusement program conducted in conjunction with the Fair. The Court answered this argument by saying:

"I find myself unwilling to say that the plaintiff is doing anything more than carrying on its amusement features as a mere incidental function to assist it in promoting and expanding its educational program, something after the fashion of

using well-known movie stars to promote defense bond sales where the spectacular and lighter attraction agencies are commendably adopted as a means to a realization of the real benefits sought."

In the *Southeastern Fair Association* case, the Court of Claims characterized the exposition or regular features of the usual State or County Fair as "unquestionably educational, planned and managed by persons whose business it is to inform people about the resources of the region and the country, and methods by which they may be conserved, utilized and improved". In this case also the government stressed the amusement features as rendering the Fair not exclusively for educational purposes, but the Court ruled that the amusement features were purely incidental and to get money to operate the Fair and attract attendance.

The exemption of State and County Fairs from Federal income taxes is as an "agricultural or horticultural organization" under Section 101(1) of the Internal Revenue Code. The Federal tax regulations (Reg. 111, sec. 29, 101(1)—1) demonstrate that one of the prime reasons for this Federal tax exemption is the educational purpose or program. These regulations prescribe the following three requirements for a Federal income tax exemption as "agricultural or horticultural organization":

"(1) Have no net income inuring to the benefit of any member;

"(2) Are educational or instructive in character; and

"(3) Have as their objects the betterment of the conditions of those engaged in such pursuits, the improvement of the grade of their products, and the development of a higher degree of efficiency in their respective occupations."

Indirectly, therefore, a state or county fair is recognized to be an educational organization under the Federal income tax law and regulations.

In a number of judicial decisions, courts have consistently held that a state or county fair is an educational organization:

Saxon v. Arkansas State Fair Ass'n. (1930), 181 Ark. 750, 27 S.W. (2nd) 505—The Supreme Court of Arkansas held that a corporation created to conduct a state fair was organized “exclusively for educational purposes” and that the issuance of its stock was thereby exempt from the State’s Blue Sky Law, saying:

“Associations, such as that in the instant case, have been organized from purely patriotic motives for the purpose of educating the farmer to the point where he may appreciate the dignity and beauty of his calling and also encourage the use of modern methods in the operation of his farm and the application of business principles, by which his home may be beautified and his business rendered profitable and his labor lessened; the hope being that, when these ends are accomplished, the rural life and activities which have meant so much in the past and in the opinion of many is the nation’s hope for the future may be preserved.”

In answer to the argument that the fair was not exclusively “for educational purposes” because “in addition to the exhibits, horse racing and harmless amusements are engaged in as part of the fair”, the Court said:

“These amusements no more detract from the exclusively educational nature of the association than do the swings and playgrounds in the schoolyard for the use of the children at stated intervals render a public school not ‘exclusively educational’. These are but incidents to the main

purpose and in aid of it, and it might be said that a certain amount of amusement is necessary in any educational enterprise. Since fairs are created to bring together those engaged in agricultural pursuits, stock-raising, manufacturing farm implements, etc., so they may the better discuss conditions and improve themselves in matters of farming and stock-raising, and the amusement features are but to afford periods of relaxation, it is our opinion that the appellee association falls within the exemption of the statute and may be said to be exclusively educational within its meaning, and therefore no permit was needed for the sale of its stock."

Briggs v. City of Raleigh, (1928) 195 N.C. 223, 141 S.E. 597—The Supreme Court of North Carolina sustained the issuance of municipal bonds to construct buildings for a State Fair Grounds. Chief Judge Stacey characterized a state fair as an educational organization as follows:

"The purpose and design of a State Fair is to promote the general welfare of the people, advance their education in matters pertaining to agriculture and industry, increase their appreciation for the arts and the sciences, and bring them in closer touch with many things which otherwise might remain in reserve or 'caviare to the general', to borrow an expressive phrase from Shakespeare's Hamlet."

State ex rel. Leaverton v. Kearns, (1922) 104 Ohio St. 550, 138 N.E. 217—The Supreme Court of Ohio sustained the expenditure of public funds in aid of a county fair and held that such expenditure was not in violation of a constitutional prohibition against the use of public moneys to aid a private business. In answer to the argument that the fair was a private agricultural business, the Court said, "an agricultural fair is upon an entirely different basis,

being a public institution designed for public instruction, the advancement of learning and the dissemination of useful knowledge.”

Watton v. Cruce, (1944) 44 Okla. 186, 143 P. 1152—The Supreme Court of Oklahoma held that an organization similar to a State Fair could be incorporated as an educational institution since that was its principal purpose and function.

Powell v. Thomas, 214 S.C. 376, 52 S.E. (2d) 782—The Supreme Court of South Carolina sustained the issuance of public bonds to finance the construction of a Chester County Cattle Barn and Show Ring in order to conduct fairs and cattle shows. The Court ruled that such fairs and shows would be educational, and that the issuance of the bonds was thereby authorized by the State Constitution permitting their issuance for an educational purpose.

If the word “charitable” is given the broad meaning as including “all governmental, scientific, religious and educational purposes, with the proviso that the aid be for the public or given to a representative of the public”, or as applying “to almost anything that tends to promote the well-doing and well-being of social man”, it can be forcefully argued that a state fair is a charitable organization. See opinion of this office in 32 Opinions of the Attorney General, 463, and 1 Paul, *Federal Estate and Gift Taxation*, p. 648 therein cited.

It is to be noted that the Federal Government has exempted the Maryland State Fair and Agricultural Society, Inc. from income tax and from Social Security taxes as a non-profit educational institution.

As I said earlier, the State of Maryland by administrative action, under advice of this office, exempted the Timonium Fair when it was operated by the corporation which preceded the present one. The 1867 Legislature which incor-

porated the Maryland Agricultural and Mechanical Association to conduct a State Fair (at Pimlico), not only exempted the land and property of the Fair Association from State and County taxes, which is a clear indication of a public policy that such organizations are entitled to exemption, but even appropriated \$25,000 of public money for the purchase of the Fair Ground. Today the State Fair Board, by virtue of a legislative policy, gives very substantial financial assistance to Agricultural Fairs to further their educational and scientific purposes.

I think that the enclosed editorial from the Morning Sun of September 3, 1951, entitled "City People Haven't Got The Point" illustrates in part at least why County Fairs have been classified and should be classified as educational and scientific institutions.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—COMPUTATION OF TAX ON
 LAND CONVEYED BY OWNER TO SON AND DAUGHTER-IN-
 LAW, RESERVING LIFE ESTATE TO SELF AND WIFE—
 RECONVEYANCE BY DAUGHTER-IN-LAW.

October 4, 1951.

Mr. Edward E. Coursey,
Register of Wills
for Queen Anne's County.

In 1942, Joseph W. Ozman and his wife, Minnie, conveyed several parcels of land in Centreville owned by Mr. Ozman to their son and daughter-in-law, John H. Ozman and his wife, Sadona, as tenants by the entireties, reserving unto themselves "and unto each of them, an estate for life for and during the term of their respective, natural life". Joseph W. Ozman died in 1947 intestate, leaving no personal estate. No administration has been had. Thereafter, John H. Ozman, by suitable conveyances, became the owner of the property in fee simple, subject to his mother's life estate. In 1948, two lots were sold from the property and in 1950 and 1951, a number of lots were sold.

Recently a petition has been filed in the Orphans' Court by John H. Ozman, Sadona and Minnie T. Ozman asking that the real estate be appraised for the purpose of paying all inheritance taxes on the property. The question arises as to what tax is payable and by whom. You ask this question in several parts substantially as follows:

(1) Should the whole property be valued as of the date of the death of Joseph W. Ozman or should each lot subsequently sold be valued as of the date of its sale—presumably at its sale price?

(2) Should the direct inheritance tax on the value of the life estate of Minnie T. Ozman be paid on the basis of the value of the property as of the date of death of her husband or on some other basis?

(3) How should the tax on the remainder interest be paid, on what value, by whom and at what rate?

(4) Is the land remaining unsold to be taxed on the same basis as the lots which have been sold to date?

We have had some difficulty in determining whether the life estate of Minnie T. Ozman is taxable. Certainly, the transaction by which she became vested with an interest in the property formerly owned by her husband meets the literal test imposed by Section 111 of Article 81 of the Code, since it involves real property passing by deed "intended to take effect in possession or enjoyment at or after the death of a decedent, * * * including property over which the decedent retained any dominion during his lifetime". On the other hand, properties passing under a tenancy by the entirety are not taxable unless the tenancy by the entirety was created in contemplation of death, which, on the face of the facts disclosed to me, is not true in this case. See 21 Opinions of the Attorney General, 719, where the then Attorney General said this:

"* * * The law, as it now stands, imposes a tax on the transfer by survivorship of the interest of a joint tenant, or tenant in common, but does not impose a tax upon the death of a tenant by the entireties. Senate Bill 95, as originally introduced, sought to impose a tax on the surviving tenant by the entireties, but this was stricken out by amendment in the Senate. In my opinion, the term 'joint tenancy' as used in Section 105A of Chapter 124 of the Acts of 1936, is used in its strict technical sense, and does not include the special and unique type of tenancy between husband and wife, known as a tenancy by the entireties."

See also Chapter 620 of the Acts of 1951, where the holding of that opinion is incorporated in Section 111 of Article 81 as far as the estates of persons dying after June 1, 1951, are concerned.

The difficulty in the present case arises from the necessity of determining whether the life estate of Mr. and Mrs. Ozman was a tenancy by the entirety. There is no doubt that such an estate can exist. See 27 Opinions of the Attorney General, 396: 26 Am. Jur. 705; Tiffany, Real Property, 3d Edition, Volume 2, Section 430, page 219. There, the author says: "A holding by entirety is ordinarily in fee simple, but it may be * * * for the life of the survivor of two tenants". Under the terms of the grant (20 Opinions of the Attorney General, 900), the circumstances surrounding this case and the authorities cited, we have concluded that Joseph W. Ozman and Minnie T. Ozman held the life estate as tenants by the entirety. Therefore, no tax is payable by her on her life estate at the death of her husband.

We pass to the taxability of the remainder interests. We do not here decide whether, where there is a non-taxable life estate held by the surviving husband or wife, with remainder over, the remaindermen would have a right to come in and have their interests valued after the Orphans' Court had determined, as it must in such a case, on the petition of the life tenant that the life estate had no taxable value. This is unnecessary because in the instant case the parties waived any right which they might otherwise have had to such a procedure by failing to comply with the obligations and, thus to obtain the correlative benefits under Sections 123, 124 and 125 of Article 81 of the Code. Under Section 125, if the remaindermen fail to apply to the Orphans' Court within a reasonable time after the determination of the value of the life interest, such person "shall at the time the same vests in possession at the termination of the preceding estate, pay a tax on the whole value thereof without deduction of the tax or taxes previously paid". Section 125 goes on to say that upon termination of the life estate, the Orphans' Court "shall value the property as of the date the same vests in possession, and assess the tax thereon". We think and hold that if the life tenant fails to act, the application of the remaindermen must be made

within a reasonable time after the period set by the statute within which the life tenant should act, if in such case he is entitled to act.

We turn to the question of what tax is payable on the remainder interests, on what valuation, and at what rates. It is clear that if the remainder interests had vested in possession when it was held by both the son and daughter-in-law of Joseph W. Ozman, the tax would have been payable at the rate of one percent on one-half and at the rate of seven and one-half percent on the other half. However, several years after the death of Joseph W. Ozman, Sadona conveyed her interest in the remainder to her husband John. A similar question has heretofore been considered by this office in 28 Opinions of the Attorney General, 250, where the testator gave the rest and residue of his estate to his son and his son's wife as tenants by the entireties. Some eleven months after the issuance of letters testamentary and before an administration account had been filed, the daughter-in-law filed a renunciation of the legacy. We held, in reliance on *Bouse v. Hull*, 168 Md. 1, that where a legatee, by effective and written renunciation filed in the Orphans' Court, renounces a legacy, no inheritance tax is due on account of such legacy by that legatee. It is clearly established that where a devise of land is beneficial, it will be presumed that the devisee accepted it, but this presumption is a rebuttable one. The burden of proving a valid renunciation and thus rebutting the presumption rests upon the person alleging that the gift was not accepted. It is also settled law that a renunciation must be made within a reasonable time. However, we pointed out in the opinion just cited that even though a legatee had filed a renunciation and had done so within a reasonable time, if it should appear that the legatee had taken any step indicating acceptance of the gift, she would be estopped to deny such acceptance and the renunciation in such event would be ineffective and invalid.

It is clear to us that the daughter-in-law in this case did not renounce within a reasonable time and that she took definite steps indicating acceptance; namely, the affirmative process of transferring her title and right by warranty deed to her husband. It is our opinion, therefore, that the remainder interest is taxable at the rate of one percent on one-half thereof and at the rate of seven and one-half percent on the other one-half. See 28 Opinions of the Attorney General, 248.

On the question of valuation, the matter would seem to have been covered fully in our opinion reported in 32 Opinions of the Attorney General, 413, wherein a widow was given an estate for life with vested remainder to a daughter and son in equal shares. The property involved was a farm which was sold for \$20,000, although at the time of death it had been thought to be almost worthless. The opinion goes into the various factual situations which are found in joint sales by life tenants and remaindermen. Section 252 of Article 16 of the Code permits a court to supervise such sales with subsequent investment of the proceeds in such a manner that the same parties would have the same interest in the gross receipts of the sale as they did in the original property. If this is done, no tax would be payable on the remainder interest in the avails until they vested in possession. *Denson v. Denson*, 125 Md. 357, 362. In our earlier opinion, as in the instant case, the sales were made by the life tenant and the remaindermen without any Order of Court and they were voluntary and independent acts of the parties. In such a situation, the better view seems to be that the parties are entitled to receive an estimated value computed at the time of the sale. You advise us that the money from the sale of the lots either has been or will be deposited in a bank in Centreville in the name of Minnie Ozman and her son, John, and will be used for Mrs. Ozman's support and maintenance as long as she lives. This dedication of the proceeds of the sale of the original property to the needs of the widow, in our view, makes it entirely clear that for the

purposes of the inheritance tax statutes, the remaindermen have come into possession and the tax is due on the present value of the property. We said in 32 Opinions of the Attorney General, 413, at page 417:

“In our opinion the remaindermen, by voluntarily joining in the sale of the property with the life tenant have, for the purposes of the inheritance tax, come into possession of their estates. To hold otherwise would, we believe, tend to make uncertain the collection of the tax and the validity of the title in the property conveyed. We can see but little difference in this situation and that in which the life tenant is given power to join with the remaindermen in the sale of the property. In such cases we have held that the sale of the property is the event which brings the remainder interest into possession for the purposes of the tax. 24 Opinions of the Attorney General, 874 ; 24 Opinions of the Attorney General, 921.

“We hold, therefore, that the remaindermen should pay an inheritance tax at the present time based on the value of the remainder interest at the time they joined with the life tenant for the purposes of the sale. * * *”

We conclude, therefore, that as to the lots which have been sold, the tax is payable on the sales price—one-half thereof being taxable at one percent and the other one-half thereof being taxable at seven and one-half percent. The tax is payable by those who took from the decedent. How Mrs. Ozman, her son John and her daughter-in-law Sadona divide the payment of the tax among themselves is, of course, up to them to decide. No tax is due on the unsold land until either the death of Mrs. Ozman or the land is sold, whichever first occurs.

HALL HAMMOND, *Attorney General.*

TAXATION—INHERITANCE TAX—25% PENALTY, WHEN DUE.

November 9, 1951.

Mr. Walter C. Clarke,
Register of Wills
for Montgomery County.

This is in answer to your letters of September 20 and October 19, with enclosures.

As we understand the facts, Joseph N. Starkey died in September, 1949 (whether testate or intestate does not appear); letters were granted September, 1950; an administration account was filed July, 1951; a real inventory was filed July, 1951, and "refiled" August, 1951; the administration account was approved by the Court September, 1951; a twenty-five per cent penalty on the inheritance tax on the real estate was assessed July, 1951. We have carefully considered the memorandum submitted by Mr. Prettyman. He strenuously resists the penalty.

Section 133 of Article 81 of the Code (1939 Ed.) is as follows:

"In all cases where estates or any interest therein pass, *and there is no formal administration subject to the jurisdiction of any court*, it shall be the duty of every trustee or other person making distribution of any property passing subject to the inheritance tax imposed by this sub-title, to file in the Orphans' Court for the county or city where the decedent had his or her residence at the time of his or her death, or in case of real estate, in the Orphans' Court of the county or city in which the real estate is situated, *within ninety (90) days after the death of such person*, a full and complete inventory of the property passing subject to the inheritance tax imposed by this sub-title and which

said trustee or other person making distribution thereof is about to distribute; and in all such cases where any property passes subject to the taxes imposed by this sub-title, and there is no trustee or other person to make distribution thereof, it shall be the duty of the person receiving such estate or any interest therein, to file the inventory within the time and in the manner hereinabove provided. * * *” (emphasis supplied)

Intestate or devised real estate is subject to administration in that the executor or administrator must file a real inventory and collect and pay the inheritance tax thereon. Code (1947 Supp.) Article 93, Section 237A; (1939 Ed.) Article 81, Section 122. However, “there is no formal administration subject to the jurisdiction of any court” when administration has not in fact been granted. 32 Opinions of the Attorney General 467; 28 Opinions of the Attorney General 241. And when there is no formal administration “the person receiving such estate” (that is, the heir or devisee, to whom title passes immediately on death) must file an inventory *within ninety days after death*. The fact that administration is granted after the expiration of the ninety-day period, does not retroactively cure a default under Section 133. And when there has been such default (even though administration is later taken out), Section 134 of Article 81 comes into play. Such was the precise holding of 32 Opinions of the Attorney General 431; 30 Opinions of the Attorney General 205.

Section 134 provides that “where there is no formal administration of such estate subject to the jurisdiction of any court, and no inventory is filed as required by the last preceding Section” (that is, within the ninety-day period), it becomes the duty of the Register of Wills to apply for the appointment of appraisers and assess the tax. The statute continues:

“* * * and in addition thereto the person or persons liable for the payment of said tax shall be and become liable by way of a penalty for the payment of an additional sum equal to 25% of the amount of tax so determined to be due, * * *.”

The imposition of this penalty is expressly “in addition” to the duty of the Register of Wills and not dependent upon the performance of such duty. The penalty is, therefore, applicable in this case.

HALL HAMMOND, *Attorney General.*

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

TAXATION—INHERITANCE TAX—EXEMPTIONS—LEGACY TO
SALVATION ARMY—LEGACY TO LOCAL TRUSTEE TO EDU-
CATE MARYLAND BOYS AT HARVARD.

November 21, 1951.

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

On the facts stated in your letter of November 13, it seems clear that the legacy to the Salvation Army, a Georgia corporation, is exempt from the inheritance tax under Section 110 of Article 81. That corporation apparently carries on a substantial part of its work and activities in Maryland.

In our opinion also, the legacy to the Farmers & Mechanics National Bank, a Maryland corporation, in trust, to use the income to educate boys from Maryland at Harvard University, is likewise exempt. The exemption applies to "property passing, in trust or otherwise, to or for the use of a * * * trust or community chest fund, or foundation, created or organized under the law * * * of any State * * *, organized and operated exclusively for * * * educational purposes, * * * a substantial part or all of the activities and work of which are carried on in Maryland". It seems to us that the legacy falls within the definition in that it creates a trust, under the law of Maryland, organized and to be operated exclusively for educational purposes, a substantial part of the activities and work of which are to be carried on in Maryland. Though the income will not be spent in Maryland, the fund will be administered here for the benefit of Maryland citizens. See *Clarke v. Union Trust Company*, 192 Md. 127, 63 A(2) 635; *Shaughnessy v. Hen-nighausen*, in the Court of Appeals of Maryland, No. 27, October Term, 1951.

HALL HAMMOND, *Attorney General*.

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

TAXATION—BEQUEST OF MONEY FOR UPKEEP OF GRAVES IS
TAXABLE IF IT INURES TO THE BENEFIT OF A PRIVATE
CEMETERY COMPANY OPERATING FOR PROFIT.

December 12, 1951.

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

Under the will of a late resident of Frederick County, the sum of \$5,000 was given to a bank, in trust, to invest and to pay the net income arising therefrom in equal amounts "to the Superintendent of the Mountain View Cemetery, Union Bridge, Maryland; to the Trustees of the Methodist Episcopal Church, Middleburg, Maryland; and to the Trustees of the Pipe Creek Brethren Church, Uniontown, Maryland; said sums to be used for the upkeep of the said cemeteries". There are three Opinions in Volume 30 of the Opinions of the Attorney General which seem to answer your question as to whether the sum of \$5,000 or any part thereof would be exempt from collateral inheritance tax.

The first is found at page 178 and deals with a bequest to Loudon Park Cemetery, a privately owned corporation. It was there held that \$500 should be deducted from the \$5,000 bequest under the provisions of Section 110 of Article 81 and that the balance of \$4,500 was taxable at 7½% as being left to a private corporation operated for profit. The other two opinions are found at pages 182 and 218, respectively, and hold that bequests to churches for the upkeep of graves or graveyards are exempt under the provisions of Section 110, dealing with property passing in trust for religious, charitable, scientific, literary or educational purposes where no part of the net earnings of the operator inures to the benefit of any individual.

I assume that the Mountain View Cemetery is a private cemetery operated for profit. If this is correct, \$500 should be deducted, as exempt, from the \$5,000 legacy and of the balance of \$4,500, \$1,500 would be taxable at 7½% and the remaining \$3,000 would be exempt since it passes for the benefit of two churches.

HALL HAMMOND, *Attorney General.*

TRADE NAMES

TRADE NAMES—TRADE NAMES REGISTERED UNDER ACT OF CONGRESS MAY BE LISTED IN UNITED STATES PHARMACOPEIA.

September 5, 1951.

*Dr. John C. Krantz, Jr.,
Professor of Pharmacology,
Secretary, Committee on Revision,
U. S. Pharmacopeia.*

You raise the question whether the use of trade names for drugs which have been registered with the United States Patent Office by the United States Pharmacopeia would in any way infringe the trade names.

The United States Pharmacopeia is published by the United States Pharmacopeial Convention, which is composed of members of the medical and pharmaceutical professions, and is printed as a service to those professions. The publication gives a description, the ingredients and the formula of approved drugs. It also gives a step by step description of how the drug is prepared.

Section 32(1) of the Trademark Act of 1946, 15 U.S.C.A. Sec. 1114(1), provides in part:

“Any person who shall, in commerce, (a) use without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark * * * in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods * * * shall be liable to a civil action * * *.”

It is well settled by the Federal cases that the entire substantive law of trademarks is but a branch of the

broader law of unfair competition. *Hemmeter Cigar Co. v. Congress Cigar Co.*, 118 Fed. 2d 64, *House of Westmore, Inc. v. Denney*, 151 Fed. 2d 261. The purpose of both is to prevent one person from passing off his goods or his business as the goods or business of another. *Triangle Publications v. Hanson*, 65 F. Supp. 952, *G. & C. Merriam Co. v. Saalfield*, 198 F. 369.

The important element in trademark infringements is the likelihood of confusion in the minds of the purchasing public. *Majestic Mfg. Co. v. Kokenes*, 67 Fed. Supp. 282; *Rytex Co. v. Ryan*, 126 Fed. 2d 952. So long as this likelihood exists, neither a wrongful intent to deceive nor actual deception need be shown. *Lou Schneider, Inc. v. Carl Gutman & Co.*, 69 F. Supp. 392.

It has been held that the function of a trademark is to indicate the origin of the article to which such mark is applied, and to designate goods as the product of a particular trader and to protect his good will against the sale of others' products as his. *Avrick v. Rockmont Envelope Co.*, 155 Fed. 2d 568; *Life Savers Corp. v. Curtiss Candy Co.*, 182 Fed. 2d 4.

From the authorities cited, the conclusion is drawn that infringement exists only when there is a likelihood of confusion as to the origin of goods in the minds of purchasers. Such likelihood of confusion could not occur in the case of the United States Pharmacopeia, since that publication is used exclusively by professional people to facilitate the prescribing and preparation of drugs.

There are few cases reported involving trademark infringements which have similar factual situations to this problem. However, *Warren Bros. Co. v. Barber Asphalt Pav. Co.*, 145 Mich. 79, 108 N.W. 652, is analogous. There, the question arose as to the right of the owner of a trade name to be protected against its use by another to describe the character of material to be used by the latter in per-

forming a contract. It was held that the fact that a trade name is used by a municipal corporation in designating the kind of pavement for which bids are invited will not entitle the owner of the name to prevent others from bidding for the work, where an ordinance specified the materials to be used and their proportions, so that there was nothing to deceive the municipality into the belief that all bidders were to furnish a pavement made only by the owner of the name.

Two publications have been discovered which have a purpose similar to that of the United States Pharmacopeia, and which list drugs by their trade names. One of these is the New and Unofficial Remedies, which is issued under the direction and supervision of the Council on Pharmacy and Chemistry of the American Medical Association. This publication lists first the non-proprietary or generic names in bold faced capitals, and next to these in smaller bold faced capitals, it lists the protected names followed in parentheses by the name of the manufacturers. The other publication is the United States Dispensatory. This publication, in the case of drugs marketed under various distinguishing trademarks or trade names, uses the trade name along with the generic name, and then includes the name of the distributor or manufacturer of the drug mentioned.

It is suggested that if the United States Pharmacopeia adopts a system similar to its companion publications, that system will fully protect it from any claim of an infringement of trade names.

HALL HAMMOND, *Attorney General.*

TRIAL MAGISTRATES

TRIAL MAGISTRATES—SUBSTITUTES—SALARY OF SUBSTITUTE MAGISTRATE, SERVING MORE THAN FIFTEEN DAYS IN ANY YEAR, IS THE SAME AS THE SALARY OF THE TRIAL MAGISTRATE IN WHOSE PLACE HE SITS.

July 19, 1951.

*Mr. Marvin I. Anderson, Counsel,
Board of County Commissioners
of Anne Arundel County.*

You have informed us that one of the trial magistrates for Anne Arundel County resigned following his conviction of a crime by the Circuit Court for that County and that thereafter a substitute trial magistrate has been serving in his place. The salary of substitute trial magistrates in Anne Arundel County, you inform us, is \$500 per annum, and the question you raise is whether the substitute magistrate is entitled to receive both the salary of the substitute magistrate as well as the salary of the trial magistrate while he continues to serve in the latter capacity.

Article 52, Section 110 of the Code, as amended by Chapters 470 and 752 of the Acts of 1949, provides for the appointment of substitute trial magistrates who are to serve "in the event of the temporary absence or inability of a trial magistrate * * *". We pass the question of the right of a substitute trial magistrate to serve at all in this particular instance because of the trial magistrate's resignation.

It is clear, we think, that the substitute magistrate is not entitled to receive his regular salary of \$500 a year and at the same time receive the salary provided for the trial magistrate in whose place he is sitting. 25 Opinions of the Attorney General 319. Under the provisions of Section 110(c) of Article 52 of the Code, as amended by Chapter

752 of the Acts of 1949, a substitute magistrate is entitled to receive the same pro rata amount for his compensation and the same expenses as would have been received by the trial magistrate whose absence or inability caused the substitution, and the salary of the trial magistrate so causing the substitution is required to be diminished by the sum necessary to compensate the substitute magistrate for any period of absence in excess of fifteen days in any one year.

It is our view, therefore, that a substitute magistrate serving during the temporary absence or inability of a trial magistrate receives his regular pay as a substitute magistrate during the first fifteen days which he substitutes for the trial magistrate and that thereafter he is entitled to receive the rate of pay provided for the magistrate for whom he is substituting.

HALL HAMMOND, *Attorney General*.

J. EDGAR HARVEY, *Deputy Attorney General*.

TRIAL MAGISTRATES—REMOVAL OF CASES—THE RIGHT OF
REMOVAL IS ABSOLUTE BUT MAY BE EXERCISED BUT
ONCE.

December 5, 1951.

Mr. H. Allen Mezger,
Trial Magistrate
for Baltimore County.

We have your letter in which you raise several questions relative to Article 52, Section 109A of the Annotated Code of Maryland (1947 Supplement), which provides for the removal of a civil or criminal case pending before a Trial Magistrate in any County. The questions raised are: (1) Must the Magistrate before whom the case is pending grant the petition for removal as a matter of right? (2) How many removals must be granted to a particular defendant? Section 109A provides in part:

“(Removal of cases.) (a) Any defendant in a civil or criminal case pending before any trial magistrate may have the case removed to another trial magistrate in the same county by filing at any time before trial an affidavit, executed by the defendant or his agent or attorney before any person authorized to administer oaths, stating that he does not believe such defendant can have a fair and impartial trial by the trial magistrate before whom the case is pending, provided, however, that in Kent County the notice of removal hereinbefore provided for must be given at least forty-eight (48) hours prior to the time at which the case sought to be removed is set for trial.

“(b) Upon the filing of any such affidavit, and in a civil case upon the payment of all costs accrued to the date of removal, the trial magistrate before whom the case is pending shall designate some other trial magistrate in the same county to

try the case, and shall forthwith transfer to him all the papers and a record of the proceedings in the case."

Section 109A is similar to Article 4, Section 8 of the Constitution of Maryland, which provides for removal in certain types of cases "upon suggestion in writing under oath of either of the parties to said proceedings, that such party cannot have a fair and impartial trial in the Court in which the same may be pending, the said Court shall order and direct the Record of Proceedings in such Suit or Action, Issue, Presentment or Indictment, to be transmitted to some other Court having jurisdiction in such case, for trial". While the Court of Appeals has not construed Section 109A, it has decided that the right of removal granted by the provision of the Constitution above referred to is an absolute right which leaves nothing to the discretion of the trial court and must be granted if there is filed a suggestion in writing, supported by an affidavit that a fair and impartial trial cannot be had in the court where the case is pending. *Griffin v. Leslie*, 20 Md. 15, 18; *State v. Cobourn*, 169 Md. 110, 114, 179 A. 512. Therefore, the answer to your query is that the petition for removal must be granted as a matter of right and that the Trial Magistrate may not look behind the affidavit.

With reference to the number of removals which may be granted to a particular defendant, the Court of Appeals, in construing Article 4, Section 8 of the Maryland Constitution, has said:

"* * * where the right has been once exercised there can be no second or subsequent removal at the instance of the same party, as that might defeat the object for which the right was granted, and tend to almost infinite delay, and the great oppression of witnesses. *Price v. State*, 8 Gill, 307; *State v. Gore*, 32 Md. 498."

Cooke v. Cooke, 41 Md. 362, 368. See also *State v. Gore*, 32 Md. 498, 499 and *Lee v. State*, 164 Md. 550, 552, 165 A. 614. We have no doubt that the reasoning of such decisions should be applied to Section 109A and that the right of removal in Magistrates' proceedings can only be exercised once.

HALL HAMMOND, *Attorney General*.

UNEMPLOYMENT COMPENSATION

UNEMPLOYMENT COMPENSATION—REAL ESTATE BROKERS
REQUIRED TO PAY UNEMPLOYMENT COMPENSATION
CONTRIBUTIONS ON COMMISSIONS PAID BY THEM TO
THEIR SALESMEN.

November 23, 1951.

*Mr. William H. Mahaney, Chairman,
Maryland Employment Security Board.*

You requested an opinion concerning the liability of real estate brokers for unemployment compensation contributions on earnings paid to salesmen hired on a commission basis under the terms of Section 19 (g) (7) (P) of Article 95A, as amended effective June 1, 1951.

The amendment provides that "excluded employment" shall include "service performed by real estate salesmen on a commission basis for licensed real estate brokers to the same extent they are now or hereafter may be exempt by federal law."

At the present time, no federal unemployment insurance tax is being paid on such salesmen to the Federal Government. A ruling in this respect was made by the Commissioner of Internal Revenue, pursuant to the interpretation of Congressional Joint Resolution No. 296 dated June 14, 1948, which provides that the employer-employee relationship is to be defined under the "usual common law rules." The interpretation followed by the Federal Government is that set forth in the case of *Dimmitt-Rickhoff-Bayer v. Finnegan*, 179 F. 2d 882.

The decision in the *Dimmitt* case concerned primarily real estate salesmen in the State of Missouri and did not take into account the effect of a local licensing law that might have effect in other States. There is such a licensing act in Maryland (Article 56, Sections 343 to 356).

It is my opinion that real estate brokers and salesmen complying with the provisions of the Maryland licensing act meet the master and servant test under the usual common law rules, since the broker, whether he exercises it or not, has full authority over the salesmen to direct not only what shall be done, but how it shall be done. It must, therefore, follow that, in this State, the Federal Law does not, by its terms, exclude such salesmen from coverage, even though they are excluded by federal administrative interpretation.

For the above reasons, I must advise you that it is my conclusion that the brokers are liable for unemployment compensation contributions to the State of Maryland on remuneration paid to their salesmen.

AARON A. BAER, *Spec. Asst. Attorney General.*

UNIFORM ACCOUNTS LAW

UNIFORM ACCOUNTS LAW—WASHINGTON SUBURBAN SANITARY DISTRICT MUST RENDER AN ANNUAL COMPREHENSIVE STATEMENT OF ITS FINANCIAL CONDITION TO THE STATE FISCAL RESEARCH BUREAU.

December 11, 1951.

Dr. Elwyn A. Mauck,
State Fiscal Research Bureau,
Department of Legislative Reference.

This is to answer your letter inquiring whether or not the Washington Suburban Sanitary District is covered by the Uniform Accounts Law.

Section 103E of Article 41 of the Annotated Code of Maryland (1947 Supp.) provides in part:

“It shall be the duty of every Treasurer, or if there be no Treasurer, of every other authorized financial officer of every county, municipal or public corporation, special district and/or political sub-division of this State, which has heretofore been or shall hereafter be authorized by any law or laws of this State to incur any indebtedness redeemable from the proceeds of any general or special tax or other levy, to file with the State Fiscal Research Bureau * * *.”

The Washington Suburban Sanitary District clearly comes within the purview of Section 103E since it is a special district authorized to issue bonds which are redeemable by an assessment levied by the County Commissioners of Montgomery and Prince George's Counties against all assessable property within the said Sanitary District. See Section 1290 of the Code of Public Local Laws of Montgomery County (1947 Ed.).

In March 1948 this office considered the problems that would be involved if the Washington Suburban Sanitary Commission were required to change its system of accounting, and by letter of March 15, 1948 to Mr. James J. Lacy, then State Comptroller, we recommended that it would be an unnecessary and unproductive hardship on the said Commission to require it to change its system of accounting. The point was made that the primary purpose of the Uniform Accounting statute is to enable the same fiscal information to be gotten from all local subdivisions and that the State Fiscal Research Bureau could determine that the system then used by said Sanitary Commission would meet this requirement. However, we were then of the opinion, as we are now, that the said Sanitary Commission must comply with Section 103E by rendering an annual comprehensive statement of its financial condition to the State Fiscal Research Bureau.

You have also asked whether or not the method of requiring compliance with Section 103E, which is provided in Section 103H, is applicable to the Washington Suburban Sanitary Commission. We are of the opinion that, since the said Sanitary Commission does come within the provisions of Section 103E, it is also subject to the enforcement provisions of Section 103H.

HALL HAMMOND, *Attorney General.*

A. T. HARTMAN, *Spec. Asst. Attorney General.*

UNIVERSITY OF MARYLAND

UNIVERSITY OF MARYLAND—NEGRO MAY NOT BE DENIED
ACCOMMODATIONS IN DORMITORY.

September 14, 1951.

*Mr. Geary Eppley,
Director of Student Welfare,
University of Maryland.*

I have your letter in which you advise me that you have an application and a deposit check from an undergraduate Negro student for a room in a dormitory. You wish to know whether you are under legal compulsion to honor his application. I take it that the student about whom you write has been admitted to classes at College Park, and that the only question you wish me to answer is whether he must be given a room in a regular dormitory.

I enclose a copy of an opinion given on April 26th last to the President of West Virginia University by the Attorney General of West Virginia, dealing with the same problem which now troubles you. (This opinion is set forth below.) I may say that it is my opinion that the Attorney General of West Virginia has correctly and accurately advised his client in the matter. I agree with him that since a State is forbidden to afford different treatment based solely on race, in the use of the classroom, the library and the cafeteria, to a Negro student who has been admitted to a State University, as *McLaurin v. Oklahoma*, 339 U.S. 637, 94 L. Ed. 1149, holds, the same rule must of necessity apply to the use of dormitories, or indeed to any other facilities which the State supplies the University for the use of students.

It is my opinion, therefore, that you must make dormitory space available to Negro students under the same conditions and on the same terms as those accommodations

are made available to white students. On the other hand, the Negro is not entitled to preferential treatment. For example, if under uniform regulations a dormitory is used only for freshmen, and there are no Negro students in the freshman class, then a Negro would not be entitled to admission in that dormitory. In every case the test must be objective, uniform and not based upon race.

Opinion of Attorney General of West Virginia to President of West Virginia University.

HALL HAMMOND, *Attorney General*.

April 26, 1951.

*Dr. Irvin Stewart, President,
West Virginia University,
Morgantown, West Virginia.*

Dear Doctor Stewart:

This is in reply to your letter of April 9, 1951, which is as follows:

"As you well know, for some years West Virginia University has been admitting West Virginia Negroes to courses of study where comparable courses are not given in one of the Negro institutions of higher education. A question has arisen in that connection, upon which the Board of Governors would like to have the benefit of your advice.

"Recently there has been informal inquiry as to the admission of Negro students to the dormitories operated by the University. It is possible that formal application for admission to one of the dormitories may be made by Negro students planning to attend the summer session which opens in June, 1951.

"While the University's dormitory facilities are inadequate during the regular session, space may be available in the women's dormitories during the summer months. Private accommodations open to Negroes during the summer are not in fact equal to the accommodations provided in University dormitories.

"The West Virginia constitution requires segregation in the school system. This has been modified in practice as a result of decisions of the Supreme Court of the United States on the point

of equal facilities. We believe that the requirements of the Supreme Court decisions have been met by the University so far as the University's teaching program is concerned. The board is uncertain as to the legal situation concerning dormitories. Accordingly, it would like your advice as to whether in a case where dormitory space is available, an application for dormitory accommodations by a Negro student of the University should be declined as falling under the prohibition of the State constitution or should be accepted as coming under the decisions of the Supreme Court."

We believe the question which is raised by your request for our opinion is merely another aspect of the one which was before the Supreme Court of the United States in the recent cases of *Sweatt v. Painter* (1950, 339 U.S. 629, 94 L.Ed. 1114, 70 S. Ct. 848, and *McLaurin v. Oklahoma State Regents* (1950) 339 U.S. 637, 94 L. Ed. 1149, 70 S. Ct. 851. As stated by Mr. Chief Justice Vinson, who delivered the opinion of the court in both these cases, this question is, "To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?"

The United States Supreme Court has thus far refused to declare invalid provisions requiring segregation in public education, such as those in our Constitution and statutes. *Cumming v. Richmond County Board of Education* (1899), 175 U.S. 528, 44 L. Ed. 262, 20 S. Ct. 197; *Berea College v. Kentucky* (1908), 211 U. S. 45, 53 L. Ed. 81, 29 S. Ct. 33; *Gong Lum v. Rice* (1927), 275 U. S. 78, 72 L. Ed. 172, 48 S. Ct. 91; *Missouri ex rel. Gaines v. Canada* (1938), 305 U. S. 337, 83 L. Ed. 208, 59 S. Ct. 232, reh den 305 U. S. 676, 83 L. Ed. 437, 59 S. Ct. 356; *Sipuel v. University of Oklahoma* (1948), 332 U. S. 631, 92 L. Ed. 247, 68 S. Ct. 299; *Fisher v. Hurst* (1948), 333 U. S. 147, 92 L. Ed. 604, 68

S. Ct. 389; *Sweatt v. Painter* (1950), 339 U. S. 629, 94 L. Ed. 1114, 70 S. Ct. 848; *McLaurin v. Oklahoma State Regents* (1950), 339 U. S. 637, 94 L. Ed. 1149, 70 S. Ct. 851. In so doing, the court has frequently relied upon the doctrine of *Plessy v. Ferguson* (1896), 163 U. S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 in which it was held that a provision for "separate but equal" facilities in relation to the segregation of passengers in commerce did not violate the Fourteenth Amendment, and that the validity of such provisions was dependent upon the equality of the separate facilities. However, in both the *Sweatt* case and the *McLaurin* case, the Supreme Court refused to either affirm or reverse *Plessy v. Ferguson*.

In *Sweatt v. Painter*, the court held that the "separate but equal" requirement was not met by the establishment of a law school for negroes after a refusal to admit a negro applicant to the state-maintained law school for white students. The court based its opinion upon its conclusions that, since a negro lawyer must work in a predominantly white society during his professional career, a student who could secure legal training only in a segregated school in which he was excluded from association with members of the racial group which would form the large majority of his future colleagues, was not provided with equal facilities and opportunities to those open to white students.

This undoubtedly indicated that the court was embarking upon a much stricter application of the "equality" requirement than had heretofore been the case.

In the *McLaurin* case, the court declared that the equal protection clause of the Fourteenth Amendment had been violated where a state, after admitting a negro to graduate instruction in its state university, afforded him, solely because of his race, different treatment from other students, as requiring him to occupy a seat in a row in the classroom specified for colored students, or at a designated table in the library, or at a special table in the cafeteria. In so

holding, Mr. Chief Justice Vinson, speaking for a unanimous court, stated:

“These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.

“Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant’s case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

“It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley v. Kraemer*,

334 U.S. 1, 13, 14, 92 L. Ed. 1161, 1180, 1181, 68 S. Ct. 836, 3 ALR 2d 441 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

“We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws. See *Sweatt v. Painter*, 339 U.S. 629, ante, 1114, 70 S. Ct. 848. We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. * * *

We believe that the *McLaurin* case is identical in principle and differs only slightly in circumstance with the problem which your letter presents. Certainly, if a state is forbidden to afford different treatment based solely on race in the use of the classroom, the library, and the cafeteria to a negro student who has been admitted to a state university, as *McLaurin v. Oklahoma* holds, the same rule must, of necessity, apply to the use of dormitories, or indeed any other facility which the state supplies the university for the use of students. It is therefore our opinion that you must make dormitory space available to negro students under the same conditions and on the same terms as these accommodations are made available by you to white students. As stated by the Chief Justice in the *McLaurin* case, a negro, “having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.” On the other hand,

negroes themselves are entitled to no preferential treatment; for example, if under administrative regulation a dormitory is used exclusively for freshmen and there are no negro students in the freshman class, then negroes would not be entitled to apply for admission to that dormitory. However, in every case the test must be objective, and not based upon race.

Very truly yours,

WILLIAM C. MARLAND, *Attorney General.*

THOMAS J. GILLOOLY, *Assistant.*



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