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COMPLIMENTS OF

C. FERDINAND SYBERT

ATTORNEY GENERAL

ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1956

C. FERDINAND SYBERT
ATTORNEY GENERAL

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

ATTORNEYS GENERAL OF MARYLAND

This office was permanently separated from that of Secretary in 1657. Under royal government (1690-1715) there were two Attorneys General, one for the Proprietary and one for the King. The office was continued under the Constitution of 1776. Other places held by any Attorney General during his incumbency are indicated in each case.

Lt. Richard Smith, Sr., of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.

Capt. Thomas Manning of Calvert County (Prot.), com. by the Lt. Gen., 20 Feb. 1660/1.

Col. William Calvert of St. Mary's City (Cath.), sworn 12 June 1666.

Col. Vincent Lowe of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.

Kenelm Cheseldyne of St. Mary's City (Prot.), sworn 6 April 1676.

Thomas Burford of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.

Robert Carvile of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.

Charles Carroll of St. Mary's City and of Anne Arundel County (Cath.), formerly of the Inner Temple, London; com. by the Proprietary, to hold office during good behavior, 18 July 1688; arrived in Maryland 1 Oct. and was confirmed in office by the Deputy Governors, 13 Oct. 1688. After 1 Aug. 1689 he continued as Lord Baltimore's Attorney General until the restoration of Proprietary government. On the death 17 June 1711, of Col. Henry Darnall I, his father-in-law, he succeeded to the offices of Agent and Receiver General and Keeper of His Lordship's Great Seal.

Col. George Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

Edward Wynne of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.

Col. George Plater I, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the same. He married, about 1694, Anne, dau. of Thomas Burford above.

Maj. William Dent of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary General.

Col. William Bladen of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office, 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.

Thomas Bordley of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.

Daniel Dulany, Sr., of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.

Michael Howard of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.

Daniel Dulany, Sr., succeeded Howard in Oct., 1734, and was also sole Commissary General; resigned in 1744.

Henry Darnall III of Prince George's County (Prot. convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.

Stephen Bordley of Annapolis (Prot. son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec., 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.

Edmund Key of Annapolis (Prot., mother Cath.), com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.

Robert Goldsborough II of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in 1768; died 30 April 1777.

Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April, 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

(Reprinted from "His Lordship's Patronage", pages 132-34, by permission of the author, Professor Donnell M. Owings, Department of History, University of Oklahoma).

Luther Martin 1778
William Pinkney 1805
John Thomas Mason 1806
John Johnson 1806
John Montgomery 1811
[1]Luther Martin 1818
Nathanial Williams, Assistant Attorney General 1820
Thomas B. Dorsey 1822
Thomas Kell 1824
Roger B. Taney 1827
Josiah Bayley 1831
George R. Richardson 1845
Robert J. Brent 1851
[2]Alexander Randall 1864
Isaac D. Jones 1867
Andrew K. Syester 1871
Charles J. M. Gwynn 1875
Charles B. Roberts 1883
William Pinkney Whyte 1887
John P. Poe 1891
Harry M. Clabaugh 1896
George R. Gaither, Jr. 1899
Isidor Rayner 1900
William S. Bryan, Jr. 1904
Isaac Lobe Straus 1908
Edgar Allan Poe 1912
Albert C. Ritchie 1916
[3]Ogle Marbury 1918
Alexander Armstrong 1920
Thomas H. Robinson 1924
William Preston Lane, Jr. 1930
Herbert R. O'Conor 1934
William C. Walsh 1938
William Curran 1945
[4]Hall Hammond 1946
[5]J. Edgar Harvey 1952
[6]Edward D. E. Rollins 1952
C. Ferdinand Sybert 1954

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

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

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

[4][5]On September 30, 1952, Mr. Hammond resigned as Attorney General to accept an appointment on the Court of Appeals of Maryland. Mr. Harvey was designated by Governor McKeldin to be Acting Attorney General until the new Attorney General qualified.

[6]Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

In Memoriam

(1915-1956)

DAVID KAUFFMAN

David Kauffman was born in Philadelphia, Pennsylvania, on March 30, 1915, moving to Cumberland, Maryland, at the age of eleven; and passed away at the Sinai Hospital, Baltimore, Maryland, on October 10, 1956, after serving from January 1, 1955, as Assistant Attorney General of Maryland.

Mr. Kauffman was a 1932 graduate of Allegany High School, where he was president of his junior and senior classes, president of the student council, and varsity player on the football, basketball and track teams. In 1936, he was awarded the degree of Bachelor of Arts at the University of Pennsylvania. At college he was a member of the varsity football team for two years, participated in basketball and track, was active in the Debate Council, the Philomathean Club and Pi Lambda Phi Fraternity. In 1939, he took the degree of Bachelor of Laws at the Harvard Law School in Cambridge, Massachusetts. In that year he was admitted to the Maryland, District of Columbia and Federal Bars.

In 1938, he married Miss Helen Parnes. He had two children, James Bruce Kauffman, 16, and Ellen Jo Kauffman, 14.

He had been in the practice of law at Cumberland since 1940, after a brief stay in Washington. In 1942, his younger brother, Harry Kauffman, joined him in practice. In World War II David Kauffman served in the United States Navy. He was former president of the Allegany County Young Democrats and vice-president of the Maryland Young Democrats.

Mr. Kauffman was a member of the Commission on Administrative Organization of the State of Maryland (known as the "Little Hoover Commission" or "Sobeloff Commission") and was chairman of the Steering Committee of Economic Development of Allegany County, the State Veterans' Service Committee of Allegany County and the Cumberland Flood Control Committee. Through much of its life, he was chairman of the Cumberland Area Rent Advisory Board. He served as counsel to the Cumberland Charter Commission and as president of the Allegany County Heart Association, as well as a director of the Cumberland Industrial Promotion Company. He had various mercantile and realty interests and was president of the Tri-State Investment Company. He was president of the Cumberland Junior Association of Commerce, president of the Maryland State Junior Chamber of Commerce and a national director of the United States Junior Chamber of Commerce. He was secretary of the Allegany County Bar Association. He was a trustee of the B'nai B'rith of Cumberland, a director and treasurer of the Dapper Dan Club of Cumberland and a member of that City's Kiwanis Club, American Legion and Amvets, as well as a member of the National Municipal League and American Academy of Political and Social Science. His articles on various subjects have appeared in the Georgetown Law Review, Maryland Law Review, Taxes Magazine and Future Magazine, as well as other publications, including articles on "The Law of Arrest" and "Joinder of Conspiracy and Attempt." He was given the "Distinguished Service Award" for service to the community by the Jaycees in 1948.

Mr. Kauffman was appointed by Attorney General C. Ferdinand Sybert as one of his first appointments in January, 1955. He handled numerous important assignments, but perhaps he will be best remembered for his many enlightening opinions concerning the tax field and the problems of the Registers of Wills. He was legal adviser to many State agencies and handled numerous criminal appeal cases in the Court of Appeals. He disposed of each task which confronted him in a systematic and thorough manner.

Mr. Kauffman's life can best be summarized by a tribute paid him by J. Suter Kegg, Sports Editor of the Cumberland Evening Times, which referred to him as "Kind, considerate, charitable and possessor of a fine sense of humor. . . . There can be no doubt that we have lost a very wonderful person in Dave Kauffman. Cumberland appreciated him as much as he loved his adopted City."

STATE LAW DEPARTMENT

C. Ferdinand Sybert	Attorney General
Norman P. Ramsey	Deputy Attorney General
[1]David Kauffman	Assistant Attorney General
Stedman Prescott, Jr.	Assistant Attorney General
Alexander Harvey, II	Assistant Attorney General
[2]Clayton A. Dietrich	Assistant Attorney General
[3]Joseph S. Kaufman	Assistant Attorney General
James H. Norris, Jr.	Special Assistant Attorney General
[4]Frank T. Gray	Special Assistant Attorney General for the Comptroller of the Treasury
Joseph D. Buscher	Special Assistant Attorney General for the State Roads Commission
Walter W. Claggett	Special Assistant Attorney General in Charge of Subversive Activities Control
Philip T. McCusker	Special Attorney for the State Accident Fund
Bernard S. Melnicove	Special Assistant Attorney General for the Employment Security Board
Edward S. Digges	Special Assistant Attorney General for the Department of Tidewater Fisheries
Mrs. Anne Davis Greer	Administrative Assistant, State Law Department
Miss Margaret E. Holliday	Stenographer-Secretary, State Law Department
Mrs. Katherine D. Hudlin	Stenographer-Secretary State Law Department
Miss Agnes T. Conroy	Law Stenographer

[1]Deceased October 10, 1956.
[2]Additional Assistant October 24, 1956.
[3]Appointed October 24, 1956.
[4]Resigned December 25, 1956.

Offices: 1201 Mathieson Building,
Baltimore 2, Md.

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Annual Report For 1956

January 1, 1957.

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

DEAR GOVERNOR MCKELDIN:

It gives me pleasure to submit to you a report of the business and proceedings of the State Law Department during the second year of my administration, beginning January 1st, 1956 and ending December 31st, 1956, together with an itemized statement of the receipts and disbursements of the Department during the fiscal year beginning July 1st, 1955 and ending June 30th, 1956. This report is made to you in compliance with Article 32A, Section 10 of the Annotated Code of Maryland (1951 Ed.)

In the interest of economy, I have endeavored to omit as many details as possible, without minimizing the tremendous amount of work performed by my Department. There are included in this report those of the Special Assistants assigned to the State Roads Commission, Subversive Activities Control, Department of Tidewater Fisheries, Department of Employment Security and the State Accident Fund.

There were one hundred and sixty-seven (167) cases finally disposed of and seventy-nine (79) are pending. Many of the pending cases are partially tried, while others are awaiting the decisions of the Courts.

We have appeared for the State 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, the Court of Appeals of Maryland, the Circuit Courts for the various Counties,

the Courts of Baltimore City and the People's Court of Baltimore City.

We have continued to prepare law memoranda for the Court of Appeals in writs of *habeas corpus* cases and during the year seventy-three (73) were filed.

We have approved as to form and legal sufficiency all bonds submitted to the Department by employees handling State revenues, as well as by all public officials required by law to be bonded. A conservative estimate would be between twelve and fifteen hundred annually.

All legal documents, such as leases, contracts, contract bonds, deeds and all other similar documents in which the State is interested are submitted to us for approval before acceptance by the State.

The legal matters pertaining to the Patapsco Valley Park project continue to be handled by my Department.

The General Assembly convened on February 1st, 1956 and adjourned on March 1st, 1956. We continued to maintain our Annapolis office during the Session so that legal advice was readily obtainable by the Members, Committees and the various Departments and Officials which the Attorney General is required by law to advise. The office was in charge of Mr. Joseph D. Buscher, with Mr. William C. Walsh, Jr., assisting. I personally attended the sessions in addition to the two Assistants and spent many hours conferring with and advising the various Members of the Assembly, as well as other State officials.

The following State bonds were issued during the year:

On January 31, 1956:

$2,592,000	Installment of the General Public School Construction Loan of 1953 (Chapter 609, Acts of 1953)
250,000	St. John's College Loan of 1954 (Chapter 57, Acts of 1954)
5,000,000	Installment of the General Construction Loan of 1954 (Chapter 45, Acts of 1954)

On October 3, 1956:

$4,040,000	Installment of the General Public School Construction Loan of 1956 (Chapter 80, Acts of 1956)
500,000	St. John's College Loan of 1956 (Chapter 115, Acts of 1956)
4,148,000	Installment of the General Public School Construction Loan of 1954 (Chapter 609, Acts of 1953)

The necessary legal opinions were given, as well as approval of arrangements in connection with the sale of the bonds, and Deputy Attorney General Norman P. Ramsey, together with bond counsel, attended the settlements in New York.

The National Association of Attorneys General held its Convention in Arizona from May 20th through May 23rd, and I attended the sessions, accompanied by Deputy Attorney General Ramsey. The Southern Regional Group of the Association held its meeting at Fort Monroe, Virginia, the early part of April and Assistant Attorney General Prescott and I attended.

The sudden illness in August and sad passing on October 10th of one of my Assistants, Mr. David Kauffman, necessitated the following changes in the personnel of the office:

On October 24th, 1956, I appointed Mr. Joseph S. Kaufman in Mr. David Kauffman's place. Owing to the heavy work load of the office, approval of an additional position of Assistant Attorney General was requested by me, and on October 24th, 1956, I appointed Mr. Clayton A. Dietrich to fill the position. On December 25th, 1956, Mr. Frank T. Gray resigned to resume the private practice of law.

Matters involving the enforcement of the Blue Sky Law have consumed a great many hours; the number of applications for registration has increased over that of last year as well as the requests for information concerning the law. These requests have come to us from all parts of the coun-

try by telephone as well as by mail, and involve many types of securities.

We have continued the policy of frequent conferences with the various State officials, Boards and Commissions in solving the numerous problems presented to us, and believe that this policy has resulted in conserving much time and effort of those concerned.

With kind regards, I am

Very truly yours,

C. Ferdinand Sybert
Attorney General.

Summary of Litigation For 1956

Case Pending In The Supreme Court Of The United States

Kenneth C. Hitchcock, et al vs. Henry T. Collenberg, et al. No. 734, October Term, 1956.

Case Disposed Of In The United States Court Of Appeals For The Fourth Circuit

Clarence E. Tyler vs. Vernon L. Pepersack, Warden, Maryland Penitentiary. No. 7185. This was an appeal which was allowed in *forma pauperis* from an order of the United States District Court for the District of Maryland (Chesnut, J.), denying the appellant's petition for a writ of habeas corpus. On June 18, 1956, the appeal was dismissed. Mr. Norris represented the Warden.

Cases Disposed Of In The United States District Court For The District Of Maryland

Stephen Moore, Jr., et al. vs. David G. Harry, Jr., et al., Constituting the Board of Education of Harford County, and Charles W. Willis, Superintendent of Schools of Harford County. Civil Action No. 5076. This was an action brought by four Negro children seeking admission to certain public schools in Harford County, Md., and presented the question whether the County Board of Education had taken prompt and reasonable action to initiate desegregation in the school system. Judge Roszel C. Thomsen dismissed the action, declaring that the plaintiffs had not appealed to the State Board of Education. Mr. Alexander Harvey, II, appeared for the State Board of Education.

Rose Marie Robinson, etc., vs. Board of Education of St. Mary's County, and G. Howard Thomas, et al. Civil Action 8780. This action was brought by a number of Negro

children seeking admission of the children in certain public schools in St. Mary's County. The suit was brought against the Board of Education of St. Mary's County and the County Superintendent of Schools. The State Board of Education was not joined as a party by the original complaint; however, at the request of the Court, the Attorney General appeared on behalf of the State Board of Education as *amicus curiae* in the case and presented his opinion on certain legal questions posed by the court. Following a hearing, a motion to dismiss the complaint was granted with leave to the Plaintiffs to amend their complaint, provided that they took an appeal to the State Board of Education by a certain specified date. Mr. Ramsey represented the State Board of Education.

Kenneth C. Hitchcock, et al., vs. Henry T. Collenberg, Board of Medical Examiners, et al. Civil Action No. 7866. This suit was filed by one Kenneth C. Hitchcock, a naturopathic physician, the Md. Naturopathic Association, Inc., and others, claiming to be patients of various naturopaths. In a complaint of 26 pages, it sought various forms of relief. There are 25 prayers for relief, praying generally that a declaratory judgment be handed down stating that the Maryland Medical Practice Laws are unconstitutional, and asking that the Boards of Medical Examiners for the State of Maryland, the Attorney General, the State's Attorney of Baltimore City and the Police Commissioner of Baltimore City be enjoined from prosecuting or interfering with the practice of naturopathy by Kenneth C. Hitchcock and others similarly situated. The State filed a motion to dismiss and, after a hearing, the petition was dismissed on April 19, 1956. Mr. Prescott represented the Board of Medical Examiners.

United States of America vs. John A. Ridenour, Uncle John's Cabin, Inc., et al., and State of Maryland, D. J. Gossert. Civil Action No. 6646. This was an action by the Federal Government to enforce a lien for unpaid Federal taxes. The State of Maryland was joined as a party because it had filed a sales tax lien against the property in the

amount of $2,489.28. An answer was filed on behalf of the State asking that in the event of any sale it be allowed the amount of its lien out of the proceeds of sale and that said lien be given priority against other claims to which it is entitled by law. The taxes were paid by a nephew of the defendant and the case was dismissed by the Government.

United States of America vs. William Harlin Webb, et al. Civil Action No. 6937. This was a complaint filed by the United States against William Harlin Webb, et al., for taxes due. A decree was entered by the United States District Court of Maryland ordering sale of the property in question for the benefit of the United States, and since taxes were paid, the State of Maryland had no further interest. Mr. Murnaghan and Mr. Gray successively appeared for the State.

United States of America vs. 290,107 Square Feet of Space in the Candler Building situate in Baltimore, State of Maryland, and Emory University, et al. Civil Action No. 7667. This was a condemnation proceeding instituted by the United States against certain real estate situate in Baltimore City. This office entered an appearance in order to insure the payment of State and local taxes. A judgment on amendment to declaration of taking was signed by Judge W. Calvin Chesnut. The State was represented by Mr. Norris.

James Williams vs. Vernon L. Pepersack, Warden, Maryland Penitentiary. Civil Action No. 9080. This was a petition for a writ of *habeas corpus* filed on August 16, 1956, and after a hearing before Judge Chesnut, the writ was denied on August 29, 1956. Mr. Norris represented the Warden.

Ernest Edward Lewis vs. Vernon L. Pepersack, Warden, Maryland Penitentiary. Civil Action No. 8880. This was a petition for a writ of *habeas corpus* filed by Lewis claiming illegal confinement. A hearing was held and the Petitioner was remanded to the Penitentiary. Mr. Norris represented the Warden.

Cases Pending In The United States District Court For The District Of Maryland

In the matter of the Carter Trucking Company. In Bankruptcy.

C. Boyd Corsa, et al. vs. John P. Tawes, et al. Civil Action No. 9077.

In the matter of Harry Meisel. In Bankruptcy—No. 10594.

In the matter of Coastal Finance Corporation, Debtor. In Bankruptcy—No. 10608.

Criminal Cases Tried In The Court Of Appeals

Mildred Grillo and Vincent Grillo vs. State of Maryland. No. 99, October Term, 1955. This case involved three appeals in one record from three convictions by the Circuit Court for Prince George's County, Maryland, sitting without a jury, for violations of Sections 83(a) and 99(c) of Article 2B of the Annotated Code of Maryland (1951 Ed.). Mildred Grillo, one of the Appellants, was convicted in No. 2106 of a violation of Section 83(a) of Article 2B of the Code, occurring on January 29, 1955, and in No. 2109 of another violation of the same Section, occurring on June 7, 1955. Vincent Grillo, the other Appellant, was convicted in No. 2111 of a violation of Section 99(c) of Article 2B of the Code, occurring on June 8, 1955. The judgment of the lower court was affirmed with costs. Mr. Harvey represented the State.

William Alden Coleman vs. State of Maryland. No. 110, October Term, 1955. This was an appeal from a judgment entered in the Circuit Court for Anne Arundel County, convicting the Appellant of breaking and entering a store. The Appellant was sentenced to six years in the Maryland House of Correction, upon the uncorroborated testimony of

one witness who connected him with the crime. The judgment of the lower court was affirmed. Mr. Gray represented the State.

Robert Jackson vs. State of Maryland. No. 117, October Term, 1955. The Appellant was convicted of rape by Judges Michael Paul Smith and Stewart O. Day, sitting without a jury in the Criminal Court of Baltimore County. The Appellant was sentenced to death by hanging in the death chamber of the State Penitentiary. From the verdict, judgment, and sentence of the Court he appealed. Judgment was reversed and the case remanded for new trial. Mr. Prescott represented the State.

Morton H. Eggleston, Jr., vs. State of Maryland. No. 138, October Term, 1955. This case involved two appeals in one record from two Orders of the Criminal Court of Baltimore. By Order dated July 22, 1955, the Court directed Appellant, Morton H. Eggleston, Jr., to remain in the custody of the Director of the Patuxent Institution pending adjudication of the issue of whether or not Appellant was a defective delinquent under Section 5 of Article 31B of the Annotated Code of Maryland (1951 Ed.). A trial of this issue had originally been set for July 22, 1955, but at the request of counsel for Appellant, the hearing had been postponed to a later date. Following a hearing on September 28, 1955, the Court, by an Order entered that same date, found that Appellant was a defective delinquent under said Article 31B, and ordered that he be committed to the Patuxent Institution for an indefinite period, subject to the further order of the Court. Appeal from the Order of July 22, 1955, was dismissed, with costs, and the Order of September 28, 1955, was affirmed, with costs. Mr. Harvey represented the State.

Joseph Kisner vs. State of Maryland. No. 139, October Term, 1955. This was an appeal from a conviction of bastardy in the Circuit Court for Garrett County. The Appellant was tried by a jury. After a verdict of "guilty", he was sentenced to two years in the Maryland House of

Correction by Judge Neil C. Fraley. From this judgment he appealed. The judgment of the lower court was affirmed. Mr. David Kauffman represented the State.

Abraham Givner vs. State of Maryland. No. 162, October Term, 1955. This was an appeal from a judgment of the Criminal Court of Baltimore. The Appellant, on February 28, 1955, was found guilty on three counts of violating the Baltimore City Code inspection provisions by Judge William R. Horney, specially assigned to the Supreme Bench of Baltimore City, sitting without a jury. Pursuant to Section 727 of Article 27 of the Annotated Code of Maryland (1951 Ed.), in the absence of Judge Horney, Judge Joseph R. Byrnes fined the Appellant $50.00 and costs, fine and costs being suspended. The judgment of the lower court was affirmed. Mr. Norris represented the State.

Captain John W. Smith vs. State of Maryland. No. 174, October Term, 1955. This appeal was from two orders of the Circuit Court for Anne Arundel County, both dated December 1, 1955. One order dismissed the motion to quash the writ of certiorari. The other declared that the Trial Magistrate was without jurisdiction to conduct a preliminary hearing after a plea of Not Guilty and the election of a jury trial and that his subsequent dismissal of the warrant for lack of evidence was null and void. The orders of the lower Court, dated December 1, 1955, were affirmed. Mr. David Kauffman represented the State.

Raymond Guynne Brown, Jr. vs. State of Maryland. No. 191, October Term, 1955. This was an appeal from a sentence to a fine of $500.00 and costs and to confinement in the Maryland House of Correction for a period of six months, which sentence was imposed by the Circuit Court for Carroll County (Macgill, J.), following conviction of the Appellant by the Court sitting as a jury. The indictment charged in three counts, keeping and maintaining, managing, and having an interest in a gaming table, to wit, a pinball machine and the profits thereof. The offense in the above indictment was alleged to have occurred on October

15, 1955, and the case appealed from was tried with a similar indictment alleging the offense to have occurred on October 12, 1955. The Appellant was acquitted of the latter charge. The judgment of the lower Court was affirmed. Mr. Prescott represented the State.

Nelson M. Blake vs. State of Maryland. No. 208, October Term, 1955. Appellant was tried and convicted by a jury in the Circuit Court for Montgomery County on an indictment which charged a violation of Article 27, Section 627 of the Annotated Code of Maryland (1951 Ed.), in the following language, "that Nelson M. Blake, on the 3rd day of September, 1955, did commit a certain unnatural and perverted sexual practice on an adult male, to wit, Kenneth King, contrary to the form of the Act of the Assembly in such case made and provided * * * ." The Appellant filed a Motion to Dismiss the indictment in the trial court on the grounds that the statute on which it was based was unconstitutional. Appellant's counsel and the State's Attorney stipulated before trial that Appellant's counsel "does not complain that the indictment is not sufficiently in detail to describe the offense, or that the defendant could not plead autre fois acquit in case of any subsequent attempt at prospective prosecution." The judgment of the lower Court was affirmed. Mr. Prescott represented the State.

Leo Elmer Hayes vs. State of Maryland. No. 4, October Term, 1956. This was an appeal from a conviction for attempted robbery with a dangerous and deadly weapon upon indictment in the Criminal Court of Baltimore City. The Appellant was tried without a jury by Judge Joseph L. Carter, found guilty and sentenced to twenty years in the Maryland Penitentiary. From this judgment, he appealed. The judgment of the lower Court was affirmed. Mr. Norris represented the State.

James W. Faulcon vs. State of Maryland. No. 21, October Term, 1956. This was an appeal from the Criminal Court of Baltimore, Part I, (Carter, J., without a jury) on trial of a single count indictment, charging that the appel-

lant, feloniously, wilfully and of deliberately premeditated malice aforethought did kill and murder one Walter W. Lockett. The verdict of the Court, sitting as a jury, was murder in the first degree. The sentence imposed was life imprisonment in the Maryland Penitentiary. From the Verdict, Judgment and Sentence, this appeal was entered. The judgment of the lower Court was affirmed. Mr. Prescott represented the State.

Robert M. Mazer vs. State of Maryland. No. 43, October Term, 1956. This was an appeal from a verdict of the Criminal Court rendered February 10, 1956, by which the Defendant, Robert M. Mazer, was found guilty on an indictment alleging unlawful possession of Cannabis, a narcotic drug, and from the sentence of that Court entered on April 17, 1956, by which the Defendant was sentenced to five years in the Maryland House of Correction. Judgment of the lower Court was affirmed with costs. Mr. Prescott represented the State.

Constas Gus Basiliko vs. State of Maryland. No. 50, October Term, 1956. This was an appeal by the Appellant, Constas Gus Basiliko, from the judgment and sentence that he pay a fine of $1,000.00 and serve two years in the Maryland House of Correction passed by the Circuit Court for Montgomery County upon a verdict of guilty by a Jury under the second count of an indictment charging the Appellant and others with conspiring by false pretenses to fraudulently obtain monies from the State Roads Commission of the State of Maryland. Judgment of the lower Court was reversed and the case remanded for new trial. Mr. Dietrich represented the State.

George Norman Gregorie vs. State of Maryland. No. 52, October Term, 1956. This case involved two appeals in one record from two separate convictions of Appellant by the Circuit Court for Prince George's County, Maryland, sitting without a jury, for violations of Section 627 of Article 27 of the Annotated Code of Maryland (1951 Ed.). In No. 2329, Appellant was convicted of committing an un-

natural and perverted sexual practice on Victor Francis Guido, a thirteen year old boy, on December 10, 1955. In No. 2330, Appellant was convicted of committing a similar offense on David Sherman Breeden, Jr., a fourteen year old boy, on December 18, 1955. The judgments of the lower Court were affirmed with costs. Mr. Harvey represented the State.

Edward S. Clay vs. State of Maryland. No. 54, October Term, 1956. This was an appeal from the conviction of Appellant by the Criminal Court of Baltimore, sitting without a jury, of the crime of manslaughter by vehicle, as defined in Section 455 of Article 27 of the Annotated Code of Maryland (1951 Ed.). Appellant likewise appealed from the Order of the Supreme Bench of Baltimore City, dated April 26, 1956, denying his motion in arrest of judgment. Judgment and sentence of the lower Court were affirmed. Mr. Harvey represented the State.

State of Maryland vs. Max A. Rappaport. No. 58, October Term, 1956. The Appellee was indicted on the charge of feloniously voting in the Primary and General Elections held in this State from the year 1946 to 1952, when he had been convicted of the crime of grand larceny in the first degree, a felony, in the County of New York in the State of New York, and for which he had received no pardon. A Motion to Dismiss Indictment was filed and granted by Judge James Macgill. The State appealed from the order of dismissal. The order of the lower Court was affirmed with costs. Mr. Norris represented the State.

Gorman Dize vs. State of Maryland. No. 62, October Term, 1956. The Appellant was charged in a warrant dated April 10, 1956, with violating Section 18 (a) of Article 2B of the Annotated Code of Maryland (1951 Ed.). The Appellant appeared before the trial magistrate for Calvert County, Maryland, on May 2, 1956 and requested a jury trial. On May 3, 1956, the trial magistrate forwarded the papers in the case to the Circuit Court for Calvert County, and they were filed by the Clerk. The matter was set for

trial for May 11, 1956, and immediately prior to the trial, the Appellant appeared with counsel and filed a motion to dismiss the warrant, claiming that it was defective, which motion was denied. Appellant immediately thereafter filed a demand for a bill of particulars; the State excepted to the demand and the Court denied it. The court and the jury were ready for trial when the two papers were filed and immediately after the court ruled on them the case was heard before the jury. Judge John B. Gray, Jr., presided at the trial. At the conclusion of the case, the jury found the Appellant guilty and the court imposed a sentence upon the Appellant. The judgment of the lower Court was reversed and the case remanded. Mr. Prescott represented the State.

George Lightfoot Cole, Jr. vs. State of Maryland. No. 72, October Term, 1956. This case was an appeal from the judgment of the Circuit Court for Montgomery County convicting the Appellant of the rape of a four-year-old child, and sentencing him to death. The Appellant, in the court below, admitted the acts constituting the crime but pled not guilty by reason of insanity. The judgment of the lower Court was affirmed with costs. Mr. Gray represented the State.

E. Russell Moxley vs. State of Maryland. No. 90, October Term, 1956. This was an appeal from a judgment of the Circuit Court for Howard County, sitting as a Criminal Court. The Appellant, on May 26, 1956, was found guilty of electioneering within one hundred feet of the polls in Ellicott City at a primary election held May 7, 1956, contrary to Article 33, Section 202, of the Annotated Code of Maryland (1951 Ed.) by Judge James Macgill, sitting without a jury. Appellant was fined Fifty Dollars ($50.00) and costs. A motion for a new trial was denied. The judgment of the lower Court was affirmed with costs. Mr. Norris represented the State.

Scott S. Lilly vs. State of Maryland. No. 106, October Term, 1956. This was an appeal from the conviction of Appellant by the Criminal Court of Baltimore sitting

without a jury, of the crime of manslaughter by vehicle as defined in Section 455 of Article 27 of the Annotated Code of Maryland (1951 Ed.). The judgment of the lower Court was affirmed. Mr. Harvey represented the State.

Kelly Briley vs. State of Maryland. No. 107, October Term, 1956. Kelly Briley was indicted in the usual form for the murder of Jessie Mills, which occurred on January 21, 1956 in Baltimore City. He pleaded not guilty and was tried before Judge Joseph L. Carter and a Jury. He was found guilty of murder in the first degree. A Motion for a New Trial filed before the Supreme Bench of Baltimore City was denied. He was sentenced to death by hanging. From this judgment he appealed. The judgment of the lower Court was affirmed. Mr. Prescott represented the State.

Eddie Lee Daniels vs. State of Maryland. No. 124, October Term, 1956. The Appellant, Eddie Lee Daniels, was tried and found guilty of murder in the first degree by a jury in the Circuit Court for Montgomery County, Maryland, with three Judges presiding, on June 12, 1956. He was thereafter sentenced to death and he appealed to this Court. The judgment of the lower Court was affirmed without costs. Mr. Prescott represented the State.

Peter S. Messina vs. State of Maryland. No. 137, October Term, 1956. This was an appeal from a conviction of the Appellant in the Criminal Court of Baltimore (E. Paul Mason, Judge), in a trial without a jury, and a sentence of four months in the Baltimore City Jail, upon an indictment charging the Appellant with indecent exposure. The judgment of the lower Court was affirmed with costs. Mr. Gray represented the State.

Earl Lebert Dodson vs. State of Maryland. No. 140, October Term, 1956. This was an appeal from the judgment and sentence of the Criminal Court of Baltimore, rendered February 8, 1956, entered upon a jury verdict of guilty on indictments charging unlawful possession and control of

marijuana (cannabis), a narcotic drug, and from the sentence of that Court to five years in the Maryland House of Correction. The judgment of the lower Court was affirmed with costs. Mr. Norris represented the State.

John S. Nolan vs. State of Maryland. No. 155, October Term, 1956. This was an appeal from the judgment by the Circuit Court for Montgomery County entered pursuant to a jury verdict of guilty, convicting Appellant of the crime of embezzlement as defined in Section 154 of Article 27 of the Annotated Code of Maryland (1951 Ed.). The Court held that the cash had come into possession of the employer and there was not sufficient evidence to find the Appellant guilty of embezzlement. The case was remanded for further proceedings. Mr. Harvey represented the State.

Bertha T. Dennis vs. State of Maryland. No. 159, October Term, 1956. The Appellant was convicted after a trial by jury of allowing a minor to loiter on the premises, the Appellant being licensed to sell alcoholic beverages, and the Trial Court thereupon imposed a sentence upon her. By this sentence the Appellant was ordered to pay a fine of Fifty Dollars and costs above and below. From this judgment the appeal in the instant case was taken. The judgment of the lower Court was affirmed. Mr. Dietrich represented the State.

Cleveland Haskin, Sr. vs. State of Maryland. No. 162, October Term, 1956. This was an appeal by Cleveland Haskin, Sr., licensee, from the verdict of the Criminal Court of Baltimore, without a jury, on two indictments finding the Appellant guilty of selling and furnishing an alcoholic beverage (beer) to persons under twenty-one years of age, and from the judgment of the Criminal Court sentencing the Appellant to two years in the Maryland House of Correction and a fine of $1,000.00. The judgment of the lower Court was affirmed with costs. Mr. Kaufman represented the State.

Charles Warren Manger and Morris Schwartz vs. State of Maryland. No. 169, October Term, 1956. The Appellants were arrested and tried upon charges of violating the provisions of Section 306 of Article 27 of the Annotated Code of Maryland (1951 Ed.). The Court, sitting without a jury, found each of the Appellants guilty and sentenced each to one year in the Maryland House of Correction and fined each $1,000.00. Each of the respective Defendants filed a motion to quash the search and seizure warrant, which motions were denied. At the trial the State offered substantial evidence of bookmaking all of which had been obtained as a result of the execution of the search and seizure warrant. Objections were duly made to the introduction of this evidence, which objections were overruled. The judgment of the lower Court was affirmed with costs. Mr. Kaufman represented the State.

William Henry Johnson vs. State of Maryland. No. 171, October Term, 1956. William Henry Johnson was convicted of manslaughter by automobile in the Criminal Court of Baltimore, sitting without a jury, and was sentenced to the Maryland House of Correction for a period of eight months. He appealed from that judgment and sentence. Judgment of the lower Court was reversed. Costs to be paid by the Mayor and City Council of Baltimore. Mr. Norris represented the State.

Cornelius Farrell vs. State of Maryland. No. 174, October Term, 1956. This was an appeal from a conviction of rape by the Criminal Court of Baltimore, sitting without a jury. The Court sentenced Appellant to suffer death by the administration of lethal gas. The Court at the time of disposition instructed court-appointed counsel to take an appeal to this Honorable Court, stating that he thought this case ought to be reviewed by this Court. An order of appeal was thereupon noted and the Appellant filed an oath Forma Pauperis. Judgment of the lower Court was reversed and the case remanded for a new trial, the costs to be paid by the Mayor and City Council of Baltimore. Mr. Kaufman represented the State.

Kenneth C. Hitchcock vs. State of Maryland. No. 177, October Term, 1956. This was an appeal from a judgment of conviction and sentence of the Criminal Court of Baltimore City entered upon a jury verdict of guilty on Indictments Nos. 453, 1406, 1407 and 1408. The indictments charged the illegal practice of medicine and surgery on four different dates, viz., January 13, 20, 27 and February 2, 1956. Judgment of the lower Court was affirmed with costs. Mr. Prescott represented the State.

CIVIL CASES TRIED IN THE COURT OF APPEALS

J. Millard Tawes, Comptroller of the State of Maryland vs. Joseph F. Hughes, Co., Inc. No. 87, October Term, 1955. This was an appeal from an Order of the Baltimore City Court reversing in part and affirming in part the Comptroller's denial of a request for a revision of an assessment entered on August 19, 1953, of sales taxes imposed on the purchase of certain building material and equipment by the Joseph F. Hughes Co., Inc., the Appellee. The materials were purchased during the period from July 1, 1947 to June 30, 1953. The assessment was imposed on the purchase prices of the following items: (1) lumber used for forms, (2) fuel for temporary heating, (3) nails and hardware used in the form lumber, (4) photographs showing the progress made on the buildings, (5) special bits for small tools, (6) muriatic acid which was used to clean and brighten the surface of bricks, all of which were purchased by the Appellee to fulfill lump-sum contracts for the City of Baltimore and other political subdivisions of the State of Maryland. On August 19, 1953, the Comptroller's office made a total assessment of $8,154.22 against the Appellee, which included sales tax in the amount of $6,358.06, interest in the amount of $1,160.35, and a penalty of $635.81. These figures were later reduced by the Comptroller's office to $5,404.74 sales tax, $985.33 interest, and $540.46 penalty. The Appellee requested a hearing before the Comptroller, which was held on October 28, 1953, before the Chief of the Retail Sales Tax Division of the Comptroller's office. On December 14, 1953, the Comptroller rendered an opinion

in which the request for the revision of the assessment was denied. On the 28th day of January, 1954, the Appellee filed an appeal to the Baltimore City Court from the Comptroller's decision, and that court, by Order of August 10, 1955, reversed the portion of the Comptroller's decision as to the sales tax upon the form lumber, hardware and muriatic acid, and affirmed the Comptroller's decision as to the sales tax upon fuel, photographs and tool bits. The Comptroller noted an appeal as to that portion of the Order of August 10, 1955, adverse to him and Appellee filed a cross-appeal from that portion of the Order, which affirmed the assessment of sales tax upon fuel, photographs and tool bits. The Order of the lower Court was affirmed in part and reversed in part, and the ruling of the Comptroller affirmed. Mr. David Kauffman and Mr. Prescott represented the State.

Dr. Jeannette R. Heghinian vs. Fred L. Ford, Acting Commissioner of Police, Baltimore City. No. 92, October Term, 1955. By petition for writ of mandamus filed in the Court of Common Pleas of Baltimore City, the Appellant sought to have the Court compel the Police Commissioner of Baltimore "forthwith to designate both a male physician and a female physician for each examination of a person" required by Section 577 of the Charter and Public Local Laws of Baltimore City, Flack's 1949 Edition. At the conclusion of the Petitioner's case, and again at the conclusion of the whole case, the Appellee filed a demurrer to the evidence, moving for dismissal of the petition on the grounds that: (a) the Appellant had shown no legal right to relief by way of mandamus, (b) the Appellant had shown no duty owed by the Appellee to her, (c) the writ of mandamus, which must issue as prayed, was not a proper remedy upon the case presented, (d) no evidence had been introduced warranting the issuance of a writ of mandamus, and (e) Appellant was seeking, by way of mandamus, what amounts to a declaratory judgment. After hearing, the court dismissed the petition. This appeal followed. The Judgment of the lower Court was affirmed. Mr. Ramsey represented the State.

William A. Carrier, et al. vs. Edwin D. Lynch, Sheriff, etc., et al. No. 111, October Term, 1955. The owners of an outdoor, drive-in movie theatre appealed from a decree of the Circuit Court for Worcester County, Maryland, construing Section 605 of Article 27 of the Annotated Code of Maryland (1951 Ed.) as prohibiting the keeping open or using of an outdoor movie on the Sabbath day in Worcester County. Appellants had instituted a declaratory judgment action under Article 31A of the Code against the State's Attorney and the Sheriff of Worcester County, Appellees herein, praying for a construction of said Section 605 and an injunction restraining the Appellees from arresting and prosecuting Appellants under this statute. Decree of the lower Court affirmed with costs. Mr. Harvey represented the State.

Steiner Construction Company, Inc. vs. J. Millard Tawes, Comptroller of the State of Maryland. No. 120, October Term, 1955. This was an appeal from an Order of the Baltimore City Court which was entered September 7, 1955, and which affirmed the Opinion and determination of the Comptroller of the Treasury of the State of Maryland (hereinafter called "the Comptroller"), dated October 28, 1953, and also affirmed the assessment by him of retail sales taxes against Steiner Construction Company, Inc. (hereinafter called "Steiner"). On January 23, 1952, the Comptroller notified Steiner that a deficiency assessment for retail sales tax had been entered against it in the amount of $1,655.41 for the tax period from July 23, 1947, to November 20, 1950, with interest amounting to $227.61. Under date of February 21, 1952, the Appellant applied in writing for revision of the assessment, and on March 28, 1952, Steiner sent the Comptroller a written request for a formal hearing. This hearing was held on September 30, 1953, and thereafter the Comptroller filed his Opinion, dated October 28, 1953, holding that the assessment was correct and that Steiner was required to pay the tax. On December 24, 1953, Steiner filed in the Baltimore City Court its Petition and Appeal from the determination of the Comptroller; on March 31, 1954, the appeal was argued and

memoranda of law were submitted by counsel for the parties to the Honorable James K. Cullen; and on August 8, 1955, he filed an Opinion affirming the assessment entered by the Comptroller. Order of the lower Court affirmed with costs. Mr. Prescott represented the State.

J. Millard Tawes, Comptroller of the State of Maryland vs. Thompson Trailer Corporation. No. 133, October Term, 1955. This was an appeal from a decree of the Circuit Court for Baltimore County reversing the Comptroller's denial of a request for revision of an assessment of sales and use taxes. The assessment was made against Thompson Trailer Corporation on August 31, 1954 for $4,360.19 tax, plus $425.70 interest and $436.62 penalty making a total of $5,228.51. The Appellee conceded that the tax had been properly assessed leaving a balance of $2,365.82 which was contested by the Appellee. The Court held that the sale of the personal property and equipment was a casual and isolated sale and was exempt from the sales tax, and affirmed the order of the lower Court abating the assessment of the sales tax sought to be collected. Mr. Prescott represented the State.

Maryland-National Capital Park and Planning Commission vs. Blanchard Randall, Secretary of State of the State of Maryland. No. 150, October Term, 1955. This was an appeal by the Plaintiff from an order of the Circuit Court for Montgomery County, passed December 13, 1955, dismissing the Petition in the Special Case Stated, filed by both parties to this cause. The Plaintiff and Appellant in this action is the Maryland-National Capital Park and Planning Commission, an administrative agency of the State of Maryland, and a public body corporate, created by Chapter 448 of the Laws of Maryland, 1927. The Defendant and Appellee was Blanchard Randall, Secretary of State of Maryland. The Petition asked the Court to decide nine questions of law arising from the enactment of House Bill 505 by the General Assembly at its 1955 Session; the veto of said Bill by the Governor following the adjournment; the requirement of Article II, Section 17, of the Maryland Constitution

that said Bill be returned to the House of Delegates for reconsideration; and the probability that said Bill will be passed by the General Assembly over the Governor's veto. The parties agreed in the Petition that a decree may be entered "either enjoining and prohibiting the transmission of House Bill No. 505 by the Defendant to the House of Delegates of Maryland, or declaring said Bill void in whole or in part, or deciding that said Bill is regular and valid in all respects, and containing such other provisions as may be proper in the premises". The Chancellor felt that she was without power to grant affirmative relief against the Appellee in the performance of his executive functions, and, for that reason, that she was likewise without power to determine the validity of House Bill 505 (although she strongly suggested its invalidity). The Chancellor therefore dismissed the Petition. The Appellant and Appellee entered into a Special Case Stated in the court below in order to obtain a ruling as expeditiously as possible. The Appellee was in the position of a stakeholder who was interested only in rendering aid to the court so that a proper decision would be rendered. Order of the lower Court affirmed. Mr. Prescott represented the State.

William Ray Yantz vs. Warden, Maryland House of Correction. No. 212, October Term, 1955. This was an appeal from an Order dated March 6, 1956, by which the Honorable Michael J. Manley, Associate Judge of the Supreme Bench of Baltimore City, sitting as the Baltimore City Court, after a hearing, denying the issuance of a writ of habeas corpus and remanding the Appellant to the custody of the Appellee. The Appellant was found guilty by Trial Magistrate Jesse Shank of Washington County in two cases of assault and was sentenced to three years in the one case and to two years in the other, the sentences to run consecutively, and to be served in the Maryland House of Correction. The Appellant alleged through his court-appointed counsel that he was being illegally detained. An appeal was allowed by this Court. The Order of the lower Court was affirmed. Mr. Norris represented the State.

J. Millard Tawes, Comptroller of the Treasury vs. Aerial Products, Inc. No. 217, October Term, 1955. The instant case arose out of an application for refund of tax, penalties and interest paid by Aerial Products, Inc. after an investigation made by the office of the Comptroller. The Comptroller's office completed an audit of the accounts of Aerial Products, Inc. for sales and use taxes, and the Appellee was advised of the results of the audit. Prior to the receipt of notice of assessment from the Comptroller, however, Appellee paid the assessment in full. Claim for refund was in due course filed. Aerial Products, a manufacturer operating on Government war contracts, purchased certain machinery, title to which upon purchase remained in the Government. Other machinery was, by contract, authorized to be purchased for immediate resale to the Government. The original claim covered eleven particular captions or claims, some being technical, and others being disposed of administratively, so that, at the conclusion of negotiations and at the time of the hearing before the Comptroller's office, there remained only five captions or claims for consideration. After hearing, the Comptroller ruled against Appellee on all of its claims included in captions 1, 2, 3, 4 and 5, and an appeal was duly noted to the Circuit Court for Cecil County. The matter was heard by the court, and the ruling of the Comptroller was reversed by an opinion filed January 16, 1956. Appellant duly noted an appeal. The Court held that the purchases were exempt from the Maryland Sales Tax. The Order was modified and the judgment rendered for $6,578.29 with interest. A petition for re-argument was filed, but was denied on October 3, 1956. Mr. Ramsey represented the State.

Daniel G. Van Clief, etc., A. B. Hancock, etc. vs. Comptroller of the State of Maryland. No. 16, October Term, 1956. This case was an appeal from an Order of the Baltimore City Court (Joseph R. Byrnes, J.) affirming an Order of the Comptroller of the State of Maryland denying a claim for refund of retail sales tax paid by the Appellants herein. The tax was originally paid at the time of the purchase of a brood mare, and the petition for refund was

filed on the ground that the sale was exempt from retail sales tax. The Order of the lower Court was reversed with costs. Mr. Gray represented the State.

Baltimore Foundry & Machine Corporation vs. J. Millard Tawes, Comptroller of the State of Maryland. No. 28, October Term, 1956. This was an appeal from a judgment of the Baltimore City Court affirming the Comptroller's assessment of Retail Sales Tax against the Baltimore Foundry & Machine Corporation, in the amount of Five Hundred Sixty Three Dollars and Ten Cents ($563.10), due on the purchase by the Corporation of patterns to be used in its business, which patterns were purchased during a period from 1949 through 1955. The Baltimore Foundry & Machine Corporation paid the tax assessed under protest and filed a claim for refund with the Comptroller. The Comptroller held a hearing on April 26, 1955, and rendered an opinion on June 22, 1955, denying the claim for refund. The Claimant then, pursuant to the provisions of Article 81, Section 348 of the Annotated Code of Maryland (1951 Ed.), entered an appeal to the Baltimore City Court. That Court affirmed the Comptroller's ruling and the petitioner appealed to this Court. The judgment of the lower Court was reversed with costs and the case remanded. Mr. Prescott represented the State.

Frances G. Thomas, ADM. of the Estate of James F. Thomas, deceased, vs. James M. Hepbron, as Police Commissioner of Baltimore City and as Trustee of the Special Fund. No. 39, October Term, 1956. This was an appeal from an order of the Superior Court of Baltimore City, dated April 19, 1956, sustaining, without leave to amend, the Demurrer of James M. Hepbron, Police Commissioner of Baltimore City, to the petition for Writ of Mandamus filed against him by the Administratrix of the Estate of James F. Thomas, deceased, a former police officer. The petition sought a Writ of Mandamus directing the Police Commissioner, as Trustee of the Department's special pension fund, to pay to the Petitioner the amount of $1,268.42, plus interest, representing the sum contributed to the Fund by

the deceased police officer during his life. The judgment of the lower court was reversed and case remanded. Mr. Harvey represented the Police Commissioner.

United Artists Corporation and Carlyle Productions, Inc. vs. C. Morton Goldstein, et al., constituting the Maryland State Board of Motion Picture Censors. No. 40, October Term, 1956. This was an appeal by the distributor and producer of the motion picture entitled "The Man With The Golden Arm" from an Order of the Baltimore City Court affirming two Orders of the Maryland State Board of Motion Picture Censors. By Orders dated January 12 and February 10, 1956, the Board required the elimination of a scene of less than two minutes in length from this motion picture before the film would be licensed for general showing throughout the State of Maryland. The Order of the lower Court was reversed. Mr. Sybert represented the Board of Motion Picture Censors.

Household Finance Corporation vs. State Tax Commission of Maryland. No. 42, October Term, 1956. Household Finance Corporation, a foreign finance corporation, had appealed from an assessment of its capital stock made by the State Tax Commission for the year 1953 to the Circuit Court of Baltimore City. Judge Oppenheimer, after consideration thereof, affirmed in part and remanded in part to the Commission the Commission's 1953 capital stock assessment of Household. Thereupon, Household appealed as to that part affirming the assessment and the Commission cross-appealed as to that part remanding the assessment. The Order of the lower Court was affirmed as to valuation, and modified as to apportionment, and, as modified, was affirmed. Mr. Kaufman represented the State Tax Commission of Maryland.

Billy Ray McElroy vs. Director Patuxent Institution. No. 48, October Term, 1956. The Appellant, Billy Ray McElroy, was committed to the Patuxent Institution as a Defective Delinquent on February 10, 1956, after a hearing subject to the further order of the Court. His application

for a writ of habeas corpus to the Circuit Court of Queen Anne's County was denied. The Appellant then made application for leave to appeal from this denial, and it was allowed by this Court. The appeal was dismissed with costs. Mr. Norris represented the Director Patuxent Institution.

Topps Garment Manufacturing Corp. vs. State of Maryland. No. 65, October Term, 1956. This was an appeal from an Order of the Circuit Court for Dorchester County denying a motion of the Appellant to strike a judgment and attachment in favor of the Appellee entered on an unappealed assessment for use taxes against the Appellant, and granting judgment of condemnation absolute against assets held by the Garnishee, Phillips Hardware Company. The judgment of the lower Court was affirmed with costs. Mr. Gray represented the State.

Maryland Racing Commission vs. James McGee, et ux, No. 75, October Term, 1956. The Maryland Racing Commission appealed from the Order of Mandamus issued by the Superior Court of Baltimore City on the 21st day of May, 1956, requiring the Commission to restore James McGee to good standing as a trainer of race horses in the State of Maryland and to renew his license as a trainer of race horses at all tracks under the jurisdiction of the Commission, with all rights and privileges appurtenant thereto. The Writ of Mandamus issued commanded the Commission to rescind and countermand its Order of April 1, 1956 by which it had found McGee guilty of violating Rule 111 of the Commission, and denied him the privilege of the tracks in Maryland for a period of six months from April 1, 1956. Rule 111 deals with the administration of stimulant drugs to race horses. After a hearing before the Commission and as penalty for violation of Rule 111, McGee's trainer's license had been revoked and he had been denied the privilege of the tracks in Maryland and the privilege of racing any horse owned by him for a period of six months. The Order of the lower Court was reversed. Mr. Ramsey represented the Maryland Racing Commission.

Board of Health of the State of Maryland, et al. vs. Edward J. Crew. No. 87, October Term, 1956. This case was an injunction proceeding brought by the Appellee to enjoin the Appellants from enforcing an Order issued to the Appellee to close his private well and leave it in such a way that it could not be used again. The court below granted the relief prayed and enjoined the Appellants from taking any action under their Order. The decree of the lower court was reversed with costs. Mr. Gray represented the State Board of Health.

David H. Fax, et ux vs. State Tax Commission of Maryland. No. 97, October Term, 1956. This case was an appeal from an Order of the Baltimore City Court, affirming the ruling of the State Tax Commission in denying an income tax exemption to the taxpayer for certain sums of money received by virtue of employment with the Atomic Energy Commission of the United States Government and its agent during the taxable year 1951. The judgment of the lower court was affirmed with costs. Mr. Gray represented the State Tax Commission.

W. J. Dickey & Sons, Inc. vs. State Tax Commission of Maryland. No. 101. This appeal included six income tax cases, each for a separate year, but involving the same legal questions. They were appeals from orders of the State Tax Commission which affirmed assessments against W. J. Dickey & Sons, Inc. for income taxes for the years 1946 and 1949 through 1953 (The years 1947 and 1948 are the subject of other pending litigation). In its tax returns for the years in question, Dickey applied an allocation formula to its income as a result of which application virtually all of the sales of goods made by Dickey were allocated outside the State. The Comptroller levied assessments developing a tax based upon all of Dickey's sales being allocable in Maryland. The assessments of the additional taxes were affirmed by the State Tax Commission and by the Circuit Court for Baltimore County (Kintner, Judge). The order of the lower Court was affirmed with costs. Mr. Gray represented the State Tax Commission.

Maryland State Board of Motion Picture Censors vs. Times Film Corporation. No. 108, October Term, 1956. This was an appeal by the Maryland State Board of Motion Picture Censors from an Order of the Baltimore City Court which reversed in part, and affirmed in part, an Order of the Board requiring the elimination of certain scenic matter from a motion picture entitled, "Naked Amazon". By Orders dated November 3, 1955 and December 14, 1955, the Board required the elimination of all views of native people with their bodies exposed nude below the waist, appearing in reels 3A, 3B and 4A of the film in question, on the ground that such scenic matter was obscene and/or pornographic, as defined in Article 66A of the Annotated Code of Maryland (1956 Supp.), Section 6 (a), (b) and (c). This portion of the Order, the court reversed. The Orders of the Board, heretofore referred to, had also required the elimination of certain scenic matter which had theretofore been eliminated by the New York Board of Censors, which did not appear in the film exhibited to the Maryland Board, such scenic matter being contained in reels 3D and 4D thereof. There was no appeal by the producer of the film with respect to this point, and to the extent that the Court's Order affirmed that portion of the Board's Order, the controversy was apparently not before this Court. The Order of the lower Court was affirmed with costs. Mr. Ramsey represented the State Board of Motion Picture Censors.

Wallis H. Gardella, et al. vs. Comptroller of the State of Maryland and the State Tax Commission. No. 135, October Term, 1956. This was an appeal from an Order of the Baltimore City Court (Joseph R. Byrnes, J.), affirming an order of the State Tax Commission of Maryland, approving an assessment entered by the Comptroller of the Treasury against the Appellants for income taxes due for the taxable years 1950, 1951 and 1952. The assessments were levied by the Comptroller upon the denial to the Appellants of certain credits taken by the Appellants on their return for amounts paid to the District of Columbia under its Unincorporated Business Franchise Tax. The judgment of the

lower Court was affirmed with costs. Mr. Gray represented the Comptroller and the State Tax Commission.

Robert H. Reddick, M.D. vs. State of Maryland. No. 146, October Term, 1956. A Bill for Declaratory Decree and Injunction was filed on June 26, 1956, by the State of Maryland on relation of the Attorney General against Drs. Robert H. Reddick, Marcos Jiminez, Robert Dwight Brown, Lloyd W. Hughes, Simon Virkutis, Alexander Mozzer, Yuen K. Yuan, and William C. Harrison, who were purporting to act as the Board of Medical Examiners of the State of Maryland, representing the Maryland State Homeopathic Medical Society. A temporary injunction was issued at the same time upon the order of the Honorable Reuben Oppenheimer, Associate Judge of the Supreme Bench of Baltimore City. On June 27, 1956, a companion case was filed against the alleged officers of the Maryland State Homeopathic Medical Society. The temporary Injunction was extended, after a hearing on July 3, 1956, until the final determination of the case. The Appellant filed combined demurrers and answers and the cases were heard before the Honorable Joseph R. Byrnes, Associate Judge of the Supreme Bench of Baltimore City. After a two weeks hearing, Judge Byrnes handed down an opinion on August 13, 1956 and signed the orders in both cases on August 20, 1956. The Appellant was the only one of the eight defendants who appealed from those orders. The decrees of the lower Court were affirmed with costs. Messrs. Ramsey and Norris represented the State.

Glen Burnie Improvement Association, Inc., et al. vs. State Appeal Board, et al. No. 154, October Term, 1956. This was an appeal by the Glen Burnie Improvement Association, Inc., a body corporate, and Thomas Brayshaw and Adeline Brayshaw, his wife, Appellants, complainants-protestants below, from an Order of the Circuit Court for Anne Arundel County, in Equity, dated the 27th day of September, 1956, dismissing Appellants' Bill of Complaint after sustaining Appellees' demurrers which questioned Equity jurisdiction. Appellants' Bill of Complaint alleged

that the action of the State Appeal Board in upholding the decision of the Board of License Commissioners of Anne Arundel County granting a license to G. Nelson Davis, one of the Appellees herein, to sell alcoholic beverages was arbitrary, capricious and unlawful in that the license was illegally issued for a new building within 1,000 feet of a public school and churches contrary to the provisions of Section 44(a) of Article 2B of the Annotated Code of Maryland. Appellants asked the Equity Court below to set aside or reverse the action of the State Appeal Board, to declare invalid the resolution of the Board of License Commissioners of Anne Arundel County and for other relief, including a prayer for a preliminary injunction against the execution of the Order. The order of the lower Court was affirmed with costs. Mr. Harvey represented the State Appeal Board.

Cases Pending in the Court of Appeals

James M. Taylor vs. State of Maryland. No. 184, October Term, 1956.

Charles Bradley Hall vs. State of Maryland. No. 186, October Term, 1956.

Robert H. Reddick, etc. vs. Commissioner of Personnel. No. 193, October Term, 1956.

John Guerriero vs. State of Maryland. No. 198. October Term, 1956.

Carl Daniel Kier vs. State of Maryland. No. 207, October Term, 1956.

May Department Stores Company, etc. vs. State Tax Commission of Maryland. No. 213, October Term, 1956.

State, Ex. Rel. Francis A. Fischer vs. J. Lee Ball, Sheriff of Prince George's County. No. 217, October Term, 1956.

Warden of the Baltimore City Jail vs. Andrew Jackson Drabic. No. 218, October Term, 1956.

In the year 1956, at the request of the Court of Appeals of Maryland, this office prepared memoranda 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, Mr. Norris prepared and filed with the Court of Appeals memoranda in the following cases:

OCTOBER TERM, 1955

Carl Jett, Jr., vs. Supt., Maryland State Reformatory for Males. Nos. 14 and 22.

Patrick J. Hirons vs. Warden, Maryland Penitentiary. No. 17.

Marvin L. Wilhelm vs. Warden, Maryland House of Correction. No. 18.

Ernest Edward Lewis vs. Warden, Maryland Penitentiary. No. 19.

Albert G. Williams vs. Warden, Maryland Penitentiary. No. 20.

Eldridge Thompson vs. Warden, Maryland House of Correction. No. 21.

Joseph H. Whitley vs. Warden, Maryland House of Correction. No. 23.

Joseph R. Ramberg vs. Warden, Maryland House of Correction. No. 24.

James Williams vs. Warden, Maryland Penitentiary. No. 25.

Robert Johnson vs. Warden, Maryland Penitentiary. No. 26.

James B. Lucas vs. Warden, Maryland Penitentiary. No. 27.

James Height vs. Director, Patuxent Institution. No. 28.

John C. Walker vs. Warden, Maryland House of Correction. No. 29.

Herman Albert Barnes vs. Warden, Maryland House of Correction. No. 30.

Henry E. Eberle vs. Warden, Maryland Penitentiary. No. 31.

Charles G. Wilson vs. Warden, Maryland House of Correction. No. 32.

Ellsworth L. Pritchard vs. Warden, Maryland House of Correction. No. 33.

John C. Walker vs. Warden, Maryland House of Correction. No. 35.

William Ray Yantz vs. Warden, Maryland House of Correction. No. 37 (Leave to appeal granted. See 210 Md. 343.)

Stanley Dewey Tibbs vs. Warden, Maryland House of Correction. No. 38.

Billy Ray McElroy vs. Director, Patuxent Institution. No. 39 (Leave to appeal granted. See 211 Md. 385.)

OCTOBER TERM, 1956

John P. Medley vs. Warden, Maryland House of Correction. No. 1 (Adv.)—Also Nos. 34, 36—October Term, 1955.

William H. Carter vs. Warden, Maryland Penitentiary. No. 2.

Edwin A. Forrest vs. Warden, Maryland House of Correction. No. 3.

Robert Byrd vs. Warden, Maryland Penitentiary. No. 4.

George Ricail vs. Warden, Maryland House of Correction. No. 5.

Albert C. Johns vs. Warden, Maryland Penitentiary. No. 6.

Carlton Haynie vs. Warden, Maryland Penitentiary. No. 7.

Frank Lievers vs. Warden, Maryland Penitentiary. No. 8. (Adv.).

Peter J. Tomaselli vs. Warden, Maryland House of Correction. No. 9. (Adv.).

Kenneth E. Miller vs. Warden, Maryland House of Correction. No. 10 (Adv.).

Raymond Jackson vs. Warden, Maryland Penitentiary. No. 11.

Richard Chavez vs. Warden, Maryland Penitentiary. No. 12.

Nelson France Laird vs. Warden, Maryland House of Correction. No. 13.

John Wilbur Davis vs. Warden, Maryland Penitentiary. No. 14.

Leroy Miller vs. Warden, Maryland Penitentiary. No. 15.

Howard Traynham vs. Warden, Maryland Penitentiary. No. 16.

Joseph Leslie Shaffer vs. Warden, Maryland House of Correction. No. 17.

Donald Theodore Holtman vs. Warden, Maryland House of Correction. No. 18.

Calvin Shivers vs. Warden, Maryland Penitentiary. No. 19.

Leroy Steward vs. Warden, Maryland Penitentiary. No. 20.

Nathaniel White vs. Warden, Maryland Penitentiary. No. 21.

James A. Lucas vs. Warden, Maryland Penitentiary. No. 22.

Lloyd Ransom Roberts vs. Warden, Maryland House of Correction. No. 23.

Arthur H. Clements vs. Warden, Maryland Penitentiary. No. 24.

Edgar Franklin Heffner, III vs. Warden, Maryland House of Correction. No. 25.

Benjamin F. Plater, Jr. vs. Warden, Maryland House of Correction. No. 26.

James W. Channell vs. Warden, Maryland House of Correction. No. 27.

Lester W. Davis vs. Warden, Maryland Penitentiary. No. 28.

John P. Medley vs. Warden, Maryland House of Correction. Nos. 29 and 30.

Joseph R. Holt vs. Warden, Maryland Penitentiary. No. 31.

James A. Williams vs. Warden, Maryland Penitentiary. No. 32.

James Franklin Webster vs. Warden, Maryland House of Correction. No. 33.

Howard H. Fairbanks vs. Warden, Maryland House of Correction. No. 34.

James Joseph Canter vs. Warden, Maryland House of Correction. No. 35.

Howard Dowling vs. Warden, Maryland House of Correction. No. 36.

William Person vs. Warden, Maryland Penitentiary. No. 37.

Kenneth C. Creager vs. Warden, Maryland House of Correction. No. 38.

Floyd Calhoun Finley vs. Warden, Maryland House of Correction. No. 39.

Leo Fritz vs. Warden, Maryland House of Correction. No. 40

Larry Graham Patton vs. Warden, Maryland House of Correction. No. 41.

Clarence T. Porter vs. Sheriff, Allegany County. No. 42.

Frank Lievers vs. Warden, Maryland Penitentiary. No. 43.

Charles Devonshire vs. Warden, Maryland Penitentiary. No. 44.

William Edward Beard vs. Warden, Maryland Penitentiary. No. 45.

William Floyd Campbell vs. Warden, Maryland Penitentiary. No. 46.

James Price vs. Warden, Maryland Penitentiary. No. 47.

John Benjamin Long vs. Warden, Maryland House of Correction. No. 48.

Jesse V. Hall vs. Warden, Maryland House of Correction, et al. No. 49.

Cases Finally Disposed of in Lower Courts

Farm Bureau Mutual Fire Insurance Company vs. State Insurance Department. Before the State Tax Commission of Maryland. The Insurance Commissioner levied a deficiency assessment against the insurance company, disallowing as an item of credit in the computation of retaliatory tax sums paid in the form of assessments made by the Fire Insurance Salvage Corps of Baltimore City. The case came on for hearing, upon the Appellant's appeal to the State Tax Commission from the Commissioner's refusal to abate the deficiency assessment. The case was heard on December 21, 1955, and Briefs were submitted by both sides.

Farm Bureau Mutual Automobile Insurance Company vs. State Insurance Department. Before the State Tax Commission of Maryland. In calculating retaliatory tax due under Article 48A, Section 44, of the Maryland Code, the Farm Bureau Mutual Automobile Insurance Company contended that it was entitled to deduct sums paid in support of the Maryland State Industrial Accident Commission under the provisions of Article 101, Section 16, of the Code. Maryland companies are forbidden to write compensation insurance in the home state of Farm Bureau Mutual Automobile Insurance Company for the reason that Ohio has a

monopolistic state fund. The company's returns had not claimed the deduction, and the company filed a claim for refund with the Commissioner. This claim was rejected by the Commissioner and the company appealed to the State Tax Commission. Hearing was held on November 30, 1955, after which both sides submitted briefs.

These cases were both decided by the Commission after January 1, 1956, the Farm Bureau Mutual *Fire* case resulting in a reversal of the Insurance Commissioner's ruling, and the Farm Bureau Mutual *Automobile* Insurance case resulting in an affirmance of the Commissioner's ruling. Mr. Ramsey represented the State Insurance Commission in both cases.

Aerial Products, Inc. vs. J. Millard Tawes, Comptroller of the Treasury. In the Circuit Court for Cecil County. This was an appeal from a ruling of the State Comptroller refusing a refund of sales and use taxes paid by the company. There were two questions involved; whether the claim was filed in time and whether any tax was payable. After a hearing the Court reversed the ruling of the Comptroller, holding that the claim for refund by the company was not barred by the thirty day limitation, and that the machinery which was purchased by Aerial Products in order to carry out the provisions of its contract with the United States Government for the manufacture of munitions was actually purchased by the Government, and the purchases were exempt from the tax. (No. 217, Oct. Term, 1955). Mr. Ramsey represented the State Comptroller.

United Artists Corporation and Carlyle Productions, Inc., vs. C. Morton Goldstein, et al., Constituting the Maryland State Board of Censors. In the Baltimore City Court. United Artists Corporation and Carlyle Productions, Inc., appealed from an order of the State Board of Censors eliminating certain scenes as a condition of showing the motion picture entitled "The Man With The Golden Arm". A hearing was held and the order of the Board was affirmed by the Court. An appeal was noted to the Court of Appeals.

(No. 40, Oct. Term, 1956). Mr. Ramsey represented the Board of Censors.

Times Film Corporation vs. C. Morton Goldstein, et al., State Board of Motion Picture Censors. In the Baltimore City Court. Times Film Corporation appealed from an order of the Board of Motion Picture Censors eliminating certain scenic matter from a motion picture entitled "Naked Amazon". The Court reversed the order of the Board and the Board noted an appeal to the Court of Appeals. (No. 108, Oct. Term, 1956). Mr. Ramsey represented the State Board of Motion Picture Censors.

Bugle Coat, Apron and Linen Service, Inc., etc. vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Baltimore City Court. This was an appeal from a sales tax assessment made by the Comptroller. The petitioner contended that the supplies used by it were "not readily obtainable" in Maryland. The tax in issue was subsequently paid by the taxpayer and an Order of Satisfaction terminating the litigation was filed. Mr. Ramsey represented the Comptroller.

Abraham Levinson and Dora Levinson vs. State of Maryland. In the Circuit Court for Prince George's County. Law No. 6318. This was a suit instituted by a husband and wife to recover property damage sustained by the husband and personal injuries sustained by both husband and wife. It was a suit against the State of Maryland, filed under the provisions of Section 146 of Article 66½ of the Annotated Code of Maryland as enacted by Chapter 38 of the Acts of 1951, providing for compensation in such cases where the property of private individuals was commandeered by police officers in making arrests. A Demurrer was filed by the State, but upon hearing it was overruled. The case was tried before a jury which rendered a verdict for the Plaintiff in the total sum of $1200.00. A motion for judgment N. O. V. was filed by the State. The trial court set aside the judgment. The Plaintiffs then entered an appeal.

While the appeal was pending the case was settled for $600.00. Messrs. Ramsey and Prescott represented the State.

Andrew C. Marx, et al. vs. County Commissioners of Baltimore County, et al. In the Circuit Court for Baltimore County. This was a suit instituted by a father for damages to his automobile and for injuries sustained by his son as a result of his son's driving on the grounds of Spring Grove State Hospital. The State filed a Demurrer setting up the immunity of the sovereign from suit. The Demurrer was sustained. Mr. Prescott represented Spring Grove State Hospital.

Elsie L. Klein and Betty Boehmer vs. Clifton T. Perkins, M.D., Commissioner of the Department of Mental Hygiene. In the Circuit Court for Baltimore County. This was a case brought by various plaintiffs in the Circuit Court for Baltimore County in equity for the purpose of enjoining the Department of Mental Hygiene and the management of Rosewood State Training School from transferring several feeble-minded colored patients from Crownsville State Hospital to Rosewood State Training School, the management of the School and the Department of Mental Hygiene having recommended this transfer in order to avoid duplication of training facilities and special instruction and care needed for this type of patient, which was, of course, available at Rosewood. The State filed an Answer to the Bill of Complaint in February, 1953, whereupon the plaintiffs demurred to the Answer, which Demurrer was overruled. No endeavor to bring this case to trial having been made by the plaintiffs, and no order having been passed by the court restraining Dr. Perkins, nothing further was done by the Attorney General's office until November, 1954, at which time the Grand Jury of Anne Arundel County complained of overcrowding at Crownsville State Hospital. Upon investigation by the Governor, assisted by the Attorney General and members of the Department of Mental Hygiene, it was ordered that necessary transfers be made as soon as practicable. At that time, this office rendered an opinion that there was nothing in the law or in the pending case to

prevent the Department of Mental Hygiene making such transfers as it felt were called for and within its administrative discretion. Immediately following this action, the State filed exceptions to interrogatories and a refusal to answer the same, and further filed a motion for summary judgment. The plaintiffs filed a motion to require the answering of their interrogatories and a further motion to require the State to file a new answer to the Bill of Complaint. Interrogatories were answered by the State. The matter was heard in open court and the court found for the defendant. Mr. Prescott represented the Commission at the trial.

State of Maryland, in the matter of William Stiller vs. Superintendent, Spring Grove State Hospital. In the Circuit Court for Montgomery County. A sanity hearing was held on April 27, 1956, before Judge Lawlor. The petition was denied and the petitioner, William Stiller, was remanded to Spring Grove State Hospital. Mr. Prescott represented the Superintendent.

Crane Rental Company, Inc. vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland. In the Circuit Court for Prince George's County. This was an appeal from the action of the Comptroller of Maryland in refusing to strike out or modify an assessment against the appellant as a use tax on excavating equipment brought by the appellant from the District of Columbia, where it was purchased, into Maryland for use in this State. The case came on for hearing and on January 27, 1956, Judge John B. Gray, Jr., affirmed the ruling of the Comptroller. Mr. Prescott represented the State Comptroller.

Baltimore Foundry & Machine Corporation vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland. In the Baltimore City Court. This was an appeal from the sales tax assessment of the Comptroller. After a hearing of the case, the Court sustained the assessment of the Comptroller. An appeal was noted to the Court of

Appeals. Mr. Prescott represented the Comptroller. (No. 28, Oct. Term, 1956.)

James Earl Allen vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Wayne Edward Alter vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Paul Barnhart vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Samuel Lee Collins vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

John Dashiell vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Robert W. Davis vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

John Franklin Dixon, Jr. vs. Motor Vehicle Commissioner. In the Circuit Court for Caroline County.

William Dixon vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Charles Wesley Elzey vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Herbert Price Ford vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Robert B. Harding vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Mary E. Henson vs. Motor Vehicle Commissioner. In the Circuit Court for Washington County.

Wendell Houston Holloway vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Dennard Leander Hudson vs. Motor Vehicle Commissioner. In the Circuit Court for Worcester County.

Joseph O'Connel Hudson vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Stanley Koppel vs. Motor Vehicle Commissioner. In the Circuit Court No. 2 of Baltimore City.

Ernest E. Lankford vs. Motor Vehicle Commissioner. In the Circuit Court for Caroline County.

Arthur Henry Miller vs. Motor Vehicle Commissioner. In the Baltimore City Court.

Frank Alexander Moynihan vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Comas Luther Oglesby vs. Motor Vehicle Commissioner. In the Circuit Court for Caroline County.

Virginia May Pearson vs. Motor Vehicle Commissioner. In the Circuit Court for Montgomery County.

Elmer W. Rhodes vs. Motor Vehicle Commissioner. In the Circuit Court for Washington County.

William Henry Rippeon vs. Motor Vehicle Commissioner. In the Circuit Court for Frederick County.

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

Herbert Schneyer vs. Motor Vehicle Commissioner. In the Baltimore City Court.

William R. Sharpe vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Charles Veryl Stanfield, Sr. vs. Motor Vehicle Commissioner. In the Circuit Court for Talbot County.

Thomas Veryl Stanfield vs. Motor Vehicle Commissioner. In the Circuit Court for Talbot County.

Harry James Tait, Jr. vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

Betty Lou Townsend vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Elwood James Trader vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

David Warren Williams vs. Motor Vehicle Commissioner. In the Circuit Court for Baltimore County.

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

Baltimore Towel Supply & Laundry Co., Inc. vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Baltimore City Court. This was an appeal from an assessment of sales tax made by the Comptroller on material claimed "not obtainable in Maryland". The case was argued before Judge Manley who held that tangible personal property purchased by the appellant outside the State for use in its business, with the exception of certain bed linen, birdseye and pre-fold diapers, is not substantially the same as that which is obtainable in Maryland and, consequently, not subject to the use tax. The ruling of the Comptroller was reversed as to all items except bed linen, birdseye and pre-fold diapers. Mr. Ambrose T. Hartman represented the Comptroller.

Sydney D. Peverly, Chairman, et al. vs. Donald L. Lewis and Freda N. Lewis, his wife, and Floyd H. Broadwater and Mertie V. Broadwater, his wife. In the Circuit Court for Garrett County. At the request of the Department of Forests and Parks, a condemnation proceeding was institu-

ted. A hearing was held and the jury returned a verdict for the landowner and allowed the Department of Forests & Parks to acquire the land in question. Mr. Ambrose T. Hartman represented the Department of Forests & Parks.

Glen Burnie Improvement Association, Inc., and Thomas Brayshaw and Adeline Briscoe Brayshaw vs. Albert F. Clauss, et al., Constituting the Board of License Commissioners of Anne Arundel County and George T. Cromwell, Clerk of the Circuit Court for Anne Arundel County, et al. In the Circuit Court for Anne Arundel County. No. 11,592 Equity. This was a Bill of Complaint to set aside and declare unlawful resolutions of the Board of License Commissioners ordering the issuance of an alcoholic beverage license to one G. Nelson Davis, and to enjoin the Clerk of the Circuit Court for Anne Arundel County from issuing the license upon any order of the Board to the said Davis. An answer was filed on behalf of the Clerk stating that he had no interest in the controversy and would submit his rights to the determination of the Court. Mr. Harvey represented the Clerk.

Glen Burnie Improvement Association, Inc. vs. Walter E. Buck, et al., Constituting the State Appeal Board. In the Circuit Court for Anne Arundel County. This was an appeal from a decision of the State Appeal Board which upheld the decision of the Board of License Commissioners of Anne Arundel County granting a license to G. Nelson Davis to sell alcoholic beverages on the premises at No. 6 Crain Highway, Glen Burnie, Maryland. A demurrer was filed on behalf of the State Appeal Board and, after a hearing before Judge Macgill, the demurrer was sustained and the suit was dismissed. An appeal was noted to the Court of Appeals. (No. 154, Oct. Term, 1956). Mr. Harvey represented the State Appeal Board.

Charles A. Laubach, Ruth D. Laubach, John P. Tierney and Mary Elizabeth Tierney vs. Dr. William Newcomer, Superintendent of Mount Wilson State Hospital. In the Circuit Court for Baltimore County. An equitable action

was brought against the Superintendent of the Mount Wilson State Hospital by certain residents of the area who alleged that soot and smoke from the heating plant of the Institution had caused them annoyance and property damage. An injunction was sought against the continued operation of the heating plant in a manner which would cause the emission of soot, dust and fly-ash. A demurrer was filed on behalf of the Superintendent on the theory that sovereign immunity protected the State from suits of this type. Following a hearing before Judge Gontrum and the submission of Memoranda of Law, the demurrer was sustained and the suit was dismissed. Mr. Harvey represented the Superintendent of Mt. Wilson State Hospital.

Stephen P. Moore, III, vs. Board of Education of Harford County. Before the State Board of Education. This was an appeal from the decision of the County Board of Education of Harford County filed before the State Board of Education on behalf of eleven colored children, through their respective parents. The Appellants contended that the desegregation policy adopted by the County Board of Education on August 1, 1956, was illegal and requested that the State Board of Education reverse the action of the Harford County Superintendent of Schools, which refused to grant applications of the colored children in question to white schools in the area. Following the taking of testimony and argument before the State Board, an opinion was rendered on March 4, 1957, upholding the desegregation policy of the Harford County Board of Education and dismissing the appeals. Mr. Harvey represented the State Board of Education.

National Enterprises, Inc. vs. C. Ferdinand Sybert, Attorney General of the State of Maryland and Perry S. Prather, Chairman, et al., constituting the State Board of Health of the State of Maryland. In the Circuit Court of Baltimore City. This was a suit brought against the Attorney General and the State Board of Health in which the Plaintiff asked for a declaratory judgment concerning the provisions of law with respect to its right to sell aspirin, vita-

mins and similar merchandise through vending machines in taverns and other places frequented by the public. The Plaintiff also sought an injunction restraining the State Board of Health from interfering with such sales from vending machines. A trial was held before Judge Oppenheimer. Following the submission of Memoranda of Law and argument, the court rendered an opinion construing the law as prohibiting the sale of aspirin and other like commodities by vending machines in any establishments other than pharmacies and stores of general merchants. The Bill of Complaint was thereupon dismissed. Mr. Harvey represented the Attorney General and the State Board of Health. Chapter 467 was passed by the 1957 Legislature regulating the sale of drugs or patent medicines from vending machines.

Robert H. Riley, et al., constituting the State Board of Health of the State of Maryland, vs. Henry Siejack. In the Circuit Court of Baltimore City. This was an equitable action brought by the State Board of Health against the operator of a refuse disposal project located on Pulaski Highway. The Bill of Complaint alleged that the Defendant had been operating his refuse disposal site without a permit and in an unsanitary and unhealthy manner, creating a menace to the health and comfort of the adjoining property owners. An injunction was sought prohibiting the operation of the project unless a permit was secured and the operation was approved by the State Department of Health. Following the filing of suit, Defendant cooperated with the State Department of Health in performing his operation to the requirements of the law. Eventually a permit was granted to the Defendant and the suit was dismissed. Mr. Harvey represented the State Board of Health.

Frances G. Thomas, Adm. of the Estate of James F. Thomas, deceased, vs. James M. Hepbron, Police Commissioner of Baltimore City. In the Superior Court of Baltimore City. This was a petition filed on behalf of the Administratrix of a deceased police officer against the Police Commissioner to require him to refund certain amounts contributed by the decedent to the Special Fund, which is

the Police Department's Pension Fund. A demurrer was filed on behalf of the Police Commissioner. After a hearing before Judge Byrnes, the demurrer was sustained without leave to amend. An appeal was noted to the Court of Appeals. Mr. Harvey represented the Police Commissioner. (No. 39, Sept. Term, 1957).

Harold M. Weiss vs. Leon Abramson, President, City Council of Baltimore, et al., and the Kimball-Tyler Company, et al. vs. Mayor and City Council of Baltimore. In the Circuit Court of Baltimore City. These two cases were filed by the various corporations in a partnership engaged in the business of manufacturing in the City of Baltimore and by a taxpayer of the City of Baltimore against the Mayor and City Council of Baltimore, various other City Officers and the State Tax Commission of Maryland. In both suits the Plaintiffs sought to have the court declare invalid Ordinance No. 643 passed by the City Council on December 4, 1956. Ordinance No. 643 repealed the exemption from taxation which, prior to its passage, applied to machinery and inventory of manufacturers in the City of Baltimore. The State Tax Commission of Maryland was joined as a Defendant in view of the fact that, as a result of the removal of this exemption, additional State taxes would likewise be collected on the previously exempt machinery and inventory of manufacturers in the City. The cases were tried before Judge Warnken. Extensive legal memoranda were submitted by all parties on the numerous legal questions raised by the two suits. Judge Warnken rendered a comprehensive opinion upholding the validity of the Ordinance in question. Decrees were thereupon entered dismissing the complaints. Appeals were later entered to the Court of Appeals. (Nos. 18, 19, Sept. Term, 1957). Mr. Harvey represented the State Tax Commission.

W. Fairfield Peterson vs. the Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City. Petitioner prayed for a writ of mandamus commanding the Board to instruct the voters of Baltimore City that they might use an adhesive sticker as a write-in

vote for nine electors pledged to support the candidates of the Maryland Conservative Party for President and Vice-President of the United States. The writ was issued as prayed. It was decided not to appeal the decision. Messrs. Ramsey and Harvey represented the Board.

Board of Managers of Boys Village of Maryland vs. Leo P. Wilson. Before the State Commissioner of Personnel. On March 29, 1956, a hearing was held before the Commissioner of Personnel on charges filed by the President of the Board of Managers of Boys Village of Maryland against Leo P. Wilson, a cottage master. It was alleged that the Respondent had sexually assaulted one of the inmates of the institution. By an opinion dated April 5, 1956, the Commissioner found that the charges had been substantial and ordered that the Respondent's employment at Boys Village be terminated on the effective date of the suspension. Mr. Harvey represented the Commissioner.

The Freestate Realty Company, Inc. vs. Frank J. Gross and Jessie M. Gross, his wife. In the Baltimore City Court. The Baltimore Federal Savings & Loan Association filed a petition in the above entitled case to require the Sheriff to pay to it surplus funds from the execution sale of the defendant's property. An answer was filed on the Sheriff's behalf, reciting the sale of the property to The Freestate Realty Co., Inc., that the purchaser stopped payment on the check given to the Sheriff for the purchase price of the property and praying for further instructions from the court in the premises. The Freestate Realty Co., Inc. filed an answer reciting, among other things, that its agent who purchased the property was without authority to do so, and that in any event he purchased the property under a mistake of fact. This answer was filed pursuant to the Sheriff's return to which an order nisi was appended, requiring the Realty Co. to show cause within a specified time why it should not be required to pay for the property described in the return. Mr. Harvey represented the Sheriff.

Allen Kahn T/A Miami Night Club and the Oasis Corporation vs. Frank J. Hanson, et al., Board of Liquor License Commissioners for Baltimore City, and James M. Hepbron, Police Commissioner of Baltimore City. In the Circuit Court of Baltimore City. This was an action brought by the owners of two night clubs located in the City, to have set aside two rules promulgated by the Liquor Board, namely Rule 3(a) and Rule 53. After a trial before Judge Oppenheimer, the Court rendered a decision granting an injunction against the enforcement of Rule 53, which required the fingerprinting and identification of employees of the holders of Special Amusement type licenses. The Court further denied the application for an injunction with respect to the enforcement of Rule 3 (a), relating to "female sitters". Judge Oppenheimer's opinion was reported in The Daily Record, December 19, 1955. Mr. Harvey represented the Liquor Board and the Police Commissioner.

Col. Elmer F. Munshower, Superintendent, Maryland State Police vs. John I. Wellham. Before the State Commissioner of Personnel. On February 14, 1956, a hearing was held at the Maryland State Police Headquarters, Pikesville, Maryland, on charges filed by Col. Elmer F. Munshower, Superintendent of the Maryland State Police, against Trooper John I. Wellham. The charges were that Trooper Wellham was incompetent and inefficient in the performance of his duties and that he had violated lawful official regulations. As a result of the hearing the Commissioner issued an order dated February 23, 1956, separating Trooper Wellham from the Maryland State Police as of the date of his original suspension, and holding that he might be considered for any other job in the State Service for which he might be qualified. Mr. Harvey conducted the hearing for the Commissioner of Personnel.

Police Department of Baltimore City vs. James Boyle. Before the Police Commissioner of Baltimore City. On January 23rd and January 27th, 1956, hearings were held before Police Commissioner James M. Hepbron on charges against Lieutenant James Boyle of the Police Department,

based on allegations of conduct unbecoming an officer and intentionally misrepresenting facts in connection with an automobile accident in which his son, William Boyle, was involved on November 19, 1955. On the first day of the hearing, testimony was presented on behalf of the Department and for the Defendant, the hearing lasting for some ten hours. On January 27th arguments on behalf of both sides were presented to the Commissioner. As a result of the hearings, Commissioner Hepbron dismissed Lieutenant Boyle from the Department and rendered an opinion dated January 31, 1956, finding him guilty of the two charges. Mr. Harvey conducted the hearing on behalf of the Police Department.

William F. Steiner, Warden, Maryland House of Correction vs. Oelwin Gray. Before the State Commissioner of Personnel. On January 12, 1956, a hearing was held before the Commissioner of Personnel on charges by the Warden of the Maryland House of Correction that Oelwin Gray, a custodial officer at that institution, had disobeyed lawful orders given to him by permitting an inmate to enter a section of the cell block on November 17, 1955, after having been previously warned not to do so. As a result of the hearing, the employee's services were terminated, effective as of the date of his suspension, but he was ruled eligible for employment by the State in another department. The Commissioner issued an opinion on this case dated January 24, 1956. Mr. Harvey conducted the hearing for the Commissioner of Personnel.

State of Maryland vs. Arthur C. Powers. In the Criminal Court of Baltimore City. A petition was filed in the Criminal Court of Baltimore by a member of the United States Navy requesting that an inmate at the Maryland Penitentiary be allowed to attend a court-martial hearing which was being held in Washington, D. C., for the purpose of appearing and testifying for the United States. An order of court was signed allowing the inmate to be transferred to Washington, D. C., for the purpose of testifying and specifying that he should be under guard at all times and

should not at any time be admitted to bail. Mr. Harvey appeared for the State.

Dr. Isadore Tuerk, Supt., Spring Grove State Hospital vs. Mrs. Ada Trent Bassett, Hospital Attendant. Before the State Commissioner of Personnel. The Superintendent of Spring Grove State Hospital brought charges against Mrs. Ada Trent Bassett, a hospital attendant, of not being physically qualified for the job which she was then performing. After a hearing before the State Commissioner of Personnel, it was ordered that the employee be removed from her position as hospital attendant at Spring Grove State Hospital. Mr. Harvey appeared for the Hospital.

Samuel E. Palumbo vs. Vernon L. Pepersack, Warden of the Maryland Penitentiary, and Wallace Reidt, et al., constituting the Board of Parole and Probation. In the Baltimore City Court. The Petitioner filed a petition for writ of habeas corpus and a hearing was held. The Petitioner had previously been convicted of attempted rape and was sentenced to the Maryland Penitentiary. Before his sentence was completed, he was paroled. While on parole, he was tried on the charges of extortion and carrying a deadly weapon. In the Criminal Court of Baltimore he was acquitted of both charges. The Parole Board, however, revoked his parole and he was sent back to the Penitentiary. At the hearing before the Board of Parole and Probation, although Petitioner was represented by counsel, they were not allowed to be present at the hearing before the Board when the Petitioner was present.

This was the main contention in this habeas corpus hearing. Judge Michael J. Manley, after hearing the evidence in the case, decided that Petitioner's counsel should have been allowed at the hearing before the Board, and ordered that he be given a new hearing or be released. The Warden and Board of Parole and Probation were represented by Mr. Harvey.

Wallis H. Gardella and Betty F. Gardella vs. J. Millard Tawes, Comptroller of the Treasury of the State of Mary-

land, and the State Tax Commission of Maryland. In the Baltimore City Court. This was a petition to the Comptroller for a refund of income taxes paid for the years 1950, 1951 and 1952. The petitioner asserted a credit under Section 286 of Article 81 of the Annotated Code of Maryland for taxes on an unincorporated business association paid to the District of Columbia. The Comptroller rejected the claims and taxpayers took an appeal to the State Tax Commission, which affirmed the action of the Comptroller. Thereafter an appeal was taken to the Baltimore City Court. Judge Byrnes sustained the opinion of the State Tax Commission on the ground that the District of Columbia tax for which credit was claimed was a privilege tax on the privilege of doing business, and hence not on income, although the amount of the tax is measured by taxpayer's income. Mr. David Kauffman represented the State. An appeal was noted to the Court of Appeals. (No. 135, Oct. Term, 1956).

George A. and Mary E. Frederick Memorial, Incorporated, etc., vs. the State of Maryland and Edward D. E. Rollins, Attorney General of the State of Maryland. In the Circuit Court of Baltimore City. This was a proceeding filed by the plaintiff requesting permission to use the income of funds left in trust for maintenance and care of aged Catholic men and women in a presently established home, rather than establishing a new home, on the grounds that the establishment and maintenance of such new home was presently impracticable. The Attorney General enters such *cy-pres* cases of charitable trusts under Section 295 of Article 16 of the Code, and in answer to the complaint filed called for strict proof of the allegations, agreeing to abide by whatever decree or order was entered in the premises. After a hearing of the facts, the Court granted the relief requested. Mr. David Kauffman represented the State and the Attorney General.

Western Maryland Railway Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City. This was an appeal from an assessment on operating and

tangible personal property made by the State Tax Commission. The taxpayer dismissed his appeal on January 6, 1956. Mr. David Kauffman represented the Commission.

Vernah S. Moyston, individually and as executrix of the estate of Roy C. Moyston, deceased vs. Ruth R. Startt, Register of Wills for Talbot County and University of Maryland. In the Circuit Court for Talbot County. Roy C. Moyston had died a resident of Talbot County, Maryland. Plaintiff sought a declaratory decree adjudicating which of the decedent's property at death was deemed to be community property of decedent and wife from the time the decedent and wife lived in Texas, a community property State, on which only one-half of the estate would be subject to Maryland inheritance tax, and which would be deemed to be separate property, all of which would be subject to Maryland inheritance tax. After examination of accounting records, bank records, broker's records, etc., and taking of testimony in open court, the characterization of various properties as community or separate property was stipulated by counsel (40 Op. A. G. 526). After a hearing, the Court on June 21st, entered a decree as to the taxability of the property in question. Mr. David Kauffman represented the Register of Wills.

Daniel E. Klein vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland. In the Circuit Court of Baltimore City. Daniel E. Klein, former Chairman of the Employment Security Board, filed a Bill for Declaratory Decree to have the court determine whether he was entitled to an increase in salary, which was recommended and approved by the Standard Salary Board prior to his filling the unexpired term of Mr. William H. Mahaney. The issue involved was: Did the prohibition of Article III, Section 35, Maryland Constitution, against an increase in salary during his term of office apply? In 40 Opinions of the Attorney General, 176, and 184, the Attorney General ruled that the increase in salary was within the Constitutional prohibition. The trial court, Judge Cullen, held that the Constitutional prohibition did not apply to a person filling a vacancy for

an unexpired term. The Comptroller of the Treasury noted an appeal to the Court of Appeals. Mr. David Kauffman and Mr. Joseph S. Kaufman successively represented the Comptroller.

Anna Zimnitzky and Nicholas Zimnitzky, her husband, vs. State of Maryland, Mount Wilson State Hospital. In the Superior Court of Baltimore City. This was a suit brought by the Plaintiffs to recover damages sustained by them through the alleged negligence of an employee of the Hospital. A Demurrer was filed on behalf of the State of Maryland, based upon sovereign immunity, and was sustained by Judge Tucker in the Superior Court of Baltimore City, December 20, 1956. Mr. Joseph S. Kaufman represented the Mount Wilson State Hospital.

Elizabeth G. Gorman T/A Grauel's Market vs. J. Millard Tawes, Comptroller of the Treasury. In the Baltimore City Court. This was an appeal from the action of the Comptroller, affirming in part an assessment levied against the taxpayer, which assessment was based on a factor of tax derived from a study of the taxpayer's retail business. On appeal, the assessment was affirmed by Judge Byrnes. Mr. Gray represented the Comptroller.

Harry Klotzman vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland, et al. In the Baltimore City Court. This was an appeal from the State Tax Commission's action in sustaining an income tax assessment by the Comptroller. By agreement of the parties, this case was remanded to the State Tax Commission for further hearing. The costs were paid and the case closed. Mr. Gray represented the Comptroller.

M. & M. Enterprises, Inc. vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Baltimore City Court. This was an appeal from a use tax assessment by the Comptroller. The case was heard by Judge Byrnes on argument and motion submitted, and on March 20, 1956, an opinion was filed affirming the ruling of the Comptroller.

A motion for a new trial was filed by the appellant, which motion was in due course denied. Mr. Gray represented the Comptroller.

Talbot Concrete Co., Inc. vs. J. Millard Tawes, Comptroller of Maryland. In the Circuit Court for Anne Arundel County. This was an appeal from a ruling of the Comptroller on an assessment for sales and use taxes against the taxpayer for building materials furnished to a sub-contractor working on the Naval Experimental Research Station at Annapolis. The taxpayer contended that the materials were furnished for a scientific institution within the meaning of the exemption provided for such institutions. The case was heard by Judge Michaelson who upheld the ruling of the Comptroller. Mr. Gray represented the Comptroller.

State of Maryland vs. Fort George G. Meade and the Citizens National Bank of Laurel, Garnishee of Fort George G. Meade Civilian Club. In the Circuit Court for Anne Arundel County. An attachment and lien were filed by the Comptroller against certain assets of the Fort George G. Meade Civilian Club for delinquent sales taxes. The United States filed a motion to quash the attachment and the lien on the basis that the Defendant was entitled to the sovereign immunity of the United States Government. The matter was eventually settled by an agreement between the Government and the State prior to trial. The settlement called for payment in full of the State's computation of Sales Taxes due by the Defendant up to the time of settlement. Penalties were waived. Mr. Gray represented the State.

State of Maryland vs. Topps Garment Mfg. Corp. In the Circuit Court for Dorchester County. A judgment was obtained in Dorchester County upon a lien filed against the Defendant for Maryland Use Taxes which the Defendant, a non-resident manufacturing corporation, had refused to remit. When an attachment was laid in the hands of a local creditor, the Defendant filed a motion to quash the attachment. The case was heard on April 23, 1956, before

Judges Henry, Duer and Taylor, and an order was entered denying the motion to strike the attachment. An appeal was noted to the Court of Appeals. (No. 65, Oct. Term, 1956). Mr. Gray represented the Comptroller.

Daniel G. Van Clief, owner of Nydrie Farm & Stud, Esmont, Virginia, and A. B. Hancock, owner of Clairborne Farm, Paris, Kentucky, vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Baltimore City Court. This was an appeal from the action of the Comptroller denying a refund of sales taxes paid by the taxpayer on account of the sale of a breeding horse, alleged to be exempt as "agricultural". The denial of refund was affirmed by Judge Byrnes and the taxpayer noted an appeal to the Court of Appeals. (No. 16, Oct. Term, 1956). Mr. Gray represented the Comptroller.

Maryland Trust Company and Harry E. Silverwood, Trustees under the will of Maxwell B. Leiter vs. J. Millard Tawes, Comptroller of the Treasury and State Tax Commission of Maryland. In the Baltimore City Court. This was a suit by the Trustees under the will of Maxwell B. Leiter for the refund of certain income taxes on the theory that the fiduciary was not liable therefor. The Comptroller held that the sums accumulated and set aside for a charitable organization were taxable inasmuch as the sums were "not paid, distributed or credited" to or for the benefit of the beneficiary during the taxable year in question. After a hearing, the court held the fiduciary liable. An appeal from this decision was taken to the Court of Appeals, but later dismissed in view of the legislative amendment to the law. Mr. Gray represented the Comptroller and the State Tax Commission.

Whitehall Foundation, Inc. vs. State Tax Commission. In the Circuit Court for Queen Anne's County. This was an appeal from a personal property assessment made by the State Tax Commission. The Circuit Court held that the equipment and furniture of a foundation conducting scientific experiments in the breeding of livestock was exempt

as a charitable and educational institution. The court further held that the term "equipment" used in the personal property exemption statute was broad enough to include livestock; that the tax assessment was invalid because the foundation's livestock was not assessed in accordance with the same standards as those used in assessing the livestock of a natural person; and that the corporate taxpayer was a "farmer" within the meaning of the exemption of $1,500.00 in the value of farming implements. An appeal was noted to the Court of Appeals. Mr. Gray represented the State Tax Commission.

The William Schluderberg-T. J. Kurdle Company vs. Joseph Allen, et al., constituting the State Tax Commission of Maryland. In the Circuit Court No. 2 of Baltimore City. This was an appeal from an assessment made by the State Tax Commission, acting in its original jurisdiction in assessing the personal property of a corporation. The assessment was against the carcasses of fresh meat in the hands of the taxpayer, a meat packer, which were sold as fresh meat in an untreated condition. The taxpayer contended that this inventory of fresh meat was entitled to the exemption for goods in process of manufacture. The case was argued before Judge Oppenheimer on October 16, 1956, and in due course the Tax Commission was affirmed in holding that fresh meat, to be sold in that condition, did not constitute manufactured goods within the meaning of the tax exemption. Mr. Gray represented the State Tax Commission.

Chesapeake Gardens, Inc. vs. Deeley K. Nice, et al., State Tax Commission. In the Baltimore City Court.

Milton R. Walker, et al., County Commissioners of Harford County vs. State Tax Commission. In the Circuit Court for Harford County. These were appeals from assessments of real estate taxes by the State Tax Commission. In accordance with settlements reached between the taxpayers and the County Commissioners for Harford County, the

appeals were dismissed by the taxpayers. Mr. Gray represented the State Tax Commission in both cases.

David H. Fax and Eleanor L. Fax, his wife, vs. Joseph Allen, Chairman, et al., constituting the State Tax Commission of Maryland. In the Baltimore City Court. This was an appeal from the action of the State Tax Commission, denying to the taxpayer an income tax exemption for sums received by the taxpayer as compensation for personal services to the Atomic Energy Commission and its agent under the Atomic Energy Act of 1946. Judge Byrnes affirmed the additional assessment approved by the State Tax Commission based on the denial of the exemption, and the taxpayer noted an appeal to the Court of Appeals. (No. 97, Oct. Term, 1956). Mr. Gray represented the Tax Commission.

Gimbel Brothers, Incorporated vs. State Tax Commission. In the Circuit Court of Baltimore City. This was an appeal from an order of the State Tax Commission assessing the stock in business of the taxpayer for the entire year on the basis of the figures furnished for the month of May, 1954, the year in which the inventory was valued. The taxpayer contended that inventories in May were unusually high and a question of fact was presented. On appeal, the case was heard before Judge Oppenheimer on December 4, 1956, and the Judge discounted the testimony of the taxpayer's principal officer, holding that the State Tax Commission should be affirmed for its assessment. Mr. Gray represented the State Tax Commission.

Charles B. Kelly, Jr., et al. vs. Deeley K. Nice, et al., State Tax Commission of Maryland, et al. In the Circuit Court for Baltimore County. This was an appeal from a decision by the State Tax Commission modifying an assessment of real property located in Baltimore County. The case was heard before Judge Kintner on April 17, 1956, and an order was entered affirming the ruling of the State Tax Commission modifying the assessment of the Appellant. Mr. Gray represented the State Tax Commission.

The May Department Stores Company vs. State Tax Commission of Maryland. In the Circuit Court of Baltimore City. This was an appeal from an order of the State Tax Commission in its original jurisdiction, assessing to the taxpayer the value of its business inventory on a "first in, first out" basis over the objection of the taxpayer that it should be permitted to value its inventory on a "last in, first out" basis. The case was heard before Judge Oppenheimer on December 5, 1956; additional testimony was presented, and Judge Oppenheimer affirmed the State Tax Commission in an oral opinion. An appeal was entered to the Court of Appeals. (No. 213, Oct. Term, 1956). Mr. Gray represented the State Tax Commission.

Maryland Technical Institute, Inc. vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City. This was an appeal from the final assessment of tangible personal property by the State Tax Commission of Maryland. The appellant contended that the Commission erred in its assessment in that it did not allow the appellant the proper rate of depreciation for the type of personal property involved. Prior to the time this case came on for hearing, it was voluntarily dismissed by the appellant. Mr. Gray represented the State Tax Commission.

Marlboro Gardens Apartments, Inc. vs. State Tax Commission. In the Baltimore City Court. This was an appeal from the State Tax Commission's action in a real estate assessment. When this case came on for trial on May 15, 1956, the appellant filed an Order of Dismissal of the appeal. Mr. Gray represented the State Tax Commission.

Thomas Raymond Demyon vs. Maryland Racing Commission. In the Baltimore City Court. This was a petition for a writ of mandamus requesting that the Maryland Racing Commission be required to license the petitioner as an owner of racing horses. An Answer was filed on behalf of the Commission and the case argued. Upon agreement of counsel that a new application for an Owner's license would be filed by the petitioner and, if necessary,

a public hearing would be accorded, the petition for mandamus was dismissed by Judge James K. Cullen on February 7, 1956. Mr. Gray represented the Maryland Racing Commission.

Wilbert H. Gries vs. Wetherbee Fort, M.D., et al., constituting the State Board of Physical Therapy Examiners. In the Baltimore City Court. This was a mandamus proceeding brought by the plaintiff against the Board of Physical Therapy Examiners, seeking to compel the Board to reinstate the plaintiff's physical therapy license, which license had been revoked by the Board for certain actions found by the Board to constitute the improper practice of physical therapy. When the case was called for trial, the plaintiff refused to proceed with the case and it was dismissed. Mr. Gray represented the Board of Physical Therapy Examiners.

Edward J. Crew vs. State Board of Health. In the Circuit Court for Harford County. This was a proceeding brought by a homeowner to enjoin an order of the Board of Health, directing him to close a private well which he had dug on his property. The case was heard before Judge Day on September 20, 1955, and Judge Day granted the injunction. The case was appealed by this office to the Court of Appeals. (No. 87, Oct. Term, 1956). Mr. Gray represented the State Board of Health.

Edward L. Austin vs. James M. Hepbron, Police Commissioner and Trustee of Police Retirement Fund. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the Police Commissioner to restore Austin to duty and employment in the Police Department of Baltimore City and to refund and pay over to the petitioner all moneys paid by the petitioner into the Special Police Retirement Fund since the date of employment of the petitioner. Since the Police Commissioner had paid to the petitioner retirement moneys to which he was entitled, the case was tried upon the issue of whether he was entitled to be restored to duty. Judge Byrnes ruled that the Police

Commissioner had acted properly in removing him from the service and refused to order his reinstatement. The case was not appealed. Mr. Gray appeared for the Police Commissioner.

David R. Martin vs. State Board of Funeral Directors and Embalmers. In the Baltimore City Court. This was an appeal from an order of the State Board of Funeral Directors and Embalmers suspending the license of David R. Martin for 60 days for misleading advertising. The petitioner advertised Mrs. Joseph D. Sondheim as an "associate" although she performed the work of a hostess only. After a hearing, the court ruled that if Mrs. Sondheim's name was to be used in the advertisement, she must be identified as a hostess and not as an associate. However, the order of the Board was reversed since a great deal of time had elapsed since the Board's action. The Board was represented by Mr. Norris.

C. W. Boone Company to the use of Margaret W. Gehrmann vs. Harry W. Gardner and *Adam J. Helm, T/A Helm's Hardware & Paints, to the use of Margaret W. Gehrmann vs. Harry Gardner, T/A General Construction Company.* In the Superior Court of Baltimore City. This was a petition by Margaret W. Gehrmann for judgment of condemnation absolute and attachments. The Sheriff of Baltimore City, as Garnishee, answered that he had assets in his possession. An order was passed by the court authorizing payment to the plaintiff upon payment of costs by the plaintiff. Mr. Norris represented the Sheriff of Baltimore City.

Margaret W. Gehrmann vs. Harry W. Gardner. In the Circuit Court No. 2 of Baltimore City. This was another petition for judgment of condemnation absolute and attachments. The Sheriff of Baltimore City, as Garnishee, answered that he had assets in his possession. An order was passed by the court authorizing payment to the plaintiff upon payment of costs by the plaintiff. Mr. Norris represented the Sheriff of Baltimore City.

Paul I. Bowen & Co., Inc., vs. Carl R. Mohr. In the Circuit Court for Baltimore County. This was a motion for judgment of condemnation absolute and the Sheriff of Baltimore County, as garnishee in this case, answered stating the amount of the assets he had in his possession standing to the credit of the defendant, Carl R. Mohr. The Order of the Court authorized and directed the Sheriff to pay to Paul I. Bowen & Co., Inc., the sum which he held. Mr. Norris represented the Sheriff.

Mary Elizabeth Schwanke vs. Joseph C. Deegan, Sheriff of Baltimore City, and Louis Bomstein. In the Circuit Court of Baltimore City. Bill of Complaint was filed against the Sheriff and Louis Bomstein to quash a levy on a writ of fi. fa. The Sheriff had sold the property and was then holding the money. Therefore, an answer was filed stating that he had no interest in this controversy and submitting his rights to the determination of the court. A decree was entered quashing the levy and ordering the Sheriff to return the property to the plaintiff and restraining him from giving title to the property to Bomstein. Mr. Norris represented the Sheriff.

Carlis Sims vs. D. Eldred Rinehart, E. Taylor Chewning, and Albert A. Shuger, members of and constituting the Maryland Racing Commission. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus filed against the Racing Commission requesting that the petitioner's license be restored with all rights and privileges. An answer to the petition was filed, but before trial, the case was dismissed by agreement of parties. Mr. Norris represented the Racing Commission.

Julia M. Langley, Administratrix of the estate of Charles F. Cronin, Jr., deceased vs. Hooper S. Miles, et al., Board of Trustees, Teachers' Retirement System, State of Maryland. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus against the Board of Trustees of the Teachers' Retirement System to require the Board to pay to the petitioner amounts paid into the sys-

tem by a deceased employee of the University of Maryland. An answer was filed alleging that the deceased employee had designated a person other than the petitioner as the beneficiary of such payments. The petitioner dismissed the suit and an order of satisfaction was filed with the court. The Board then paid the designated beneficiary. Mr. Norris represented the Board of Trustees.

Eugene Bluhm vs. Superintendent, Spring Grove State Hospital. In the Baltimore City Court. The petitioner requested a sanity hearing under Section 20 of Article 59 of the Annotated Code of Maryland. After a hearing before Judge John T. Tucker, he was found insane and remanded to the hospital. Mr. Norris represented the Superintendent.

State of Maryland, ex. rel. Carl Hohner vs. Superintendent, Spring Grove State Hospital. In the Circuit Court for Baltimore County. This was a petition by the Superintendent of the hospital for the purpose of having the sanity of the petitioner determined in accordance with Section 20 of Article 59 of the Code. The petitioner had previously requested the Superintendent to release him; however, the Superintendent was of the opinion that further detention was necessary. The petitioner, who was represented by court appointed counsel, testified in his own behalf and Dr. Williams testified on behalf of the hospital. The jury returned a verdict of insanity and the petitioner was remanded to the custody of the hospital. Mr. Norris represented the Superintendent.

State of Maryland ex. rel., Edgar J. Farley, Jr. vs. Superintendent, Spring Grove State Hospital. In the Circuit Court for Baltimore County. This was a request by the Superintendent of Spring Grove State Hospital for the purpose of having the sanity of the petitioner determined. The petitioner had previously requested the Superintendent to release him; however, the Superintendent believed that further detention was necessary. Dr. Tuerk testified on behalf of the hospital, and the petitioner, who was represented by court appointed counsel, testified in his own behalf.

The verdict was that the petitioner had sufficiently recovered so that he could no longer be classified as insane, and his released was ordered. Mr. Norris represented the Superintendent.

State of Maryland ex rel. Daniel Ravesies vs. Superintendent, Spring Grove State Hospital. In the Baltimore City Court. Ravesies, a patient confined in Spring Grove State Hospital, was given a sanity hearing before Judge Cornelius P. Mundy. Dr. Tuerk, Superintendent of the hospital, testified that the petitioner was a chronic alcoholic. The jury found Ravesies to be sane and he was discharged. Mr. Norris represented the Superintendent.

State of Maryland ex rel. Joseph Fureschi vs. Superintendent, Spring Grove State Hospital. In the Circuit Court for Baltimore County. At the request of the Superintendent of Spring Grove State Hospital, a sanity hearing was had under the provisions of Section 20 of Article 59 of the Code to determine the sanity of Fureschi. The petitioner had previously requested the Superintendent to release him; however, the Superintendent thought that further hospitalization was necessary. Dr. Williams testified on behalf of the hospital and the petitioner, who had court-appointed counsel, testified in his own behalf. The jury found that the petitioner was sane and was ordered released from the hospital. Mr. Norris represented the Superintendent.

Cases Pending in Lower Courts

State of Maryland, Retail Sales Tax Division, Comptroller of the Treasury vs. Morey Machinery Co., Inc. In the Circuit Court for Baltimore County.

State of Maryland vs. Triangle Realty and Construction Company, Garnishee of the Crofton Company, Inc. In the Superior Court of Baltimore City.

State of Maryland vs. the Crofton Company. In the Circuit Court of Baltimore City.

Shipyard Restaurant, Nick Mallis vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Baltimore County.

Marion R. Price T/A Price's Dairy vs. J. Millard Tawes, Comptroller of the Treasury, Walter E. Kennedy, Director, Retail Sales Tax Division. In the Circuit Court for Baltimore County.

The Parlett Gas Company vs. J. Millard Tawes, Comptroller of the Treasury, etc. In the Circuit Court for Charles County.

The Glenn L. Martin Company vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland. In the Circuit Court for Baltimore County.

James Julian, Inc. and James Julian, Ind., vs. J. Millard Tawes, Comptroller of the Treasury of the State of Maryland. In the Circuit Court for Wicomico County.

Charles R. Gross, T/A Gross Drive-In vs. J. Millard Tawes, Comptroller of the Treasury, Walter E. Kennedy, Director, Retail Sales Tax Division. In the Circuit Court for Baltimore County.

Fairchild Engine and Airplane Corporation vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Washington County.

John R. Fletcher and Reuben Bonnett vs. Air Conditioning, Inc., of Maryland, et al. In the Circuit Court for Prince George's County.

James P. and Jean W. Parker vs. State Tax Commission of Maryland and the Appeal Tax Court of Montgomery County. In the Circuit Court for Montgomery County.

Wayne Apartments, Sections A, B and C, Inc. vs. Montgomery County, Maryland, Appeal Tax Court for Montgom-

ery County, et al. and State Tax Commission of Maryland. In the Circuit Court for Montgomery County.

Maryland Trust Company vs. State Tax Commission. In the Circuit Court of Baltimore City.

Albert J. Carry vs. Deeley K. Nice, et al. State Tax Commission. In the Circuit Court for Montgomery County.

William A. Furman, et al. vs. State Tax Commission of Maryland. In the Circuit Court for Montgomery County.

H. T. Heintz, Inc. vs. Joseph Allen, et al., State Tax Commission of Maryland. In the Circuit Court No. 2 of Baltimore City.

Sears Roebuck Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

Temple Emanuel vs. State Tax Commission. In the Circuit Court for Montgomery County.

John Irving Shoe Corporation vs. State Tax Commission. In the Circuit Court of Baltimore City.

Otis Beall Kent vs. State Tax Commission. In the Circuit Court for Montgomery County.

Catherine La Belle vs. State Tax Commission and Appeal Tax Court of Montgomery County. In the Circuit Court for Montgomery County.

The National Shoe Stores Company vs. Joseph Allen, et al., constituting the State Tax Commission of Maryland. In the Superior Court of Baltimore City.

J. C. Penny Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

Henry Rose Stores, Inc. vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

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

W. T. Grant Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

H. L. Green Company, Inc. vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

John C. Gager vs. State Tax Commission. In the Circuit Court for Montgomery County.

Ancorp Automotive Corporation vs. Cornelius Mundy, et al., State Tax Commission of Maryland. In the Circuit Court No. 2 of Baltimore City.

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

Mercantile-Safe Deposit & Trust Company, Trustee under the will of Mary G. Alcock, deceased vs. the Wardens and Vestry of Mt. Calvary Church, et al. In the Circuit Court of Baltimore City.

The Equitable Trust Company, Trustee of the Trust under the will of Glenn Owens vs. the State of Maryland and C. Ferdinand Sybert, Attorney General of the State of Maryland, Melva Gelster, Myrtle Gelster. In the Circuit Court of Baltimore City.

In the matter of the estate of Frank Newcomer Hack. In the Orphans' Court of Baltimore County.

William H. Davidson, co-executor under the will of Morris Macht, and co-trustee under said will, et al., vs. Fidelity-Baltimore National Bank and Trust Company, co-trustee under the will of Morris Macht, et al. In the Circuit Court No. 2 of Baltimore City.

Herman Blackway vs. E. Randolph Burgess, Register of Wills for Kent County. In the Circuit Court for Kent County.

William L. Jenkins T/A Arcadia Meat Market vs. Mayor and City Council of Baltimore and Frank C. Robey, Clerk of the Court of Common Pleas. In the Circuit Court of Baltimore City.

Robert H. Riley, et al. constituting the Board of Health of the State of Maryland vs. the President and Commissioners of Chesapeake City. In the Circuit Court for Cecil County.

Burgess and Commissioners of Middletown vs. Robert H. Riley, Chairman, et al, constituting the State Board of Health of Maryland. In the Circuit Court for Frederick County.

Board of County Commissioners of Cecil County vs. the State Board of Health of the State of Maryland. In the Circuit Court for Cecil County.

Earl B. Wolverton Funeral Home, Inc. vs. State Board of Funeral Directors and Embalmers. In the Baltimore City Court.

Charles F. Dill vs. State Board of Funeral Directors and Embalmers of Maryland. In the Baltimore City Court.

Helen C. Stevens vs. State Board of Funeral Directors and Embalmers of Maryland. In the Baltimore City Court.

Melvin Bevins vs. Motor Vehicle Commissioner. In the Circuit Court for Somerset County.

W. I. Bryant, etc. vs. Merson & Bryant, Inc. and Frank Small, Jr., Commissioner of Motor Vehicles, et al. In the Circuit Court for Montgomery County.

Alton F. Corbin vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Flo Durst vs. Anna Stowell Hartung, et al. In the Circuit Court for Allegany County.

Roy Haddock vs. Motor Vehicle Commissioner. In the Circuit Court for Prince George's County.

Boyd L. Harper vs. Walter R. Rudy, Commissioner of Motor Vehicles. In the Circuit Court for Allegany County.

Eldridge Burnie Majors vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Henry James Messick vs. Motor Vehicle Commissioner. In the Circuit Court for Somerset County.

Montague-Rogers, Inc. vs. George Parke, et al. In the Circuit Court for Baltimore County.

LaBelle M. Riggin vs. Motor Vehicle Commissioner. In the Circuit Court for Somerset County.

Norman F. Toadvine vs. Motor Vehicle Commissioner. In the Circuit Court for Wicomico County.

Lawrence Rye vs. James Maddock, etc. and Game and Inland Fish Commission. In the Circuit Court for Baltimore County.

The Two O'clock Club, Inc. vs. Board of Liquor License Commissioners of Baltimore City, the Mayor and City Council of Baltimore and the Police Commissioner of Baltimore City. In the Circuit Court of Baltimore City.

Margaret A. Farr vs. Russell S. Davis, State Employment Commissioner. In the Superior Court of Baltimore City.

Robert Reuling vs. Hooper S. Miles, Chairman, et al., Board of Trustees of Employees' Retirement System. In the Superior Court of Baltimore City.

The Equitable Life Assurance Society of the United States vs. Charles S. Jackson, Insurance Commissioner of the State of Maryland. Before the State Tax Commission of Maryland.

Harry R. Shull, T/A Peerless Distributing Company vs. Sydney R. Traub, et al., Maryland State Board of Motion Picture Censors. In the Circuit Court of Baltimore City.

State of Maryland vs. John Nelson Horsey, et al. In the Circuit Court for Baltimore County.

State of Maryland, use of the Military Department vs. the Colored Master Beauticians' Association, Inc. In the Superior Court of Baltimore City.

Viola Wilson vs. Alice M. Blum, Superintendent, Maryland State Reformatory for Women, et al. In the Baltimore City Court.

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

The Baltimore Transit Company vs. Mayor and City Council of Baltimore and Beverly Ober, Police Commissioner of Baltimore City. In the Circuit Court No. 2 of Baltimore City.

Alexander Randall, et al. vs. M. Louisa Robinson, et al. In the Circuit Court of Baltimore City.

Report of Joseph D. Buscher
Special Assistant Attorney General for the State Roads Commission

The office of the Special Assistant Attorney General for the State Roads Commission during the calendar year 1956 continued to represent and advise the Commission on all matters where legal questions were involved.

During this period this office filed 217 condemnation cases in the several Counties of the State and Baltimore City. The filing of the cases in Baltimore City was occasioned by the right-of-way acquisition necessary for the Baltimore Harbor Tunnel. This compared with 318 condemnation cases filed during the calendar year 1955.

The decrease in the number of condemnation cases filed was occasioned by the operation throughout the State during the latter part of 1956 of the Boards of Property Review.

This office prepared and submitted to the 1956 Session of the Legislature a lengthy bill, the primary purpose of which was to deter, and if possible, eliminate right-of-way speculation. Another feature of this bill was designed to relieve the crowded Court calendar of so many condemnation cases. The Boards of Property Review began to operate in August of 1956. However, they were not in full operation throughout the State for a number of months thereafter.

In addition to the condemnation cases, this office sent out 3009 requests for title searches in the several counties and upon receipt of the complete title searches checked the title abstracts. Also, in connection with the construction of the Baltimore Harbor Tunnel, approximately 300 title searches in Baltimore City and the surrounding counties were necessary. This office supervised the searches in connection with the Tunnel Project. The above mentioned condemnation suits, Boards of Review hearings and title examinations were all in connection with the State Roads Commission Construction and Reconstruction Program, carry-over work

from previous years, and work made necessary because of the construction of the Baltimore Harbor Tunnel.

The bulk of the tunnel work was actually a carry-over from the previous year. However, much of the work had to be checked and many conferences were necessary between the Consulting Engineers, the Land Acquisition Agents and the Baltimore City Officials, as well as the Trustee under the Trust Indenture and its counsel.

The Trust Indenture under which the Patapsco Tunnel Project is being constructed required the legal counsel for the State Roads Commission to approve all authorizations for payments for the acquisition of land, as well as all expenditures from the trust fund which involved payment of Court costs, title search costs, settlement fees, tax adjustments and the sums deposited into Court in condemnation cases. Each individual expenditure required this Assistant to prepare and sign a formal opinion in connection therewith.

During the calendar year 1956, two hundred and forty-six condemnation cases were tried or settled prior to trial in the Circuit Courts of the various counties and the Superior Court of Baltimore City. Two of the cases tried were appealed to the Court of Appeals of the State, and briefs prepared and the cases argued before that Court.

Also, this Department represented the State Roads Commission and the members thereof, individually, in all suits and causes of action brought against the Commission and its members, as individuals, acting in their official capacities. These legal services required filing of legal papers and appearance of one of the attorneys of the staff in the Circuit Courts of many of the Counties, the Courts of Baltimore City, as well as the Court of Appeals. In addition, this Department prepared or approved all agreements entered into between the State Roads Commission and the various counties, agencies and individuals, and approved as to legal form and sufficiency all contracts entered into by the State Roads Commission for road construction.

As a result of the investigation into right-of-way speculation which came to the attention of this office in the preceding year, the members of this office further assisted in the conduct of said investigation by extensive questioning of persons involved and by making certain searches in the Land Records of the Counties. This required a considerable amount of time. Further, it was necessary for this Assistant to assist the State's Attorney for Montgomery County in preparing the conspiracy case against the individuals indicted as a result of this investigation, and this Assistant was summoned and testified as a witness in the criminal case against the defendants. The defendants were found guilty and sentenced by the Court on a conspiracy charge.

The staff consists of Mr. Frederick A. Puderbaugh, Mr. Robert S. Rothenhoefer, Mr. J. Howard Holzer, Mr. Earl I. Rosenthal and Mr. T. Thornton Murray. In addition, Mr. Herbert L. Cohen was employed by the Commission to assist the writer with legal problems relating to the Patapsco Tunnel and the Northeastern Expressway.

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

On May 30, 1956 Dr. Elmer W. Sterling of Church Hill, Queen Anne's County, Maryland, was appointed to the Commissioners of the State Accident Fund by Governor McKeldin to fill the vacancy caused by the expiration of the term of William A. Sullivan of Baltimore City. The present membership of the Commissioners is as follows:

Thomas W. Offutt of Baltimore County, Chairman; Joseph D. Weiner of St. Mary's County, Vice-Chairman; C. Rutledge Turner of Dorchester County, Secretary; Abraham Watner of Baltimore County and Dr. Elmer W. Sterling of Queen Anne's County.

The Attorneys assigned by you to the State Accident Fund remain as named in our 1955 report, namely, Philip T. McCusker of Baltimore County, U. Theodore Hayes of Baltimore City and Ernest N. Cory, Jr., of Prince George's County.

Cases tried by these Assistants before the State Industrial Accident Commission, including Medical Board for Occupational Diseases, involving accidental injury and occupational disease claims are enumerated as follows:

Baltimore City	534	Bel Air	10
Cambridge	24	Chestertown	2
Cumberland	33	Easton	8
Elkton	3	Frederick	3
Hagerstown	11	La Plata	1
Leonardtown	2	Seat Pleasant	17
Oakland	9	Rockville	4
Salisbury	17	Westminster	5

making a total of 683 hearings.

Early in 1956 the Commission discontinued the practice of holding pre-trial conferences. The total hearings for 1955 (815) included pre-trial conferences, of which there probably were about 200.

Approximately 120 claims were disposed of by Final Settlement Agreements.

Three cases were argued in the Court of Appeals of Maryland.

Approximately 12 Appeals were tried in the Law Courts in Baltimore City and an approximately equal number were tried by Associate Counsel in the counties.

Numerous suits were filed and are pending; judgments were entered and collections made on delinquent accounts of the State Accident Fund's policyholders, these accounts having been certified to the Attorney General under Section 76, Article 101, of the Maryland Code. Collections on these accounts for the year 1956 amounted to $12,412.90.

The Assistants assigned to the Fund met with the Commissioners at nearly every one of the meetings of the Commissioners and were daily available to the Fund's Personnel for legal consultation.

REPORT OF WALTER W. CLAGGETT
SPECIAL ASSISTANT ATTORNEY GENERAL
IN CHARGE OF SUBVERSIVE ACTIVITIES CONTROL

I am pleased to submit my report as Special Assistant Attorney General charged with the enforcement of the Subversive Activities Act.

The Subversive Activities Act, codified as Article 85A of the Annotated Code of Maryland (1951 Edition), was enacted in the year 1949, and this office was established in the Spring of 1950. Since that time much has been accomplished. At the time the Subversive Activities Act, or what is commonly known as the "Ober Law", went into effect, the State of Maryland had no facilities whatsoever for coping with the Communist menace. There were no prior files pertaining to subversion, no records of any type, no physical headquarters or any office equipment for dealing with Communism, and most important, no trained personnel.

The office now has a complete filing system, cross-indexed and tabulated, where information pertaining to subversives or organizations of a subversive nature can be obtained in a matter of minutes. The present records of the office are innumerable, running into the several thousands. The office is separated from the main office of the State Law Department, having its headquarters at the Central Police Building, Room 202, Fayette Street and Fallsway, Baltimore City. The Department now has four specially trained Investigators who received their special training in classes conducted by government investigating agencies, specializing in the investigation of subversive activity, its procedures and the like; for by its very nature, subversion and the investigation is decidedly different from the investigation of the ordinary crime. These four Special Investigators together with the Secretary and the Special Assistant Attorney General compose the personnel of the office.

The office is proud of its accomplishments during the past year. This office has become the central clearing house for the State agencies which are charged with loyalty in-

vestigations of their various employees. We have worked in cooperation with the many Federal agencies which deal with subversion in one phase or another. We have extended our facilities and worked in close harmony with the Subversive Activity Departments of other states. We have assisted the Civil Service Commission of the State of Maryland, the State and City Civil Defense Bureaus, the State and City Boards of Education and the various governing bodies of the respective Counties of the State. The records of this office indicate that during the past year we made thousands of loyalty clearance checks for all the State of Maryland agencies, fifteen Federal agencies and the various agencies of other states.

We have endeavored to maintain beneficial and helpful public relations and to offer the facilities of our office to the agencies and the people of the State of Maryland, for we feel that we are in a position to be of substantial assistance in the effort to keep disloyal persons from entering upon either the public payroll or the payrolls of firms whose work and products are in the interest of national defense.

The Communist conspiracy is present within the State of Maryland and this office is doing everything possible with all its available facilities and within the letter of the Subversive Activities Act of 1949 to protect the people from such conspiracy and to drive it from the confines and borders of our State.

Report of Edward S. Digges Special Assistant Attorney General for Department of Tidewater Fisheries

The office of Special Assistant Attorney General for the Department of Tidewater Fisheries during the year 1956 continued to represent and advise that Commission on all matters where legal questions were involved, with my attendance at most of the Commission meetings.

In addition thereto, I have consulted and advised with the Board of Natural Resources concerning the construction of the Little Falls Fish Ladder Project on the Potomac River.

Lectures were given at Solomons Training School for the Inspectors of the Department on their duties and powers, and admissibility of evidence in Court.

Suit was docketed by attorneys for a ship captain and owners of menhaden fishing vessels in a special three-judge Court in the District Court of Maryland attacking the constitutionality of Article 66C, Sections 258 and 259, involving the use of purse nets in the Atlantic Ocean within the three-mile limit off the Coast of Maryland. Preliminary hearings were held and Answers to the original Complaint, and Intervening Plaintiffs, were filed, with the case still pending.

Several civil suits were filed against the Department, which have been concluded, one of which involved the dredging of oysters in Piney Island Swash.

All files on pending cases have been reviewed, and are expected to be disposed of when set for trial by the various Courts.

Report of Bernard S. Melnicove
Special Assistant Attorney General
Maryland Employment Security Board

During the year 1956, 48 appeals were entered in the courts from decisions of the Board. There were also pending in the courts 41 appeals taken prior to 1956. We disposed of 59 cases, which included 31 cases instituted in 1956 and 28 cases instituted prior to 1956. There are now pending in the courts 30 cases, which include 17 cases instituted in 1956 and 13 cases instituted prior to 1956.

In addition, there were a considerable number of trials held which involved law motions, particularly with regard to the distribution of estates of insolvents and as to the propriety of the procedures used to procure injunctions against employers and to enforce proper contempt proceedings.

In connection with the 30 cases open and pending in the courts as of December 31, 1956, 9 relate to the question of whether or not a claimant is able to work, available for work, and actively seeking work; 6 concern claimants who left work voluntarily without good cause; 5 involve the misconduct of employees in connection with their work; 3 relate to the failure of claimants to apply for or to accept available suitable work; 2 concern appeals from assessments of the Board; 2 involve the question of whether certain employees of an employer are covered under the law; 1 relates to whether or not a claimant's unemployment is due to a stoppage of work which existed because of a labor dispute at the premises where he is, or was, last employed; 1 concerns a motion to strike a judgment from the records; and 1 involves a suit to recover an overpayment of benefits to a claimant.

Of said 30 open cases, 18 are pending in the Superior Court of Baltimore City, 6 in the Circuit Court for Baltimore County, 2 in the Circuit Court for Washington County, 1 in the Circuit Court for Allegany County, 1 in the Circuit Court for Harford County, 1 in the Circuit Court for Montgomery County, and 1 in the Circuit Court for Prince George's County.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1, 1955 and Ending June 30, 1956

Legal Counsel and Advice—Program 01:

Appropriation		$95,192.00
Appearance Fees		201.14
Sales of Attorney General's Reports		140.00
Sundry Refunds and Budget Credits		637.15
		$96,170.29
Appearance Fees turned into the State Treasury		201.14
		$95,969.15

Salaries:

Attorney General	$12,000.00	
Deputy Attorney General	7,764.12	
Assistant Attorney General (3)	21,468.72	
Administrative Assistant	5,533.32	
Stenographer-Secretary (2)	7,465.86	
Senior Stenographer	3,142.62	
Law Clerk	3,225.04	
Additional Clerical Assistance	255.38	
Communication	3,003.76	
Travel	2,722.98	
Motor Vehicle Operation and Maintenance	990.33	
Contractual Services	6,691.17	
Supplies and Materials	923.61	
Equipment—Replacement	1,998.90	
Equipment—Additional	1,801.81	
Fixed Charges	12,282.50	91,270.12
Reverted to State Treasury		$ 4,699.03

Subversive Activities Control—Program 02:

Appropriation		$16,125.00
Salaries:		
Special Assistant Attorney General	$7,156.24	
Stenographer-Secretary	3,773.68	
Communication	24.00	
Travel	1,906.19	
Contractual Services	2,531.74	
Supplies and Materials	43.06	
Fixed Charges	10.59	15,445.50
Reverted to State Treasury		$ 679.50

TOTAL APPROPRIATION		$111,317.00
SALES OF ATTORNEY GENERAL'S REPORTS (PROGRAM 01)		140.00
REFUNDS AND BUDGET CREDITS (PROGRAM 01)		637.15
		$112,094.15
TOTAL EXPENDITURES:		
PROGRAM 01	$91,270.12	
PROGRAM 02	15,445.50	
		106,715.62
TOTAL REVERSION TO STATE TREASURY		$ 5,378.53

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

ADVERTISING

ADVERTISING—PLUMBERS—USE MADE OF ADVERTISEMENTS BY PLUMBERS IN BALTIMORE CITY—CONSTRUCTION OF SECTION 308A OF ARTICLE 43 OF THE CODE.

March 1, 1956.

Mr. James M. Hepbron,
Police Commissioner.

We have your letter of February 23, 1956, enclosing copy of a letter from Lieutenant Vincent Gavin, Investigation Division, requesting our opinion in connection with the proper interpretation of Chapter 627 of the Acts of 1955 relating to the use which may be made of advertisements by master plumbers and registered plumbers.

This Act added Section 308A to Article 43 of the Annotated Code of Maryland (1951 Ed.), title "Health", subtitle "Plumbing". To properly understand the construction of Section 308A, it is necessary that Sections 307 and 309 likewise be considered.

Section 307 makes it unlawful for any person, firm or corporation to employ as workmen to do plumbing work in the State of Maryland any persons except those qualified to work at the plumbing business as provided under the plumbing sub-division of Article 43. To be qualified to work at the plumbing business in Maryland, a person must make application to and receive from the State Board of Commissioners of Practical Plumbing a Certificate of Competency, as required by Section 309. Section 309 provides for the appointment of the State Board and sets forth the duties and powers thereof. The Board is directed to examine every person who desires to work at the plumbing business, and upon being satisfied that such person is competent and qualified to work at such business, the Board shall grant such person a Certificate of Competency and register him in their books as a practical plumber. The result of such registration is that any person so registered shall have

full authority to work at or engage in the plumbing business for the period for which the Certificate shall be granted. Such Certificate is to be designated "A Master Plumber's Certificate".

In other words, under these Sections, no one can be a plumber or engage in the plumbing business as an employee or otherwise unless he has a Master Plumber's Certificate.

Chapter 627 of the Acts of 1955, in its entirety, is as follows:

> "An Act to add Section 308A to Article 43 of the Annotated Code of Maryland (1951 Edition), title 'Health', sub-title, 'Plumbing', said new Section to follow immediately after Section 308 thereof, relating to the use which may be made of advertisements by Master Plumbers and Registered Plumbers, and providing that this act shall be applicable only in Baltimore City.
>
> SECTION 1. *Be it enacted by the General Assembly of Maryland,* that Section 308A be and it is hereby added to Article 43 of the Annotated Code of Maryland (1951 Edition), title 'Health', subtitle 'Plumbing', said new Section to follow immediately after Section 308 thereof, and to read as follows:
>
> "308A. It shall not be lawful for any person, firm or corporation to advertise himself or itself as a 'Master Plumber' or 'Registered Plumber' unless such person, or some one associated with such firm or corporation is a Master Plumber and has been issued a Certificate of Competency as provided in Sections 309, 314 and 315 of this Article and in the case of plumbing advertisements in firm or corporate names, all such advertisements shall contain the name of a person associated therewith who is a Master Plumber. Any person, firm or corporation and the members, officers, or agents of such firm or corporation violating the provi-

sions of this Section shall be guilty of a misdemeanor and upon conviction, shall be fined not less than five dollars, nor more than fifty dollars, for every day or every part of every day that said violation continues. The provisions of this Section shall be applicable only within Baltimore City. Provided, that this Section shall not extend to any persons licensed under the provisions of Sections 682 to 702 of Article 66C of the Annotated Code.

SEC. 2. *And be it further enacted,* that this Act shall take effect June 1, 1956."

Lieutenant Gavin inquires whether Chapter 627 is a regulation of only those advertisements using the terms "Master Plumber" or "Registered Plumber", or whether it is a regulation of all plumbing advertisements. In our opinion, since no one can practice plumbing in the State unless he is a Registered or Master Plumber, the Act in question applies to all plumbing advertisements. While the title of the Act states that it relates "to the use which may be made of advertisements by Master Plumbers and Registered Plumbers", it of necessity means the use which may be made of advertisements by *all* plumbers in the City of Baltimore, since no one can be a plumber anywhere in Maryland unless he has been registered and received a Master Plumber's Certificate.

Therefore, when Section 308A requires plumbing advertisements in a firm or corporation name to contain the name of a person associated therewith who is a Master Plumber, it does no more than require that such firm or corporation list the name of the individual which it employs to do plumbing work who has been certified by the State Board under Sections 307 and 309. Without such certification of an employee of such firm or corporation, the latter would be operating illegally and contrary to the terms of Section 307.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES—APPEAL FROM DECISION OF LOCAL BOARD—FAILURE OF COURT TO DETERMINE APPEAL WITHIN 30 DAYS AFTER RECORD FILED CONSTITUTES AUTOMATIC AFFIRMANCE.

June 18, 1956.

Mr. Joseph Van Collom, Jr.,
Executive Secretary,
Board of Liquor License Commissioners
for Baltimore City.

You have recently requested our opinion in connection with the interpretation of Section 166(d)(3) of Article 2B of the Annotated Code of Maryland (1951 Ed.), which provides as follows:

> "(3) The failure of the court to determine an appeal within a period of 30 days after the record has been filed in court by the local board as above provided, shall constitute an automatic affirmance of the local board's decision, unless the time has been extended by the court for good cause shown."

You ask the following questions in connection with this provision:

1. Is Section 166(d)(3) mandatory?

2. Under the provisions of this Section, could a court extend the time for determination of an appeal after the thirty day period has elapsed?

In 27 Opinions of the Attorney General, 59 (1942) this office was asked whether the State License Bureau had the right to decide an appeal after the expiration of thirty days from the date on which the appeal papers were delivered to it. The statute in question, Section 63 of Article 2B of the Annotated Code of Maryland (1939 Ed.) provided as follows:

> "It shall be the duty of the State License Bureau to hear and determine all such appeals (from the local boards) within 30 days from the date of the receipt of the papers and testimony of the board originally hearing the allegation, complaint or charges."

We interpreted this Section as follows, at pages 61-62:

> "In our opinion, this language imposes a clear duty and obligation on your Bureau to determine all appeals which come to it within the time set by the statute. However, we have no doubt that a decision made by your Bureau on appeal after 30 days from the time of receipt of the papers would be valid. There is no provision in Section 63 which compels or necessarily tends to the conclusion that failure to act within the 30 day period nullifies a decision when made. The general rule of law is that a statute which specifies the time for the performance of an official duty will not be regarded as a limitation on the exercise of the power granted, unless the statute contains negative words denying the exercise of the power or authority after the time named. Crawford on 'Statutory Construction', page 533; *Pennsylvania R. Co. v. Reeley,* 179 Md. 35."

It will be noted that the present Section 166(d)(3) does contain negative words denying exercise of the court's power after the time named. This Section specifically provides that the failure of the court to determine an appeal within the thirty day period shall constitute an automatic affirmance of the local board's decision. In our opinion, this provision is mandatory, and unless the time has been extended by the court, the local board's action must be deemed to have been affirmed if the court's decision is not rendered within thirty days after the record has been filed in court by the local board.

A number of provisions in Section 166 indicate that the Legislature intended that every possible presumption be given to the correctness and validity of the local board's decision. Section 166(d)(1) states that the action of the local board, upon the hearing of an appeal, shall be presumed by the court to be proper and to best serve the public interest. In addition, the burden of proof is upon the Petitioner taking the appeal to show that the decision of the local board was against the public interest and that such decision was arbitrary or unreasonable. The provisions of Section 166(d)(3) are in accordance with this legislative policy and are designed to uphold the board's decision in the event that the court does not conclude within a reasonably prompt time after receiving the record from the board that the decision of the board is clearly erroneous.

It is our further opinion that a court may not extend the thirty day period *after* such period has elapsed. The statute provides for an automatic affirmance of the local board's decision unless the time "has been" extended by the court for good cause shown. We believe that the past tense was used by the Legislature to indicate that the court must act to extend the time before the thirty day period has elapsed. Any other interpretation would permit the court to review the validity of the local board's decision at any time after the filing of the record merely by extending the time for determining such an appeal.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

BANKS AND BANKING

BANKS AND BANKING—BANKS—AFFILIATES AND CLOSELY ALLIED CORPORATIONS.

September 28, 1956.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You have asked whether the relationship between one of our trust companies operating under State law and a corporation proposed to be formed would bring the trust company into violation of Article 11, Section 72 of the Annotated Code of Maryland, which prohibits banking institutions from having affiliates or closely allied corporations.

The applicable facts are as follows: One of our trust companies is interested in acquiring quarters for its operation and certain of the officers of the trust company have acquired title to a tract of land in a very desirable location. It is proposed that a corporation be formed to take title to the land, erect thereon a building and secure the necessary financing. The land presently is subject to a mortgage in the amount of approximately $100,000, but the property cost is in excess of $200,000. It will be necessary for the corporation which takes title to the land to raise approximately $100,000, which it is proposed will be raised by sale of stock. This stock is to be offered first to the trust company's stockholders. If the total amount is not subscribed by stockholders of the trust company, it is then proposed to offer the remaining shares to the public. In addition, the transaction contemplates that the stock would be issued subject to an option to the trust company to purchase the stockholders' shares at a price slightly above par, at any time after five years from the issuance of the stock.

An examination of the statute makes it clear that the Legislature had in mind something more than an "affiliate", within the strict legal definition of that term. The phrase "closely allied corporation", which a banking institution is

prohibited from having, is broader than the term "affiliate", and we believe indicates a legislative intent to prevent banking institutions from circumventing the underlying intent of the law by devices which do not strictly meet the requirements of an affiliate.

In our opinion, upon the background facts presently before us, we believe the proposed corporation is precisely the type of organization which the Legislature intended to forbid by the prohibition against closely allied corporations.

Specifically, the statute points out that the terms "affiliate" and "closely allied corporation" are to include any organization which the banking institution controls, either by direct or indirect ownership, in the name of the banking institution, of a majority of the voting shares, or which the banking institution controls "directly or indirectly, through stock ownership *or in any other manner,* by the shareholders of such banking institution who own or control either a majority of the shares of such banking institution or more than 50 per centum of the number of shares voted for the election of directors of such banking institution at the preceding election * * *". As we now know the facts, it is not possible to say whether shareholders of the trust company who own more than 50 per cent of the banking institution's stock will control, through stock ownership, the proposed corporation. It is possible to conceive of a situation where a minority interest in the bank's shares, not amounting to 50 per cent thereof, will control the new corporation. In that event, Section 72(2) will not expressly come into operation, but we believe that the term "closely allied corporation" is not limited to the situation described in 72(1) and (2). If it should occur that stockholders of the trust company owning more than 50 per cent of the shares thereof, should own shares which constitute control of the new corporation, this would be an express contravention of Section 72(2). The contemplated acquisition in the future by the trust company of the stockholders' shares clearly, when it reached a point in excess of 50 per cent of

the number of shares voted at the next preceding election, would be in contravention of Section 72(1).

Where a bank or trust company in this State conceives and is the moving force in a plan similar to that here proposed, in our opinion, the new corporation is or would become an affiliate or closely allied corporation, as that term is used in Article 11, Section 72. The whole nature of the transaction, including the acquisition of the property by certain of the bank's officers, points irresistibly to a conclusion that the trust company is seeking to create a corporate device over which it exercises dominion and control, either directly or indirectly, in such manner as to cause the corporation to be a "closely affiliated corporation", such as is forbidden by our Code.

See, for a similar conclusion on more precise facts, 26 Opinions of the Attorney General, 58.

NORMAN P. RAMSEY, *Deputy Attorney General.*

BANKS AND BANKING—AUTOMOBILE DEALER'S SALE TO BANKS OF INSTALLMENT AGREEMENTS, WITHOUT RECOURSE, DOES NOT GIVE RISE TO CONTINGENT LIABILITY FOR FACE AMOUNT OF PAPER—AGREEMENT BY DEALER TO BUY FROM BANK ANY REPOSSESSED VEHICLES, WITHIN CERTAIN LIMITS, IS PART OF DEALER'S "GROSS LIABILITY" TO BANK FOR PURPOSES OF ARTICLE 11 SEC. 91 OF THE CODE.

October 17, 1956.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

Your letter of October 11th is before us. You have asked whether the sale to a bank by an automobile dealer of instalment sales contracts, without recourse, pursuant to an underlying agreement by which the dealer agrees to purchase, under certain circumstances, repossessed vehicles, constitutes a liability of the dealer within the provisions of the last sentence of the first paragraph of Section 91 of Article 11 of the Code, which restricts the total liability of any person, copartnership or corporation to 30% of the capital and surplus of a bank, irrespective of the nature of the liabilities.

You outline the following facts: an automobile dealer sells vehicles and receives from the purchasers instalment sales contracts. These contracts are then sold outright to the bank in question, and the assignment of the contract is without recourse. At the outset of the arrangement between the bank and the automobile dealer, they entered into an agreement whereby the dealer agreed to sell, and the bank agreed to buy automobile paper acceptable to the bank. Automobile paper is defined to include notes, conditional sales contracts, leases, mortgages and other written evidences of indebtedness arising out of the sale by the dealer of new and used motor vehicles. The agreement expressly states that any paper so purchased by the bank is to be acquired by it under "without recourse" assignments.

In event that the bank is required to repossess any vehicle covered by paper so assigned, the dealer agrees, if the vehicle is delivered to him within 90 days from the date of the earliest unpaid instalment, to purchase the *vehicle* for an amount determined by a formula set up. The formula contemplates that the base price will be the unpaid balance owing on the vehicle, with certain adjustments for collision damage and "holdbacks" applicable to the repossessed vehicle. The dealer, however, has the right to refuse to purchase such vehicles, and to cast upon the bank the duty of selling the same at public or private sale, and the dealer agrees under such circumstances to pay the bank any "loss" sustained by it on the transaction. The "loss" sustained is computed by a formula set out in a contract, and may be generally said to be the difference between the amount fixed under the formula heretofore referred to, used in event of repossession and repurchase, and the net price obtained at sale, adjusted for storage, reconditioning and selling charges. The agreement expressly provides that the dealer's liability under the "loss" provisions is to be limited to a named sum, in the instant case, $100,000.

Upon these facts the essential question is whether the dealer has a liability to the bank measured by the entire outstanding balance on contracts sold to the bank, or whether its liability is only for the $100,000 which is the limit of its assumption of "loss".

It is clear to us that the original transaction as between the dealer and the bank is a *sale* of commercial paper. "Without recourse" clearly means that in the eyes of the law the dealer assumes no contingent liability *on the commercial paper* by reason of the assignment. Jones on Chattel Mortgages and Conditional Sales, Sections 1251, 1256. What is assumed by the dealer is a contract liability to buy from the bank *motor vehicles,* which had theretofore been the subject of commercial paper sold to the bank under the agreement. This is a logical provision from the bank's viewpoint since no bank wishes to find itself unduly burdened with the problem of disposing of repossessed

motor vehicles. As a matter of law, this contract liability of the dealer does not arise out of the commercial paper, even though the measure used to determine the price at which the dealer may re-acquire the repossessed vehicle is based on the remaining balance as adjusted. Essentially, the dealer's liability is limited by his option to decline to take vehicles tendered at the price set by formula, and to require the bank to dispose of the vehicle and imposing on the dealer responsibility for the "loss" which occurs to the bank, subject to an outside limit established in the contract.

There is, we believe, an essential difference between a contingent liability, which arises out of an assignment by a dealer with recourse, and an agreement whereby commercial paper is sold, with certain collateral protection to the assignee or purchaser. We have no doubt that the dealer's legal liability to the bank is not in the nature of a contingent liability on the paper, but that it is in effect a separate liability assumed by contract, measured by the loss limit set in the contract. Accordingly, in computing the gross liability of that dealer to the bank for the purpose of determining loan limits, we are of the opinion you should treat the liability under a contract such as that submitted to us as controlled by the limitation set in the contract for "losses".

C. FERDINAND SYBERT, *Attorney General.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

BOARD OF PUBLIC WORKS

BOARD OF PUBLIC WORKS—POTOMAC RIVER—PERMITS TO DREDGE—RIGHTS OF RIPARIAN OWNERS.

January 25, 1956.

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

I have received your letter of January 20th enclosing therewith documents relating to the application of The Smoot Sand & Gravel Corporation for permits to dredge in the vicinity of Mt. Vernon and Craney Island in the Potomac River. You have asked for our comments with respect to the two applications.

As to the application for permission to dredge near Mt. Vernon, I believe that the Board of Public Works would be authorized to consider the facts there set forth in making its determination as to the advisability of granting an exclusive license to The Smoot Sand & Gravel Corporation for a five year period. The Company outlines the area involved, which generally lies north and south of Mt. Vernon on the Virginia side of the Channel. The application points out that there presently exists a foul and odorous situation because of the shoal waters. This condition creates a very undesirable situation immediately in front of one of our important National Shrines. In the past, the Corps of Engineers of the United States Army have permitted dredging in the area, and they would like to have further dredging done, so that there will be available an area into which silt dredged from the Channel of the Potomac may be deposited.

In summary, as to the application for the area near Mt. Vernon, your Board might well consider that it would be advantageous to the State of Maryland and its citizens to grant the license, for a nominal consideration to cover the cost of issuance of the same, to The Smoot Sand & Gravel Corporation.

A somewhat different situation exists as respects the area surrounding Craney Island. The documents forwarded in that regard indicate that Craney Island, comprising some twenty odd acres of land, has, by deed, passed to the ownership of The Smoot Sand & Gravel Corporation. Smoot takes the position that this Island, which lies west of the Channel line on the Virginia side, establishes "riparian rights" in them and that they should not be required to obtain a license from your Board before proceeding with dredging in that area. We do not agree with the legal contention of the Company. As we have heretofore pointed out to you in our correspondence, we believe that the entire interest in the land underlying the Potomac River, from the Channel line on the Virginia side to low water mark on the Virginia side, is in the State of Maryland. We do not in any way mean to indicate that we believe Craney Island, which was patented by the Smoot Corporation's predecessor in title, belongs to the State of Maryland. Our remarks have reference to the area surrounding Craney Island as distinct from the Island itself.

Under our Code provision (Article 27, Section 572), the Legislature gives the right to any "riparian owner of *lands bordering on said rivers,* * * *" to either take gravel or allow others to take gravel under written contract. By nature, an island is not the type of real property to which riparian rights attach. Riparian rights are normally attached to fast land. This legal fact is indicated by the rule that an island which forms in a stream or body of water, by reason of the deposit of alluvial matter, belongs to the owner of the land on which the island is formed. In some states, however, riparian owners are by statute given the title to such new formations opposite their land. This is the rule in Maryland. *Melvin v. Schlessinger,* 138 Md. 337; Tiffany, *Real Property,* Third Edition, Section 1229, pages 636-637.

In addition to the legal rules heretofore cited, our statute, by its terms, clearly indicates that the riparian owners there referred to are persons owning fast land, as distinct

from the owners of islands. It should also be noted that if an island owner should be considered a "riparian owner" within the terms of our statute, it would be extremely difficult to determine the extent of his rights thereunder.

May I suggest to you, however, that the considerations heretofore outlined with respect to the Mt. Vernon dredging project may have some bearing on the Craney Island project. It may be that your Board would believe, after hearing from the officers of the Corporation, that it would be advantageous to the State and its citizens to grant a license to The Smoot Sand & Gravel Corporation, for a nominal consideration, to take sand and gravel from the Craney Island area.

I would suggest that you ask the Corporation's officers to appear before your Board at the time of its meeting to present the reason why such dredging in the Craney Island area might prove advantageous to the State. May I suggest also that you advise them of our views as to the legal position which they have taken in the Craney Island matter.

NORMAN P. RAMSEY, *Deputy Attorney General.*

BUDGET—BILLS ENACTED BY OVERRIDING OF VETO ORDINARILY DEEMED TO HAVE PROSPECTIVE APPLICATION ONLY, HENCE DO NOT THROW INTO IMBALANCE A BALANCED BUDGET PREVIOUSLY PASSED.

February 8, 1956.

Hon. Louis L. Goldstein,
President of the Senate, and
Hon. John Grason Turnbull,
State House, Annapolis.

On February 7, 1956, you presented the following question to us:

> "Senate Bill No. 52 passed by the 1955 Session of the General Assembly of Maryland was vetoed by his Excellency Governor Theodore R. McKeldin.
>
> "The Bill is now before the Senate for action with reference to overriding Governor McKeldin's veto and the question has been raised as to what impact the passage of Senate Bill No. 52, over the Governor's veto, would have with reference to the surplus which is being used to balance the 1957 Budget. We will appreciate if you will render us an opinion as to whether the passage of Senate Bill No. 52 will take effect, so as to use up the surplus and throw the 1957 Budget out of balance."

Senate Bill No. 52 provides for the disposition of surplus funds in excess of the sum of $2,000,000 remaining in the general funds of the State Treasury after any fiscal year by using such funds to pay "authorized current capital expenditures or in lieu of the issuance of certificates of indebtedness that have been authorized."

In our opinion, the passage of Senate Bill No. 52 over the gubernatorial veto will not affect the 1956-1957 Budget which is now being considered by the Legislature. Senate

Bill No. 52, in our view, will have a practical effect for the first time on the 1957-1958 Budget.

The question is not without difficulty, and we believe it appropriate to set forth the reasons for our conclusion.

Article II, Section 17 of the Constitution of Maryland provides, in part:

> "Any bill which is vetoed by the Governor following the adjournment of the General Assembly, or any bill which fails to become a law by reason of not having been signed by the Governor following the adjournment of the General Assembly, shall be returned to the House in which it originated, immediately after said House shall have organized at the next regular or special session of the General Assembly. Said bill may then be reconsidered according to the procedure specified hereinabove. 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."

Thus, since the subject bill did not contain an emergency clause, it cannot possibly take effect until June 1, 1956.

In the meantime, the budget for 1956-1957 has been presented to the General Assembly. Article III, Section 52, subsection (6) of the Constitution provides in part that:

> "* * * such (Budget) bill, when and as passed by both Houses, shall be a law immediately without further action by the Governor."

The Constitution also provides that short sessions of the Legislature, such as the current one, can extend no longer than thirty days (Article III, Section 15.)

This office has held that the Legislature may not constitutionally pass an unbalanced budget. See 37 Opinions of the Attorney General, 121, with references there cited. Article III, Section 52, subsection (3) of the Constitution

calls for the Budget to contain, as well as the proposed expenditures and estimated revenues for the year to come, the estimated surplus or deficit of revenues at the end of the preceding fiscal year.

> "(3) Within twenty days after the convening of the General Assembly in odd-numbered years (except in the case of a newly elected Governor, and then within thirty days after his inauguration), unless such time shall be extended by the General Assembly, and on the first Wednesday in February in even-numbered years, the Governor shall submit to the General Assembly a Budget for the next ensuing fiscal year. Each Budget shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the estimated surplus or deficit of revenues at the end of the preceding fiscal year. Accompanying each Budget shall be a statement showing: (a) the revenues and expenditures for the preceding fiscal year; (b) the current assets, liabilities, reserves and surplus or deficit of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenue."

In projecting the use of that surplus into the 1956-1957 budget, an appropriation of that surplus has been worked, and the surplus is accounted for in that budget, and in effect the balanced budget uses up that surplus. Furthermore, the budget will, in its statement of estimated revenues, project revenues until the end of the fiscal year of 1955-1956, terminating June 30, 1956, including the surplus which will be produced as of June 30, 1956.

We believe, in the light of these circumstances, that the more reasonable construction of this bill is that it consti-

tutes a clear direction to the fiscal authorities to give it effect in connection with the *next* budget to follow; and not that it disrupts and throws into imbalance a balanced budget which was effective on passage at least three months prior to the effective date of the bill, the veto of which was overridden. At least two canons of statutory construction serve to buttress this conclusion:

First: That where a statute is susceptible of being construed to operate either prospectively or retroactively, it is the policy of the courts to declare it to be prospective rather than retroactive unless the legislative intent that it be construed retroactively is expressed in language so imperative as to permit no other construction. *Rowe v. Cullen,* 177 Md. 357, 9 A.2d 585; *State, to Use of Maines v. A/S Nye Kristianborg,* 84 F. Supp. 775; *Taggart v. Mills,* 180 Md. 302, 23 A.2d 832; *Gutman v. Safe Deposit & Trust Co.,* 81 A.2d 207. And this is especially true where, by a retroactive construction, manifest injury may be done. *Goldston v. Karukas,* 180 Md. 232, 23 A.2d 691. Thus, legislative enactments are presumed to be applied prospectively. *Board of Comm'rs of Anne Arundel County v. Snyder,* 186 Md. 342, 46 A.2d 689.

Second: Another canon of statutory construction would seem equally opposite, namely, where two legislative acts can reasonably be construed together so as to give effect to both, such a construction is to be preferred. *Montgomery County v. Bigelow,* 196 Md. 413, 77 A.2d 164. Wherever possible, statutes dealing with the same subject matter should be construed as supplementary to each other. *State v. Fisher,* 204 Md. 307, 104 A.2d 403; *Welch v. Kuntz,* 196 Md. 86, 75 A.2d 343; *Blades v. Szatai,* 151 Md. 644, 135 A. 941, 50 A.L.R. 232.

It may further be noted that the bill, as originally passed and vetoed in the 1955 Session provided for its effective date to be July 1, 1956, rather than June 1, 1955, which would seem to indicate an obvious legislative intent to leave unimpaired the balanced budget which was before the General Assembly in 1955.

For these compelling, reasons, we believe that Senate Bill No. 52, if the gubernatorial veto is overriden, will not apply until the Budget of 1957-1958. While other factors exist which further fortify this conclusion, we do not believe it necessary to discuss them here. See generally, among other opinions on budget procedure, 37 Opinions of the Attorney General, 121, 139, 143, 473; 36 Opinions of the Attorney General, 109, 133, 138, 143; 35 Opinions of the Attorney General, 150; 34 Opinions of the Attorney General, 105, 116. See also Report, *The Maryland Budget System,* Commission on Administrative Organization of the State (Sobeloff Commission 1951-1952) and *McKeldin v. Steedman,* 203 Md. 96, 98 A.2d 563.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

BUILDING AND LOAN ASSOCIATIONS

BUILDING AND LOAN ASSOCIATIONS—PROPOSED MERGER OF TWO FOREIGN ASSOCIATIONS WITH BRANCH OFFICES IN STATE—SECTION 151 OF ARTICLE 23 OF THE CODE DOES NOT PROHIBIT CONTINUED MAINTENANCE IN STATE OF BRANCH OFFICES IN EXISTENCE PRIOR TO JUNE 1, 1951.

March 5, 1956.

Hon. Frederick Malkus, Jr.,
State House,
Annapolis, Maryland.

We have the letter from Messrs. Scrivener and Parker, which you have forwarded to us, asking our opinion on the application of Section 151 of Article 23 of the Code, as amended by Chapter 234 of the Acts of 1955, to a proposed merger of two building and loan associations, each of which has a principal office in the District of Columbia.

We understand that Association A, organized under the laws of the District of Columbia, is not a Federal association and has two branches in Maryland, as well as its principal office in the District of Columbia. Both of the branches in Maryland were established prior to June 1, 1955. It is proposed that into Association A will be merged Association B, which is a Federally chartered savings and loan association. Association B has one branch in Maryland, established prior to June 1, 1955, and its principal office in the District of Columbia. Under the terms of the merger, the principal office and the branch office of Association B will become branch offices of Association A. The question which has been posed is whether the amendment in 1955 of Section 151 of Article 23 of the Code prohibits the maintaining by the merged association of the Maryland branch of Association B.

Prior to amendment, the first sentence of Section 151 of Article 23 provided as follows:

> "No foreign building, loan or homestead association shall make loans of any kind or transact any business of a building and loan association within the State of Maryland, *or maintain an office in the State of Maryland for the purpose of transacting such business* until it has been admitted to do business in the State of Maryland. * * *". (Emphasis supplied.)

By Chapter 234 of the Acts of 1955, the language underlined above was deleted and the following language was added at the end of the Section (the rest of the Section remaining unchanged):

> "Provided that no foreign building, loan or homestead association, or any such association which maintains its principal office outside the State of Maryland, shall hereafter open for business, nor maintain any branch office or offices within the State of Maryland, except such as may be open before June 1, 1955, but provided further that any branch office or offices open on March 1, 1955, may thereafter be moved to a new location within the same county and within a radius of one mile of the location of such branch office or offices."

We assume that both Association A and Association B have been admitted to do business within the State of Maryland. The question which arises is whether, after the merger, the resulting Association (in fact bearing the name of Association A) may be considered to have opened for business or maintained a branch office within the State which was not open before June 1, 1955.

As in the case of corporations, the absorbing association formed by a merger of two or more building and loan associations becomes liable for the valid debts of the old associations and for all obligations to stockholders of the constituent associations existing at the time of such merger. (12 C.J.S., *Building and Loan Associations,* Section 118(b)). In this instance, Association A will take over all

of the business, assets and liabilities of Association B, including the branch office in Maryland.

In our opinion, the statute will not be violated as a result of this merger in view of the fact that the Maryland branch of Association B, which will after the merger become a branch of the merged Association under the name of Association A, was in fact established prior to June 1, 1955. In other words, such branch cannot be deemed to have been "hereafter" opened for business within the statutory language, nor can it be said that the merged Association will be maintaining any branch that was not open before June 1, 1955.

The purpose of Chapter 234, as we see it, was to prohibit the opening of *new* branches of building and loan associations, and it was not intended to affect existing installations in a case such as the present one, where after the merger there will be no additional branch offices of a foreign association open in Maryland other than there were before (although the branch offices which will be in existence will all belong to one foreign association rather than to two). We do not think that this statute prohibits the continued maintenance of the Maryland branch of Association B after its merger with Association A.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

BUILDING AND LOAN ASSOCIATIONS—PROPOSED VOLUNTARY DISSOLUTION BY FOREIGN ASSOCIATION AND TRANSFER OF ASSETS TO ANOTHER FOREIGN ASSOCIATION—SECTION 151 OF ARTICLE 23 OF THE CODE DOES NOT PROHIBIT CONTINUED MAINTENANCE IN STATE BY TRANSFEREE OF BRANCH OFFICE IN EXISTENCE PRIOR TO JUNE 1, 1951.

April 13, 1956.

Hon. Winship Wheatley, Jr.,
State House,
Annapolis, Maryland.

We acknowledge receipt of your recent letter with reference to our opinion of March 5, 1956, (41 Opinions of the Attorney General, —) concerning the interpretation of Section 151 of Article 23 of the Maryland Annotated Code, as amended by Chapter 234 of the Acts of 1955.

The opinion above referred to, was based on a representation to us that two building and loan associations, Association A, organized under the laws of the District of Columbia, and Association B, a Federally chartered savings and loan association, proposed to merge. Association A has two branches in Maryland and Association B one branch, all three of which had been established prior to June 1, 1955. In our opinion to Senator Malkus, we concluded that Chapter 234 of the Acts of 1955 did not prohibit the continued maintenance of the branch in Maryland of Association B by the association resulting from the merger.

It now appears that the facts as originally represented to us were not accurate in that the Rules and Regulations for the Federal Savings and Loan System do not permit a merger of a Federal association with a District of Columbia association. We understand that what is actually planned by the two associations concerned is a voluntary dissolution by Association B and the immediate transfer of its assets to Association A. After such voluntary dissolution and

transfer by Association B, Association A proposes to operate the branch office in Maryland which had previously been owned and operated by Association B. You have requested a further opinion from us based on this different set of circumstances.

Section 151 of Article 23 of the Code (1955 Supplement), reads, in part, as follows:

> "No foreign building, loan or homestead association shall make loans of any kind or transact any business of a building and loan association within the State of Maryland until it has been admitted to do business in the State of Maryland. * * * *Provided that no foreign building, loan or homestead association, or any such association which maintains its principal office outside the State of Maryland, shall hereafter open for business, nor maintain any branch office or offices within the State of Maryland, except such as may be open before June 1, 1955, but provided further, that any branch office or offices open on March 1, 1955, may thereafter be moved to a new location within the same county and within a radius of one mile of the location of such branch office or offices.*" (Emphasis supplied.)

The language underlined above was added by Chapter 234 of the Acts of 1955.

As we said in 41 Opinions of the Attorney General, *supra*, "The purpose of Chapter 234, as we see it, was to prohibit the opening of *new* branches of building and loan associations, and it was not intended to affect existing installations in a case such as the present one, * * *". We now conclude that it is immaterial under the new set of facts outlined that a dissolution and transfer of assets is involved rather than a technical merger. In either instance, after the transaction has been completed, one foreign association will be in existence owning three branch offices located within the State of Maryland. In either instance, likewise, there will

be no additional branch offices of a foreign association in operation in Maryland other than there were before, although the branch offices which will be in existence will all belong to one foreign association rather than to two.

It is true that in the case of a merger there is no interruption to the business of the branch office of Association B, which is merely absorbed by the resulting association. However, the practical effect of a dissolution and transfer of assets is, we believe, the same. We assume that the transfer of the assets would become effective simultaneously with the voluntary dissolution, and that at such time Association A would take over all assets and liabilities of the Maryland branch of Association B. In such a case, we do not believe that Association A would be "hereafter" opening for business or maintaining any branch office within the State of Maryland which was not open before June 1, 1955, within the meaning of Section 151 of Article 23.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

CLERKS OF COURT

CLERK OF COURT AND CLERK OF THE COUNTY ARE DIFFERENT OFFICES—DECLINATION OF A SURVEYOR'S COMPASS TO BE RECORDED WITH THE CLERK OF THE COUNTY.

July 24, 1956.

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

This is to acknowledge receipt of your recent letter in which you ask whether or not you should accept for record the certificate of a registered surveyor, showing the declination of his transit as tested at a U. S. Coast Geodetic Magnetic Station known as "Federal", located on the northerly side of the Federalsburg-Hurlock Road (Maryland Route No. 307) 1153 feet West of the westerly boundary of the town of Federalsburg.

Section 119 of Article 25 of the Annotated Code of Maryland (1951 Ed.) makes it lawful for the County Commissioners of each County in the State, if they deem it expedient, to erect or cause to be erected at some public spot adjacent to the court house of each County two good and substantial stone pillars, one hundred feet distant apart, the one from the other, and upon the same true meridian line, and upon the summit of one, place a distinctly visible needle-point, and on the summit of the other, a hair-sight, in such a manner that a straight line passing through the centre thereof and continued until the same shall strike the centre of the needle-point upon the other, shall be in and upon the line of the true meridian running north and south, and they shall enclose and protect the same properly; the said pillars and enclosures to be subject to the custody of the County Clerk.

Section 120 of Article 25 requires every surveyor surveying land in any county of the State that shall adopt Section 119 of Article 25 to register the actual variation of his

compass from the true meridian line at least once in every year, the date and time of such tests, and an affidavit verifying its correctness, with the Clerk of the County in which he may reside.

The office of Clerk of the County and that of Clerk of the Circuit Court for the County are separate and distinct. The holder of each office serves a different master, has different duties to perform, and has charge and custody of entirely different records.

Sections 119 through 121 of Article 25 are contained in the Code, under the title "County Commissioners", and inspection of the index to the Annotated Code of Maryland (1951 Ed.), which has been legalized by the Legislature, reveals that Sections 119 through 121 of Article 25, have been indexed under "Clerk to the County Commissioners". It is to be noted that Article 17 of the Code covers the duties of the Clerks of Courts for the State, and that throughout the Code, where the Legislature has intended that the Clerks of Court act, it has specifically referred to them as the Clerks of Court. We believe it is quite apparent that the registration required by Section 120 of Article 25 of the declination of a registered surveyor's transit, is to be with the Clerk to the County Commissioners, who is the Clerk of the County, and not with the Clerk of the Circuit Court.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

Mandamus

No General Statute

Pressman vs Elgin

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CLERKS OF COURT—RECORDS—CLERKS OF COURT MAY PASS REASONABLE RULES & REGULATIONS GOVERNING INSPECTION OF RECORDS IN HIS OFFICE—NO ABSOLUTE RIGHT IN ALL PERSONS TO EXAMINE PUBLIC RECORDS—RECORDS SHOULD BE ACCESSIBLE TO PUBLIC FOR ALL PROPER PURPOSES—LAWYERS & PERSONS WITH ACTUAL INTEREST MAY INSPECT.

November 20, 1956.

Mr. Henry J. Ripperger, Clerk,
Circuit Court of Baltimore City.

We have your recent letter in which you ask whether or not you, as Clerk of Court, have the right to refuse persons other than lawyers, their authorized clerks or representatives, or persons involved in litigation, the use of the files and records that you are required by law to keep in your office. You tell us that the number of persons visiting your office daily to see the records, for purposes of promoting private business enterprises, has reached such proportions that it now constitutes a nuisance and interferes with the administration of your office.

The judicial records of this State should always be accessible to the public for all proper purposes, but this does not mean that all persons have a right to inspect the records to satisfy any whim or fancy. The Court of Appeals has said that unless the law specifically says that he must do so, it is not necessary for the Clerk of Court to permit persons to inspect the records in his office. *Belt v. Abstract Co.,* 73 Md. 289. The court, in that case, went further and said that it was the duty of the Clerk not to permit anyone to examine the records in his office unless he or one of his Deputies supervised such examination. In *Pressman v. Elgin,* 187 Md. 446, the court said that if a person desires to see public records out of mere curiosity, the courts will not order the custodian to permit him to see them, even though a statute requires the records to be open for public inspection and that the right to inspect public records, accorded

by statute, must be exercised subject to such reasonable rules and regulations as the custodian of the records finds it necessary to impose in the orderly government of his office.

There is no statutory provision in this State permitting members of the general public to inspect the records in the office of the Clerk of Court. We are therefore governed in this matter by the common law and, at common law, there is no absolute right in all persons to examine public records. It is only when a person can show an actual interest in the record that he is entitled to inspect it.

Section 9 of Article 10 of the Annotated Code of Maryland (1951 Ed.) provides for any lawyer, or his authorized clerk or representative, to inspect the records, but it makes no provision for an inspection of the records by anyone else. The only other section of the Code dealing with the right of the public to inspect the records of your office is Section 1 of Article 17 of the Annotated Code of Maryland (1951 Ed.), which provides that everyone shall be entitled to obtain copies of any papers or records upon application therefor, upon the payment of the usual fees prescribed by law. Such copies are to be made by you, as Court Clerk, and not by the individual requesting the copies. *Belt v. Abstract Co., supra.*

There is nothing in the terms of the statutes that provide for the general public to inspect the records of your office. We are, therefore, of the opinion that you may refuse to permit anyone to inspect the records in your office except lawyers, their authorized clerks and representatives, and individuals who can show an actual interest in the records, and that even they may only inspect them subject to reasonable rules and regulations prescribed by you.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

CLERKS OF COURT—CONDITIONAL CONTRACTS OF SALE—RECORDING—MEMORANDUM OF CONDITIONAL SALE MUST DESCRIBE CHATTELS SUFFICIENTLY AND MUST SHOW THE AMOUNT DUE AND WHEN AND HOW PAYABLE—ADDITIONAL GOODS MAY BE ADDED TO CONTRACT OF CONDITIONAL SALE BUT WHEN MADE ADDITIONAL MEMORANDUM SHOULD BE RECORDED WITH CLERK OF COURT.

December 7, 1956.

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

Your recent letter asks whether or not you, as the Clerk of Court, are required to record a particular memorandum of a conditional contract of sale. The memorandum of conditional sale which you have submitted for our inspection refers to the goods and chattels covered by the instrument as "tractors, combines, corn pickers and additions, replacements, and substitutions". It does not include any further description of any of the particular chattels it is intended to include. Its designation of the chattels would fit any other chattels of the same kind. It does not even state how many of each type of the chattels named therein it is intended to cover. It also purports to cover other chattels which are only generally described therein as additions, replacements and substitutions. In our opinion, this amounts to no description at all.

The purpose of a description is to afford a means to identify specifically the chattel covered by the instrument. An adequate description is one which may be applied only to one chattel and not to all falling in the same classification. Tractors, combines, corn pickers and most other chattels today can be identified by manufacturer's name, year of make, model, size and serial number. All of these are aids to identification of particular chattels. The memorandum submitted fails to contain an adequate description of any

of the chattels covered thereby. *State v. Md. Casualty Co.*, 164 Md. 76.

It also appears that the amount which has been listed as due on the contract has really been left open. The memorandum offered for record states the amount due to be a specified sum of money "plus additional amounts to become due per terms of said contract, all payable at varying times in accordance with the terms of said contract." The memorandum does not set out the total amount that is to become due at later times and fails to state when and how either the amount stated as due now or the additional amounts to become due are to be repaid. The law requires that such memorandum show when and how the amount is to be repaid; that is, in what amount and on what dates installments are to be paid.

Section 74 of Article 21 of the Annotated Code of Maryland (1951 Ed.) reads, in part, as follows:

> "Every note, sale or contract for the sale of goods, chattels, or of any item of furnishing or equipment which is affixed to real property, wherein the title thereto, or a lien thereon, is reserved until the same be paid in whole or in part, or the transfer of title is made to depend upon any condition therein expressed and possession is to be delivered to the vendee, shall in respect to such reservation and condition, be void as to subsequent purchasers, mortgagees, incumbrancers, landlords with liens, pledgees, receivers, and creditors who acquired without notice a lien by judicial proceedings on such goods and chattels, or in the case of any item affixed to real property on such real property, until such note, sale or contract be in writing, signed by the vendee and be recorded, as provided in this Section and Section 65 of Article 17, in the Clerk's office of the Superior Court of Baltimore City, or in the Clerk's office of the Circuit Courts of the various counties, as the case may be, where the vendee resides, or in the case of a corporate or

> partnership vendee, then where such vendee has its principal place of business in the State of Maryland, but in any case of any item affixed to real property, such recording shall be where such property is located and may also be where the vendee resides, or where a corporate or partnership vendee has its principal place of business in this State. *Such recording shall be sufficient to give actual or constructive notice to such parties when a memorandum of the paper writing signed by the vendee or vendees, setting forth the date thereof, the amount due thereon, when and how payable and a brief description of the goods and chattels therein mentioned shall have been recorded with the clerk aforesaid. * * *.*" (Emphasis supplied.)

It is our opinion that the purpose of the recording is to enable the public to ascertain with reasonable certainty from any instrument or memorandum thereof filed in the record office the principal terms and conditions of the conditional contract of sale. The description of the chattels should be sufficient for anyone examining the record to identify those particular chattels without looking elsewhere. In this case there has been no serial number of the items covered by the contract included in the memorandum and nothing else added to particularly identify the chattels covered thereby. The memorandum should in addition include the full amount due on the contract, and should show when and how that amount is to be paid to the vendor by the vendee.

Section 124 of Article 83 of the Code (1951 Ed.) does permit an installment sales agreement (in the nature of a conditional contract of sale) by its terms to include additional goods purchased after the original agreement, and the amount due on the new purchase to be combined with the unpaid balance due on the prior purchases, but it requires the vendor at the time of the additional purchase to deliver to the vendee a statement showing the amount

due on the agreement immediately previous to the new purchase, the amount due after the new purchase, the payments agreed to be made thereafter, and the number of additional months required to complete the payments. There is no provision in the law, however, that permits the substitution or replacement of goods and chattels covered by a conditional contract of sale. It is true that Sections 62 and 63 of Article 21 permit future advances and substitution of goods in the case of some chattel and crop mortgages, but those Sections do not apply to conditional contracts of sale.

In *Praeger v. Implement Co.*, 122 Md. 303, the Court of Appeals said:

> "The provisions of the Code relating to mortgages and bills of sale do not apply to contracts of sale, commonly called conditional sales."

A conditional sale is one in which possession is delivered to the buyer but title and general ownership remain in the seller pending payment of the purchase price, on the happening of which event title automatically passes to the buyer. A chattel mortgage imposes a lien upon property to which the mortgagor already has legal title, while a contract of conditional sale denotes only a change of possession from the seller to the buyer with the retention of title in the seller. A conditional sales contract is an assertion of title by the seller to offset the presumption in law that possession implies ownership.

If a conditional contract of sale is entered into whereby there are to be additions made to the contract when further sales occur in the future, then at the time the addition is made to the contract, in order to secure the vendor in so far as third parties are concerned, a memorandum with an adequate description of the additions to the contract along with a statement showing the total amount due after the new purchase and how that total balance is payable should be recorded in the office of the Clerk of Court.

Since the memorandum of conditional sale which you have submitted to us does not comply with the requirements of Article 21, Section 74, of the Code, in that it does not adequately describe the chattels, and in that it does not show the total consideration under the contract and when and how it is to be paid by the vendee to the vendor, we are of the opinion that you may properly refuse to receive the same for record.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

CONSTITUTIONAL LAW — TRAINING SCHOOLS — STATUTORY PROVISIONS REQUIRING SEGREGATION IN CORRECTIONAL TRAINING SCHOOLS ARE NOT SO CLEARLY INVALIDATED BY SUPREME COURT OPINIONS IN "PUBLIC SCHOOL CASES" AS TO WARRANT EXECUTIVE DEPARTMENT IN DISREGARDING LEGISLATIVE WILL.

January 11, 1956

Mr. W. Thomas Kemp, Jr.,
Chairman—Board of Public Welfare.

You state in your recent letter that the State Department of Public Welfare has recommended to the State Planning Commission that Montrose School for Girls, which at present cares for white girls, be enlarged to permit care of both white and Negro girls. The Board of Welfare proposes to have the girls at Barrett School, which at present cares for colored girls, transferred to Montrose, so that Barrett will be available for some other use. In the event Barrett is not required for other Department of Public Welfare use, it would be closed. You state that in the opinion of the Department, substantial savings will result to the State from this consolidation of the two schools.

You have inquired whether the legislative designation of these institutions as schools for white and colored girls prevents such a consolidation, in light of the decisions of the United States Supreme Court in the public education cases. Specifically, you inquire whether the Supreme Court decisions have the effect of invalidating the Maryland statutory provisions which confine Montrose School to the care of white girls and Barrett to the care of colored girls. Since the training schools for boys are likewise set up on a segregated basis your inquiry, although directed to the girls' is of general applicability.

The statutory provisions with respect to the various Houses of Reformation in the State of Maryland are found

in Article 27 of the Annotated Code of Maryland (1951 Ed. and 1955 Supp.). The particular institutions under the Department of Public Welfare are: Boys Village (for colored boys), Maryland Training School (for white boys), Montrose School (for white girls), and Barrett School (for colored girls). Section 743 of Article 27 (1955 Supp.) deals with Boys Village and reads as follows:

> "There shall be established in the State an institution to be known as the Boys' Village of Maryland. Said institution is hereby declared to be a public agency of said State *for the care and reformation* of colored male minors *committed* or transferred *to its care under the laws* of this State. The appointment and powers of the board of managers of said institutions shall be governed by article 88A, § 32 to 35, both inclusive, of the Code." (Emphasis supplied.)

Maryland Training School for Boys is dealt with in Section 746, which reads, in part, as follows:

> "From and after the acquisition by the State of Maryland from the Maryland School for Boys, a corporation of this State, of the property heretofore held, conducted and managed by said corporation *as a reformatory institution for the care and training* of white male minors committed thereto under the provisions of the laws of this State, the same shall continue under the name of the Maryland Training School for Boys to be conducted as a public agency of this State *for the care and reformation* of white male minors now *committed* thereto, *and who may hereafter be committed* thereto *under the laws* of this State. * * *" (Emphasis supplied.)

Montrose School for Girls is treated in Section 747, which reads as follows:

> "From and after the acquisition by the State of Maryland of the property of the Maryland In-

> dustrial School for Girls the same shall continue as a reformatory under the name of the Montrose School for Girls to be conducted as a public agency of this State *for the care and reformation* of white female minors now *committed* thereto, *and who may hereafter be committed* thereto *under the laws* of this State. The appointment and powers of the board of managers of said institution shall be governed by article 88A, §§ 32 to 35, both inclusive, of the Code." (Emphasis supplied).

Barrett School for Girls is covered by Section 748, which reads, in part, as follows:

> "There shall be established in this State, an institution to be known as the Barrett School for Girls. The said institution is hereby declared to be a public agency of this State *for the care and reformation* of colored female minors *committed* or transferred *to its care under the laws* of this State. * * *" (Emphasis supplied.)

Examination of these statutes shows that in each instance the Code specifies whether colored or white are to be received by the institutions.

By the provisions of Article 88A of the Annotated Code of Maryland (1951 Ed.), Sections 3 and 32, supervision, direction and control of the institutions above mentioned are committed to the Department of Public Welfare.

The history and legal effect of the decisions of the Supreme Court in the Public Education cases were considered in our opinion in 40 Opinions of the Attorney General, 175, addressed to Dr. Thomas G. Pullen, Jr., State Superintendent of Schools. We held in that opinion that all constitutional and legislative provisions of this State which require segregation *in the public schools* are unconstitutional, and hence must be treated as nullities. We stated that the law laid down by the Supreme Court with respect to public education is clear, and that differences of mechanics of relief did not in any way limit the present

existing legal compulsion on the school authorities to make a "prompt and reasonable" start toward the ultimate elimination of racial discrimination *in public education.*

Since the General Assembly specified in the statutes creating the various training schools whether white or colored are to be there received, your present inquiry raises the issue of the constitutional validity of each of the several Acts of the General Assembly. Before proceeding to a detailed consideration of the problem posed, some statement of the basic principles which must guide our actions in the matter seems appropriate.

The fundamental concept upon which the Federal Government and that of the States of the United States is based is that our State and Federal Governments depend for their existence upon the will of the people expressed through Constitutions duly adopted. The basic theory of our State and Federal Constitutions is that the powers given by the people to the governing body break down into a triparitie division. The three coequal branches, executive, legislative and judicial, serve the people, and are themselves restrained from despotic or arbitrary exercise of power by the internal system of checks and balances. This principle is so well established as to require little discussion.

The judicial branch of the Government of the United States and of the State of Maryland is, under our system, the interpreter of the Federal and State Constitutions. The existence in the judiciary of this important power and duty is one of the most vital of the internal system of checks and balances protecting our people against the arbitrary exercise of executive or legislative authority. The landmark decision of *Marbury v. Madison,* 1 Cranch (U.S.) 137, 2 L.Ed. 60, stands as a monument to the judicial recognition of this vital principle. Inherent in the power to interpret the Constitution of the United States and the various States, which is vested in the judiciary, is the power to pass on the constitutional validity of laws passed by the legislative branch of the Government.

It would be contrary to the theory of our government to permit the Executive Department to arrogate to itself this purely judicial power. Attempts to invade this exclusively judicial power have been resisted by the courts in the past. This is as it should be. Even the theory that the executive's oath to support the Constitution entitles such an officer to decide questions of the constitutional validity of statutes passed by the legislative branch has been rejected. 11 Am. Jur. Constitutional Law, Section 87, pp. 712-713; 11 Am. Jur. Constitutional Law, Section 205, p. 907.

As a corollary to the exclusive right of the judiciary to determine constitutional questions, and in order properly to protect the Legislature and its prerogatives as against executive action nullifying legislative will, we indulge in the presumption that every law found on the statute books is constitutional until declared otherwise by the courts.

The Maryland Constitution expressly recognizes the doctrine of separation of powers in Article 8 of the Declaration of Rights, which provides:

> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

Substantially this same provision has been found in our Constitution since the earliest days of Maryland. Unlike the Federal Constitution, where separation of powers must be found by reading the entire document, Maryland has always so provided. Niles on Maryland Constitutional Law, at p. 19, in commenting on this provision, made the following statement:

> "The language of our Maryland Declaration of Rights * * * is clear and explicit; and our courts have been alert to oppose even the first steps toward usurpation by one department of the powers or duties of either of the others * * *."

Our Maryland view was clearly laid down by Judge Earle in the case of *Crane v. Meginnis,* 1 G. & J. 463, decided in 1829, where the court made the following comment:

> "The Constitution of this State composed of the Declaration of Rights, and Form of Government, is the immediate work of the people in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that, from the exercise of which it must abstain. * * * When they transcend defined limits their acts are unauthorized, and being without warrant, are necessarily to be viewed as nullities."

The court then went on to point out that the judicial power of the court to interpret the Constitution is the check upon legislative excess or legislative encroachment upon the rights of citizens or of coequal branches.

The office of Attorney General is created by Article V of the Constitution, Sections 1 through 6. The Attorney General is head of the Department of Law, one of the executive and administrative departments of this State. Article 41, Sections 2 and 171, Annotated Code of Maryland. By Article 32A, Sections 1 through 12, the general powers and duties of the Attorney General are set out.

The place of the Attorney General in the constitutional structure of our State is such that this office must be circumspect that, as an arm of the executive, it does not encroach upon duties and prerogatives of the judicial or legislative departments. Chancellor Bland, in *The Chancellor's Case,* 1 Bland 595, 672, pointed out the obligation of the various departments one to another, when he said:

> "The Declaration of Rights declares 'that the legislative, executive, and judicial powers of government ought to be forever separate and distinct

> from each other.' This division and separation is the peculiar characteristic and great excellence of our government. It is the grand bulwark of all our rights, and every citizen has the deepest interest in its most sacred preservation. Each of these several departments should be kept, and should feel it to be its highest honor, to keep strictly within the constitutional boundaries assigned to it. The Legislature should not encroach upon the judiciary, nor upon the executive, nor should either of those departments trench upon each other or upon the legislative."

Historically, the Attorneys General of Maryland have observed the injunction not to encroach upon judicial or legislative prerogatives. In the exercise of the Attorney General's duty to act as advisor to the Governor, this office has rendered opinions to the Governor as to the constitutional validity of Acts pending for signature before the Governor. 20 Opinions of the Attorney General, 268; 7 Opinions of the Attorney General, 239; 21 Opinions of the Attorney General, 272; 36 Opinions of the Attorney General, 129; 38 Opinions of the Attorney General, 150. Other opinions may be cited and the list here contained is not intended to be exhaustive. As to existing laws, however, after passage by the Legislature, the Attorney General should exercise care to observe the division of powers. This office must scrupulously avoid invasion of the judiciary's powers and duties. We will always seek to give just and proper effect to every decision of the courts of this State and of the Supreme Court of the United States on constitutional matters. However, we are constrained to denounce an existing law as violative of State or Federal constitutional guaranties only in those situations where a fair interpretation of a court decision indicates a challenged law is constitutionally invalid. In the absence of clear indication that a decision of our courts or the Supreme Court of the United States covers and invalidates a given statute, we must, under our constitutional restraints, withhold condemnation of the law.

The inquiry then must be whether this is such a case. In our opinion, it is not a clear case within any decision of the United States Supreme Court or of the courts of this State, such as would warrant our expressing a view of the invalidity of the training school laws unless the matter be resolved by proper action of our judiciary or our Legislature. It is not our function to make policy in this field.

The unique position occupied by the training schools here under discussion is evident from the fact that they are primarily intended as places to separate erring minors from the corrupting influence of improper circumstances and associates. Basically, the State is removing the individuals there confined from society for the protection and welfare of the individual. The theory that every minor should receive education as part of the process of "reform" introduces the element of doubt. But for this aspect of training schools, they would be purely correctional.

Very many of the past discussions of training schools, found in the reported Maryland cases and in the opinions of the Attorney General, indicate the nature of the problem. For example, in an opinion of Attorney General Robinson, reported in 9 Opinions of the Attorney General, 168, in discussing the Maryland Training School for Boys, the Attorney General said:

> "As its name and position among the State Departments would seem to imply, the Maryland Training School for Boys was intended for the *education* of male minors along economical and practical lines."

In the same opinion, Attorney General Robinson made the following comment:

> "* * * it (the Maryland Training School) was established *primarily for the care and reformation* of such white male minors, who, through misfortune, environment or the effects of crime, are, in the opinion of the Justices of the Peace or

> Courts of the State or County, better off within its walls." (Emphasis supplied.)

Again, at page 170, the Attorney General commented:

> "I realize that your institution was not intended to be a place of punishment. *It was organized as a place of reformation.*" (Emphasis supplied.)

The Court of Appeals, in *Baker v. State*, 205 Md. 42, had before it the question of whether the Escape provisions of the criminal law (Article 27, Section 164, 1951 Ed. of the Code) applied to Boys Village. The appellants contended Boys Village was not within the criminal law Escape statute. Judge Henderson, at page 45, said:

> "The appellants further contend that Boys Village is not a 'reformatory * * * or other place of confinement' within the meaning of Section 164. This argument overlooks the fact that the statute creating Boys Village states that it is a place for 'care and reformation'."

The court held that Boys Village was a "reformatory" within the meaning of the statute.

Further lack of clarity is indicated by the fact that the statutes creating the institutions in question are codified in Article 27 of our Code. This Article is, of course, the criminal law Article. However, for many years, these institutions exercised their powers under the supervision of the State Superintendent of Schools; the instructors have been included in the Teachers Retirement System, and they have to a degree been considered "educational institutions". They have not, however, in our opinion been included within the term "public education" in the sense that that term has been used in the Supreme Court opinions.

As heretofore set out, one of the ways in which the various institutions seeks to reform the inmates is by education. However, the distinguishing characteristic of such institutions, to our mind, is that inmates are there under legal compulsion and are denied the privilege of leaving

the school. The inmates are, in other words, *confined* to these institutions. This is a situation different from that which was before the Supreme Court in the Public School cases, in that *educational* equality was the problem before the court. Here, desegregation of the institution, contrary to express legislative intent evidenced by the statutes creating the institutions, could have the effect of enforcing *social* as well as *educational* association among the inmates for twenty-four hours a day.

We are aware that compulsory school attendance laws may make it obligatory upon parents who wish their children to attend the public schools to accept and abide by a system of public education from which racial discrimination has been eliminated, consistent with our opinion in 40 Opinions of the Attorney General, 175, interpreting the application of the Supreme Court decisions to the Maryland public education scene. We believe it is important, however, to consider the freedom of choice which inheres in parents under our compulsory school attendance law. Section 223 of Article 77 of the Code (Public Education Article), provides, in part as follows:

> "Every child residing in Baltimore City and in any county in the State between 7 and 16 years of age shall attend some day school regularly as defined in Section 226 of this Article * * * *unless it can be shown* that *the child is elsewhere receiving* regularly *thorough instructions* during said period in the studies usually taught in said public schools to children of the same age * * *." (Emphasis supplied.)

It will be noted that parents are free to demonstrate that a child is receiving regular instruction in private schools. This retains the necessary element of freedom of choice in the field of public education and is consistent with the social views of the citizens of the State of Maryland that the elimination of discrimination in the fields of public action should not carry over into and destroy the historic view of our people that separation of the races in *social*

matters is the accepted norm and has been the established policy and practice through the years. See *Williams v. Zimmerman,* 172 Md. 563, 567, 192 A. 353, 355.

One further point is worthy of mention. Basically the argument in the public education cases turned on the issue of whether to retain or reject the "separate but equal" doctrine laid down in *Plessy v. Ferguson,* 163 U.S. 537, 41 L.Ed. 256. We are not aware of any instance in which the doctrine of "separate but equal" has been applied to the field of correctional institutions such as those here under discussion. Even though the effect of the public education cases is to abolish the doctrine in all fields to which it was heretofore applicable (which has been questioned), we do not believe it can be fairly said the effect would be carried over into still other fields of activity never heretofore included within the doctrine.

Judge Hammond, while Attorney General, had occasion to write an extended opinion on the constitutional validity of a personal property tax on "stock in business". 37 Opinions of the Attorney General 424 at 439. After he had concluded that the courts of our State would probably hold the Act valid and constitutional, even though he had some doubt in his mind as to its constitutional validity, he made the following comment, which we believe exactly appropriate in the instant case:

> "* * * Our doubts are not so strong as to warrant this office taking the extraordinary action of advising the State Tax Commission to ignore an Act of the General Assembly."

In our opinion, the present case is not such a clear one as to warrant our taking the "extraordinary action" of advising your Department to ignore the express will of the Legislature.

C. FERDINAND SYBERT, *Attorney General.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—LIMITATIONS ON EVEN YEAR 30-DAY LEGISLATIVE SESSIONS—IF LEGISLATION IS NOT OTHERWISE WITHIN SCOPE OF PERMISSIBLE ACTION, ATTACHMENT OF REFERENDUM TO BILLS WILL NOT VALIDATE SUCH BILLS.

January 17, 1956.

Hon. Louis L. Goldstein,
President of the Senate.

You inquire whether a proposed bill concerning a local amendment of liquor laws, subject to referendum of the voters of a certain county, would be valid under Article III, Section 15, of the Constitution of Maryland.

As you know, Section 15 provides:

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

From the facts presented to us, we do not believe that the proposed measure falls within any of those three categories. It is significant that the Court of Appeals has stated that the "emergency" must be an emergency in fact and that the mere legislation declaration of an emergency will not suffice. *Washington Suburban Sanitary Comm. v. Buckley*, 197 Md. 203, 78 A. 2d 638 (1951).

You further inquire whether the addition of a referendum might not be a distinguishing characteristic. We have reviewed the various opinions of the Court of Appeals on this subject, as well as the opinions of this office on that point, and we do not believe that the referendum feature would take this type of legislation out of the purview of the constitutional prohibition and its obvious intendment. See discussion in *Funk v. Mullan*, 197 Md. 192, 78 A. 2d.

632 (1951); *Shaw et al v. North Beach,* The Daily Record, October 6, 1950; 34 Opinions of the Attorney General, 130; 38 Opinions of the Attorney General, 150; 40 Opinions of the Attorney General, 266; 40 Opinions of the Attorney General, 191; Bartlett, *Limitations on Even Year Legislative Sessions,* 12 Md. Law Review, 124.

If the referendum device were held to be an allowable exception to the limitations on even year legislative sessions, it could render the constitutional provision virtually nugatory.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Assistant Attorney General.*

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—DETACHMENT OF TERRITORY MAY BE ACHIEVED BY STATUTE OR CHARTER AMENDMENT—LEGISLATURE HAVING PROVIDED FOR ANNEXATION BUT NOT DETACHMENT. THE ALTERNATIVE PROCEDURE OF DETACHMENT BY CHARTER AMENDMENT IS AVAILABLE TO THE MUNICIPAL CORPORATION.

April 10, 1956.

Mr. Frank P. Flury,
Corporation Counsel for
Town of Berwyn Heights.

We have your letter requesting our opinion as to the procedure by which a municipal corporation may provide for detachment or excision of territory.

You point out that following the adoption of Article 11E of the Constitution, popularly known as the Municipal Home Rule Amendment, the General Assembly, by Chapter 423 of the Laws of 1955, now Article 23A, Section 4, *et seq.*, of the Annotated Code of Maryland (1955 Supp.) provided for annexation procedure but made no provision for detachment.

You inquire whether detachment procedure should be accomplished by a procedure similar to annexation, or by charter amendment.

In our opinion, the procedure for detachment of territory should be pursued by charter amendment.

Section 1 of Article 11E provides:

> "Except as provided elsewhere in this Article, the General Assembly shall not pass any law relating to the incorporation, organization, government, or affairs of those municipal corporations which are not authorized by article 11-A of the Constitution to have a charter form of government which will be special or local in its terms or

> in its effect, but the General Assembly shall act in relation to the incorporation, organization, government, or affairs of any such municipal corporation only by general laws which shall in their terms and in their effect apply alike to all municipal corporations in one or more of the classes provided for in § 2 of this article. It shall be the duty of the General Assembly to provide by law the method by which new municipal corporations shall be formed."

Provisions are made in Article 11E for local legislation for taxation and debt limits by the General Assembly. *Cf. Woelfel v. City of Annapolis*, 209 Md., 314.

Provision for general legislation for municipalities as a class is also made in Section 2 of Article 11E. As previously discussed, the General Assembly has already acted thereon by passing the Home Rule Act, Article 23A, treating annexation but not detachment.

The power to detach territory from a municipal corporation is analogous to the power of annexing new territory. 37 Am. Jur., *Municipal Corporations,* Section 35, Annexation may be achieved by statute or by charter amendment. McQuillen on *Municipal Corporations,* (3rd Ed.) Section 7.14. And the same is true of detachment. McQuillen, Section 7.24. As Article 11E confers all powers of municipal government to the municipal corporation except those reserved to the Legislature or brought about by general legislation by the Legislature, there would seem to be no doubt that a municipal corporation has power and authority to detach. McQuillen, Sections 10.13, *et seq.* Since the Legislature has not provided a statutory method to achieve detachment as it has to achieve annexation, the alternative procedure of detachment by charter amendment is available to the municipal corporation.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Assistant Attorney General.*

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—POWER AND PROCEDURE OF CONDEMNATION UNDER HOME RULE CHARTER—NO POWER OF ANNEXATION OF LAND IN ANOTHER MUNICIPALITY.

April 19, 1956.

Mr. Bert E. Sager,
Town Attorney,
The Mayor and Town Council of Edmonston.

You inquire as to two questions concerning municipal corporations. While under the law we are not counsel for municipal corporations and ordinarily refrain from giving opinions to them, in the interest of uniformity of interpretation of a State-wide measure, we comply with your request herewith.

1. You state that the Town of Edmonston, a municipal corporation subject to Article 11E of the Constitution of Maryland, desires to amend its charter by including in the powers of the Town the power of eminent domain or condemnation for the public purpose of opening, widening or improving streets. You wish to know if this is legally permissible.

In our opinion, the answer is in the affirmative. Article 11E, popularly referred to as "The Municipal Home Rule Amendment", grants broad powers to municipal corporations. Article 23A of the Annotated Code of Maryland (1955 Supp.), the "Municipal Home Rule Act", prescribes methods by which a municipal charter may be amended. McQuillen on *Municipal Corporations* (3rd Ed.) Sec. 32.17 states:

> "*Power to condemn as conferred by home rule charter.* The question has arisen as to whether a municipality, such as a city, may exercise the right of eminent domain in its behalf, without first having received from one of the legislative branches of the state express or specific authority

> therefor, where the constitution authorizes the legal voters of certain cities and towns to enact and amend their municipal charter, subject to the constitution, and a municipality has enacted a new charter or amended its old charter so as to provide for the exercise of the power of eminent domain in certain instances. In several such cases it has been held that the power to condemn exists by virtue of a charter provision conferring such authority. So it has been decided that under such a charter authorizing condemnation proceedings for water supply, a city may condemn property outside its corporate limits to obtain water for consumption therein, it not being necessary first to obtain legislative authority to condemn."

There is, of course, also the alternative procedure of adopting by charter amendment the Model Charter outlined by Article 23B (1955 Code Supplement) which contains a specific section on condemnation; Sec. 95.

2. The second point you raise is phrased as follows:

"This Town adjoins another municipality which at one point juts into our Town to take one piece of property into that Town. As this situation is not desirable and creates problems of street maintenance etc., it is possible that an agreement may be reached between the towns for this Town to annex the property and the other Town to release it. In view of Section 19(1) of Article 23A, would the consent or release by the other Town be sufficient to enable this Town to annex it by following the procedure outlined in Section 19 of Article 23A, or would this situation require action by the Legislature to accomplish the exchange. It might be stated that both of our Towns apparently believed the property was in our Town until the past year when the matter was considered and it was found that we had been assessing and taxing property in the other Town for a number of years."

Under the general classification system set out in Article 11E of the Constitution, the General Assembly has by Article 23A of the Code, Section 19, prescribed a general annexation procedure for municipalities. See McQuillin, *supra,* Secs. 7.11 and 7.14. These statutory requirements should be followed. *Layton v. Monroe,* 50 La. Ann. 121, 23 So. 99. Subsection (1) of Sec. 19 of Article 23A states:

> "(1) *Annexation of land in another municipality not authorized.*—The provisions of this section shall authorize an increase in the area within any municipal corporation only as to land which is not then within the corporate limits of any other municipal corporation."

While it might be argued that the legislative intention therein was to avoid clashes between contesting municipalities and hence does not affect cases between consenting municipalities, such as the instant one, that intention is not so clear as to contradict the express terms of the statute. "The language of a statute is its most natural expositor, and when the language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations." *Graham v. Joyce,* 151 Md. 298, 307. From the wording of the statute, a legislative prohibition exists against one municipality annexing the territory of another municipality, and in our opinion the proposed annexation of the territory of another municipality is not permissible as such.

There is, however, the possibility of antecedent detachment or excision of the territory involved by the other municipality, with subsequent annexation by your municipality. For the procedure of detachment see 41 Opinions of the Attorney General.

If this somewhat circuitous procedure should be deemed impracticable, remedial relief in the Legislature is, of course, possible.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

CONSTITUTIONAL LAW — HOME RULE — MUNICIPALITY'S POWER TO ALTER EXEMPTION FROM LOCAL PROPERTY TAX ASSESSMENT PREVIOUSLY FIXED BY STATE LAW.

May 11, 1956.

Mr. Albert W. Ward, Secretary,
State Tax Commission.

You have asked our opinion concerning the rate of assessment proposed to be made on personal property constituting stock in business, for purposes of City of Frederick taxes.

Article 81, Section 14, of the Code provides that, for purposes of municipal taxation in the City of Frederick, the stock in business of a corporation engaged in manufacturing or commercial business shall be assessed at 75% of the fair average value of the property. Although this Section has been amended from time to time, the last amendment being by Chapter 716 of the Laws of 1955, the provision as to taxation by the City of Frederick has remained the same since prior to January 1, 1954.

Now, purporting to act under the Home Rule powers granted by Article 11E of the Constitution of Maryland, the Mayor and Board of Aldermen of the City of Frederick have passed a resolution providing for an amendment to the charter of the City of Frederick, stating that the stock in business of any person engaged in manufacturing or commercial business in the City of Frederick shall be valued for purposes of municipal taxation at 60% of value.

The question raised is whether the attempted charter amendment supersedes the provisions of Article 81, Section 14, of the Code of Public General Laws by virtue of the Home Rule powers granted to all municipal corporations by Article 11E of the Constitution.

The authority of the City of Frederick to amend Section 14 of Article 81 must be found in Section 3 of Article 11E of the Constitution, providing that, "any municipal cor-

poration . . . shall have the power and authority (a) to amend or repeal any existing charter or local laws relating to the incorporation, organization, government or affairs of said municipal corporation heretofore enacted by the General Assembly of Maryland . . ." It is our opinion that the City of Frederick has the power to amend Section 14 in so far as it applies solely to City of Frederick taxes, since to that extent, Section 14 is a "local law", within the meaning of Section 3 of Article 11E. While this particular provision is codified as a Public General Law in the Code, that factor is not governing in determining whether it is a local law. In construing the Home Rule constitutional provisions concerning Baltimore City, the Court of Appeals has expressly held that an Act of the Legislature, although codified as a Public General Law, is to be considered a "local law" for purposes of Home Rule powers if it pertains solely to the affairs of a particular locality. *In State v. Stewart,* 152 Md. 419 (1927), the court stated, at p. 425:

> "It is the subject matter and substance rather than the designation or form, which is conclusive. Otherwise, any law could be removed from the domain of public local laws by the mere act of the legislature in calling it an amendment to a public general law."

See also *Ness v. Supervisors of Elections,* 162 Md. 529 (1932).

Unless Article 11E contains a prohibition against the amendment proposed to be made by the City of Frederick, therefore, the City is empowered to amend Section 14 of Article 81, as proposed.

Section 5 of Article 11E provides:

> "No such municipal corporation shall levy any type of tax, . . . which was not in effect in such municipal corporation on January 1, 1954, unless it shall receive the express authorization of the General Assembly for such purpose, by a general

> law which in its terms and its effect applies alike to all municipal corporations . . ."

It is our opinion that this provision does not apply to the amendment proposed to be made by the City of Frederick, as above stated, since it is our conclusion that the change proposed in the percentage of value of stock in business to be assessed does not constitute the levy of a "type of tax" which was not in effect prior to January 1, 1954. The change proposed is a relatively minor change in the degree of exemption accorded stock in business for assessment for personal property taxes, and in economic effect is essentially equivalent to a change in rate of tax for that classification of property. See 37 Opinions of the Attorney General, 424, approving such partial exemptions for stock in business as essentially equivalent to a change in rate of tax for that classification of property.

In this opinion, we do not mean to imply any broad conclusions as to what is meant by "type of tax", as used in Section 5 of Article 11E. Our opinion in this connection is restricted to the case presented in accordance with the facts heretofore set forth.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—STATE VERSUS PRIVATE ACTION — DECISIONS OF SUPREME COURT IN REGARD TO SEGREGATION CASES ARE NOT APPLICABLE TO WASHINGTON COLLEGE.

May 11, 1956.

Dr. Daniel Z. Gibson, President,
Washington College.

You have inquired whether, in our opinion, an institution such as Washington College, which receives aid in the form of scholarship money from the State of Maryland, is thereby legally bound, under the present state of the law, to accept a qualified Negro student who applies for admission whether or not appointed to a State scholarship.

In an opinion published in 40 Opinions of the Attorney General, 175, we set forth our views with respect to the legal effect of the decision of the Supreme Court in *Brown v. Board of Education,* 347 U.S. 483 (1954), in which the Court held unconstitutional racial discrimination in public education. In the course of that opinion, we said the following:

> "We believe that the two opinions of the Supreme Court in the *Brown et al.* cases mean just what they say, namely that 'All provisions of federal, state, or local law requiring or permitting such discrimination (racial discrimination) must yield * * *' to the principle that such discrimination in public education is unconstitutional. * * *".

The decision of the Supreme Court in the *Brown* case relates solely to State action, since the Fourteenth Amendment on which the decision is based requires that "No State shall * * * deny to any person within its jurisdiction the equal protection of the law." That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. *Shelley v. Kraemer,* 334 U.S. 1

(1948). The applicability of the Supreme Court decision, therefore, depends on whether action of the Board of Governors of Washington College, in accepting or rejecting students for admission, can be considered State action and, therefore, subject to the prohibitions of the Fourteenth Amendment.

In 37 Opinions of the Attorney General, 152, the Attorney General in discussing the applicability of the Fourteenth Amendment to department stores in the City of Baltimore, said the following at pages 153-154:

> "It seems clear, therefore, that on the established authorities, department stores, which are privately owned and not agencies or instrumentalities of the State in any sense, may discriminate legally on whatever basis they determine is proper and that this does not constitute action on the part of the State. The conduct of private individuals or corporations is not ruled by the Fourteenth Amendment. We express no opinion as to the wisdom of the policy under discussion."

Two decisions of Federal courts in this Circuit set forth the standards for determining whether action by a nominally private organization can be considered State action. In *Kerr v. Enoch Pratt Free Library,* 149 F. 2d. 212 (4th Cir. 1945), a Negro applicant brought suit to compel the Board of Trustees of the Enoch Pratt Free Library to admit her to a training class conducted by that institution. She contended that the library, though in form a private corporation, was in fact an instrumentality of the State, and that the library policy which refused to admit Negroes to classes was a denial of the equal protection of the law under the Fourteenth Amendment. The library had been created by a gift from a private individual on condition that Baltimore City grant a $50,000 annuity for its maintenance. City Ordinances were enacted, accepting the gift and setting up a system whereby the City Solicitor should regularly inspect the library account books. Public funds represented approximately 99% of the total annual budget.

Disbursements by the Library Corporation were made through the City Bureau of Control and Accounts on vouchers submitted by the Trustees. Salary checks were issued by the City Payroll Offices and conformed to City salary schedules, and employees were included in the City Retirement System.

In an opinion by Judge Soper, the Fourth Circuit Court of Appeals reversed a holding by the District Court that the Pratt Library was a private organization, and held that since the library was acting under the authority of a statutory plan in order to perform a State function, it was an instrumentality of the State of Maryland, subject to constitutional restraint. The Court distinguished *Clark v. Maryland Institute,* 87 Md. 643 (1898), and *St. Mary's Industrial School v. Brown,* 45 Md. 310 (1876), both of which held the Maryland corporations there involved to be private corporations, on the grounds that in neither of these cases "was the corporation under examination completely owned and supported from its inception by the state as was the library corporation in the pending case."

Several years later, Judge Chesnut decided the case of *Norris v. Mayor and City Council of Baltimore,* 78 F. Supp. 451 (D.C., Md., 1948). In that case a young Negro brought suit against the Mayor and City Council of Baltimore and the Maryland Institute for an injunction to prohibit the Institute from excluding him solely because of his race. The Institute rented from the City for $500. annually a large building with an annual rental value of some $11,000. to $12,000. In addition, the City made annual payments to the Institute of some $25,000. under a contractual arrangement whereby each member of the City Council had authority to appoint one student to the Institute free of tuition charges. The State likewise made annual contributions in the amount of approximately $16,500., and for such contribution each member of the Maryland Senate had the right to appoint to said Institute, free of tuition charges, one student. The total amount of public funds received from both City and State was about 23% of the Institute's total

budget. Neither the budget nor disbursements by the Institute, including employees' salaries, were under the control of public officials.

Judge Chesnut, in his opinion, distinguished the facts in the *Norris* case from those in the *Kerr* case, noting that the Institute was not subject to public control with respect to the management of its affairs. Quoting at length from *Clark v. Maryland Institute* and *St. Mary's Industrial School v. Brown, supra,* the Court held that the Maryland Institute was a private organization, not subject to the constitutional limitations of the Fourteenth Amendment. No appeal was taken in the *Norris* case to the Fourth Circuit Court of Appeals.

Washington College was incorporated by Chapter 8 of the Acts of 1782. The object of the incorporation was to enable the Visitors of the Kent County School, located in what was then known as the Town of Chester, to enlarge and improve the school into a college or place of universal learning with a system of liberal education in the Arts and Sciences. The original number of Governors of the College was set by the Act at 24, including the 7 original incorporators who were Visitors of the Kent County School; 10 others, to be elected by subscribers and contributors to the College who resided in the various counties of the Eastern Shore of Maryland; and the remaining 7 to be chosen by the 17 thus selected. By Chapter 121 of the Acts of 1922, the number of Governors was increased to 25, 12 to be selected by the Alumni of the College, 12 to be appointed by the Governor of the State, and the 25th member to be the President of the College, who would be elected each year by the other 24. Chapter 44 of the Acts of 1953 further authorized the 25 members of the Board of Governors to elect an additional 12 members or any lesser number, in their discretion.

There is nothing in the provisions of the Code relating to Washington College which makes its Governors subject to State control. Sections 259-261 of Article 77 authorize the College to establish a department for the instruction of teachers for the State, and further authorize the issuance

of certificates permitting graduates of this department to teach in the public schools of Maryland under certain specified conditions. Section 262 provides that the Governors of the College shall supply free tuition and books to one indigent female student from each county of the Eastern Shore of Maryland, and Section 264 further requires the College to supply free tuition and free books to one male or female student from each and every county on the Western Shore of the State. Section 273 (1955 Supp.) provides that all scholarships to Washington College, with the exception of those awarded from five counties, shall be awarded by the State senator of the county concerned only after competitive examinations.

By Chapter 7 of the Acts of 1954, $250,000. was appropriated by the Legislature for building a gymnasium and field house at Washington College, and $25,000. was added to this amount by Chapter 266 of the Acts of 1955. Earlier acts had supplied funds from State loans for reducing indebtedness of the College ($10,000. by Chapter 464 of the Acts of 1922), and for library and laboratory construction and equipment ($100,000. by Chapter 369 of the Acts of 1924). In addition, the Legislature has each year made an annual appropriation to the College. By Chapter 339 of the Acts of 1955, the appropriation was $95,000., and was conditioned as follows:

> "In return for the allowance, Washington College shall furnish 38 scholarships covering free tuition, board, room rent and textbooks, and 25 covering free tuition and textbooks and 50 covering free tuition, as provided by Article 77, Sections 259-265, inclusive, of the 1951 Annotated Code. * * *".

We understand that for the 1955-1956 school year, 38 students out of a total enrollment of 467 received full State scholarships, and 29 students received State scholarships covering tuition and books alone. You have advised that the

State appropriation of $95,000. was 16.2% of the College's total budget for the current year, and that for the 1956-1957 school year a similar appropriation has been provided which will amount to 13.9% of the total budget. We further understand that the Board of Governors has full control over disbursements, including the salaries of all employees of the College.

Since State and private action are merely opposite ends of a continuous spectrum, each case must be determined on its own particular facts. Applying the principles enunciated in the cases discussed herein to the particular facts at hand, we reach the conclusion that Washington College is a private institution and is, therefore, not subject to the prohibitions of the Fourteenth Amendment. No such factual conclusion can be reached that the College was owned and supported, from its inception, by the State, as was a necessary prerequisite to the Court's decision in the *Kerr* case, *supra.* Nor does the fact that 12 of the authorized 37 members of the Board are appointed by the Governor of the State make Washington College a public corporation exercising State action. As the Court said in the *Norris* case, *supra,* at page 458:

> "The legal test between a private and a public corporation is whether the corporation is subject to control by public authority, state or municipal. To make a corporation public, its managers, trustees or directors must be not only appointed by public authority, but subject to its control."

The statutory provisions of the Code applicable to Washington College do not give the State or any of its agencies control over the policies of the institution. Both *Clark v. Maryland Institute* and the *Norris* case, *supra,* involved a determination as to whether or not the Maryland Institute, on similar facts as are involved here, was a public corporation exercising State power. Members of the City Council have the same right to appoint students to the Maryland

Institute as do State senators with respect to Washington College. Both the Maryland Court of Appeals and the United States District Court for the District of Maryland, however, in considering the facts relative to the Maryland Institute in those two cases, concluded that it was a private institution.

As in the *Norris* case, the proportion of public funds received annually by Washington College in relation to its total budget is small, even smaller than in the instance of the Maryland Institute. The mere donation by the Legislature of public funds to a private educational institution does not, in itself, convert a private corporation into a public one, particularly where, as here, the appropriation is in consideration of the granting of a specified number of scholarships and represents less than 20% of the private institution's budget. In *Johns Hopkins University v. Williams,* 199 Md. 382, 399 (1952), the Court of Appeals referred to a number of different occasions when the State had issued its bonds and given the proceeds to non-profit educational institutions. The fact that large amounts of public funds (listed by the Court at pages 399-40) were donated at various times to certain named schools and colleges throughout the State did not alter the Court's conclusion that these institutions, including specifically Washington College, were all "private, non-profit corporations".

We, therefore, conclude that such action as the Board of Governors may take with respect to the admission of an applicant who desires to enter Washington College is not State action. Accordingly, the recent decision of the Supreme Court in the case of *Brown v. Board of Education* is not applicable to Washington College.

We hereby overrule anything contained in 25 Opinions of the Attorney General, 488 (1940) which may be at variance with the conclusions reached herein. That Opinion, handed down before both the *Kerr* and the *Norris* decisions, held that Washington College was public to the extent that it

would be proper for the State Roads Commission to rent equipment to it. We did not therein consider the broad question of whether action by the Board of Governors of the College, in formulating admission policy, constituted State action within the meaning of the Fourteenth Amendment.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

CRIMINAL LAW

CRIMINAL LAW—BAIL BONDS—CORPORATIONS TO BE ELIGIBLE TO WRITE BAIL BONDS MUST COMPLY WITH MARYLAND LAWS REGULATING SURETY COMPANIES.

March 15, 1956.

Mr. Lawrence R. Mooney, Clerk,
Criminal Court of Baltimore.

You have asked us whether or not you have the authority to accept criminal bail recognizances from a Maryland corporation established specifically for the purpose of writing such criminal bail recognizances, although the corporation has not met the requirements of the laws of the State of Maryland regulating surety companies. Section J of Criminal Proceedings, Rule 903-0 of the Rules of the Supreme Bench of Baltimore City of January 1, 1947, reads as follows:

> "No corporate bond shall be accepted unless the corporation issuing same shall be authorized to carry on the surety business in Baltimore City, and shall have a resident agent upon whom service of process may be had, and give such assurance as the court may require that it will carry on the surety business in Baltimore City during the life of the bond."

No corporation is authorized to carry on the business of a surety in Baltimore City, or anywhere else within the geographical boundaries of the State of Maryland, unless it complies with Sections 196 through 198, inclusive, of Article 48A of the Annotated Code of Maryland (1951 Ed.), which read as follows:

> "196. (Corporate Surety Bonds Authorized.) Whenever any bond, undertaking, recognizance or other obligation is by law, or the charter, ordinances, rules or regulations of any municipality,

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

"197. (Qualification and Surplus.) Any company to be qualified to act as surety or guarantor in this State, or to transact any of the classes of business known as casualty, liability or workmen's compensation insurance, must comply with all the requirements of this Article applicable to insurance companies, except such requirements as may be inconsistent with those embraced within the sections under this sub-title, must be authorized under the laws of the state where incorporated and under its charter to do the classes of business for which a license is sought under the laws of

this State, and every such company authorized to write fidelity or surety bonds, or liability or workmen's compensation insurance, must have good, available assets of at least One Hundred and Twenty-five Thousand Dollars in excess of its capital stock, reserves and all other liabilities.

"198. (Certificate of Authority.) The Commissioner shall issue to any such company having complied with all the requirements of this Article applicable thereto and applying therefor a license or certificate setting forth that said company has qualified and is authorized for the ensuing year to do the classes of business in this State set forth in said certificate which said certificate shall be evidence of such qualification of such company to do the classes of business authorized by said certificate, and if so authorized therein of its authorization to become and be accepted as sole surety on all bonds, undertakings, recognizances and obligations required or permitted by law, or in the charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer, and of the solvency and credit of such company for all purposes, and of its sufficiency as such surety."

It is therefore our opinion that you may not accept a bail recognizance from a Maryland corporation, or from a foreign corporation, which has not complied with the laws of the State of Maryland which relate to surety companies, and that until such corporations do comply with the laws of the State, they are not qualified to act as sureties on any type of surety bonds.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

CRIMINAL LAW—SECOND OFFENDERS—SECOND OFFENDERS MUST BE SPECIFICALLY CHARGED AS SECOND OFFENDERS IN THE WARRANT. THE STATE MUST PROVE THE FORMER CONVICTION AS AN ELEMENT OF THE CRIME PRESENTLY CHARGED.

August 30, 1956.

Mr. Henry P. Turner,
State's Attorney for Talbot County.

We have your recent letter in which you ask whether or not a person can be convicted as a second offender under Section 171 of Article 66½ (operating under the influence of intoxicating liquor) if the warrant does not set out the former conviction and if at the trial of the case no evidence was offered of the prior conviction.

Article 21 of the Declaration of Rights of the Constitution of Maryland guarantees to every man the right in all criminal proceedings to be informed of the accusation made against him, and the information so guaranteed is not to be conveyed by word of mouth or by any other means than by a copy of the indictment or charge under which he is to be tried. He must be informed of the whole charge made and not a part only so that he may prepare to defend himself against the entire charge. He could not adequately defend himself against the entire charge unless he had full knowledge thereof, both of every element of the offense charged and of the penalty to which he may be subjected in case of conviction. The fact of prior conviction is an essential element of the crime charged under Section 171 of Article 66½, and must, therefore, be stated in the warrant. *Goeller v. State,* 119 Md. 61 at 63.

In *Hall v. State,* 121 Md. 577 at 580, the Court of Appeals said:

> "It is well settled that in such cases as this the indictment must set out the former conviction, and the jury by their verdict must find the traverser

> guilty of such second offense before the penalty provided for the second offense can be imposed. *Maguire v. State,* 47 Md. 485; *Goeller v. State,* 119 Md. 61. In *Maguire's Case, supra,* it was said: 'The law would seem to be well settled that if the party be proceeded against for a second or third offense under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offense, the fact thus relied on must be averred in the indictment; for the settled rule is that the indictment must contain an averment of every fact essential to justify the punishment inflicted. *Rex v. Allen,* Russ & R., 513; *Regina v. Page,* 9 C. & P. 756; *Reg. v. Willis,* L. R. 1 C. C. 363; *Plumbly v. Conn.,* 2 Met. 413; 3 *Whart.*, C. L., sec. 3417; 1 *Bish.* C. L., secs. 961, 963. * * * ' ".

See also *Maguire v. State,* 47 Md. 485.

It is also our opinion that the prior conviction of the accused must be offered into evidence at the time of the trial of the case and that the trial court may not look for this evidence following the trial of the case. In *Hall v. State, supra,* the Court said at Page 580:

> "And this averment of a prior conviction can only be sustained by the production of the record; or a duly authenticated copy of it, sustained by proof of the identity of the person on trial with the one described in the former indictment. *Reg. v. Clark,* 20 E. L. & Eq. 582; 1 *Bish.* C. L., sec. 963; 3 *Whart.* C. L. sec. 3417."

In *Maguire v. State, supra,* the Court said at Page 498:

> "The authorities are clear to the effect that in order to justify a sentence as for a second offense, it must appear by the verdict that the jury have found the party guilty of such second offense. *Thomas' Case,* 22 Gratt. 912; 3 *Whart.* C. L. sec. 3418; 1 Bishop's C. L. secs. 961, 963."

The same would be true in the case of a trial before the court as before the jury. The former conviction is just as much an essential element of the crime as is the evidence of driving under the influence, and it is only after proof of a former conviction that the more severe penalty is imposed by the statute. All the essential elements of a crime must be offered into evidence at the trial of the case and the court may not look outside of the record to find such evidence.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

DEPARTMENT OF CORRECTION

DEPARTMENT OF CORRECTION—PRISONER'S FUND AND WELFARE FUND—POWERS OF INVESTMENT—BOARD OF CORRECTION MAY NOT INVEST FUNDS HELD FOR PRISONERS WITHOUT STATUTORY AUTHORITY.

March 22, 1956.

Mr. Enos S. Stockbridge, Chairman,
Board of Correction.

You have requested our opinion as to the proposed investment by the Department of Correction of cash amounts maintained in two different Funds at the various penal institutions under the Department's control.

We understand that the "Prisoners' Fund" represents accumulated earnings of inmates at such institutions plus any amounts that inmates may have turned over to the authorities of the institution to be held for them while under confinement. Each inmate has an account representing the amount that he owns in this Fund, and his account is charged with sums paid out at his request for purchases of cigarettes, candy and other incidentals. On discharge, as the result of expiration of sentence or parole, each inmate is paid the amount which the books of the Fund show is credited to him.

The "Welfare Fund" represents sums derived principally from the operation of the commissaries in each institution. Amounts deposited in the Welfare Fund are used to pay for movie rentals, athletic equipment and other benefits for the inmates.

As of June 30, 1955, we understand, the aggregate balances of both of these Funds in all the institutions under the Department's jurisdiction amounted to $194,301.53. You ask (1) whether there is any legal objection to the Board's undertaking to invest a portion of these Funds in United States Government Bonds or other securities of a

conservative nature selected by the Board; (2) whether, in the event the market value of such investments declined at a future date, the Department or the individual members of the Board would be subject to personal liability for any loss in the value of the principal. You point out that while there is a more or less constant turnover of these Funds, the running balances on hand are quite substantial. In the case of a long-term inmate, interest on funds credited to the account of such an individual would be a material item, even at a low rate. You state that whatever interest might be earned by way of such investment would be allocated among the funds in the various institutions and pro rata among the inmates having credits in a particular Fund.

We have made a careful study of the provisions of Article 27 of the Annotated Code of Maryland (1951 Ed.) and can find nothing in Sections 754-798, which are the general provisions defining the powers and duties of the Department of Correction, relating directly to the questions which you have raised. Section 757 grants the Board of Correction full power and control over the Maryland Penitentiary and the Maryland House of Correction. It further gives the Board "any and all incidental powers and authority appropriate and convenient to enable the said Board to fully discharge the powers of management, control, supervision, visitation and inquisition *conferred upon them by this sub-title*". (Emphasis added.) Section 758 grants to the Board of Correction the power to make any and all contracts "appropriate to the needs of said institutions" or to the discharge of any of the official duties of the Board. Section 761 relates to the Board's powers with respect to the State Reformatory for Males, and Section 765 contains similar provisions as to the Maryland State Reformatory for Women.

Section 769 contains several provisions which relate indirectly to the questions which you have raised. Section 769(1) provides that articles of handicraft made by the inmates of penal institutions may be sold at retail for the account of the inmates under such terms, conditions, rules

and regulations as may be prescribed by the Board of Correction. Section 769(5) (a) directs the Board to provide, whenever it deems expedient, such form of labor as will offer an opportunity to prisoners to earn a surplus over the cost of their maintenance to the State, and further directs the Board to provide, in its discretion, for the payment of any part of such surplus so earned to the prisoner earning the same, or to such person or persons as he may direct. Under Section 769(5) (c), the Board is granted the power and authority necessary for the proper performance of any duty or function devolving upon or required of the Board under Section 769.

The statute, therefore, recognizes in Section 769 that prisoners will earn money while they are inmates at the various institutions, and the Board is directed to provide for the payment of such money to the inmates who have earned same. The statute is silent, however, as to the investment by the Board of funds belonging to prisoners or of any other funds.

The rules adopted by the Board of Correction for the various penal institutions likewise do not contain any provisions which deal with the power and authority of the Board with respect to the investment of these Funds. These rules were originally adopted on February 5, 1944, pursuant to Section 775 of Article 27, which gives the Board the power to make such rules and regulations not inconsistent with law for the maintenance, discipline and conduct of institutions, prisoners, officials and employees under its supervision or control as might be "necessary and convenient for the proper administration of the power and authority" conferred upon the Board by the statute. The regulations relating to "Duties of Financial or Administrative Officer", on page 12, provide as follows:

> "* * * He shall also receive and be responsible for the safe keeping of all valuables belonging to the inmates. He shall also receive and remit to the Treasurer of the Board of Correction all monies

> belonging to inmates, which shall be subject to disbursement by them during confinement upon orders as approved by the Board of Correction. * * * He shall keep accurate records of the accounts of the inmates and supply all such statements thereof as may be directed by the Board of Correction or the Warden or Superintendent."

A careful reading of the applicable statute and regulations thus discloses no provision authorizing the Board of Correction or any other prison official to exercise investment powers with respect to funds in their possession or control which belong to prisoners or which are to be applied to their benefit. Although the Board, under Section 757 quoted hereinabove, has certain incidental powers, such powers are limited solely to those appropriate and convenient to enable the Board to discharge the powers of management, control and supervision conferred upon it by statute. The statute, by implication, does permit the Board to maintain accounts for prisoners, but there is no suggestion anywhere that the Board shall have the right to make such investments of prisoners' moneys as it may deem appropriate and be relieved from liability for any loss which might accrue.

In our opinion, the Board of Correction, in holding the Prisoners' Fund and the Welfare Fund, acts solely as a custodian. As such custodian, it is charged with the duty and responsibility of protecting these Funds while entrusted to the Board's care. There is no trust relationship, either expressed or implied, between inmates and the Board with respect to such Funds, and the Board is under no duty to invest these funds for the purpose of realization. If any investments were made and benefits resulted therefrom, the particular accounts would of course be the beneficiaries thereof. On the other hand, if losses resulted from such investments even though the Board restricted its investments to Government Bonds or other approved securities, a court might well hold the individual members of the Board liable for such loss on the theory that they had ex-

ceeded the authority conferred upon them by statute. It is recognized that a prison official may be civilly liable to an inmate where he is chargeable with non-performance or negligent performance of duties imposed upon him by law. 72 C.J.S., *Prisons,* Section 12. Similarly, if a prison official undertakes without statutory authority to assume the power to deal with moneys belonging to prisoners and, as a result of such assumption of powers, a loss is sustained, it would appear that such official would be civilly liable to an inmate.

As a practical matter, if the investments were confined to Government Bonds and other securities of a conservative nature, losses resulting from a depreciation in the value of such securities would probably not ensue, for if such losses were suffered, they would probably be minor in nature and could be offset against accrued investment income. However, even Government securities are subject to fluctuation and no one can predict what the value of even this type of investment will be at some date in the future. If the principle is established that the Board of Correction, in the absence of an express statutory authorization, has investment powers in so far as these Funds are concerned, a future Board might decide to exercise a broader discretion than is contemplated at present and investments in common stocks and other more volatile securities might be undertaken.

We appreciate the fact that the purpose of any investment program would be to enhance the value of moneys entrusted to the Board's care and thus benefit the prisoners themselves. We suggest, however, that if the Board feels such investment powers are necessary to the proper administration of these Funds, it apply to the Legislature to have the law amended so as expressly to confer upon the Board the power to make investments of certain specified types and, further, to exempt the members of the Board from any personal liability for such investments; providing that such investments were of the type approved by the Legislature. In such event, the members of the Board would be

protected from civil liability in the event that any investments made by them of prisoners' moneys resulted in losses. As the law now stands, we do not believe the Board may undertake to assume the responsibility of making such investments without incurring the risk of civil suit, even though the objectives of such a program are indeed worthy ones.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

DEPARTMENT OF GEOLOGY, MINES AND WATER RESOURCES

GEOLOGY, MINES AND WATER RESOURCES—STATE PERMIT REQUIRED UNDER SECTION 669(A) OF ARTICLE 66C FOR RESERVOIR IMPOUNDING MORE THAN MILLION GALLONS OF WATER.

June 8, 1956.

Dr. Joseph T. Singewald, Jr., Director
Dept. of Geology, Mines and
Water Resources.

We have your recent letter requesting our opinion in connection with the proper interpretation of a portion of Section 669 of Article 66C of the Annotated Code of Maryland (1951 Ed.). Section 669(a) provides as follows:

> "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."

We understand that the District Engineer of the Corps of Engineers of the United States Army, Baltimore District, contends that a reservoir impounding more than one million gallons of water, is not subject to control by the Water Resources Commission under this statute if the reservoir is created by a dam of less than 10 feet in height. In our opinion, the statute is intended to control a reservoir which impounds more than a million gallons of water, whatever may be the height of the dam which creates the reservoir.

The provisions of the statute apply to three categories: (1) reservoir, (2) dam, (3) waterway obstruction. Although a dam may create a reservoir, a dam and a reservoir are two entirely different things. According to Webster's International Dictionary (2d Ed.), the usual and ordinary meaning of a dam is: "a barrier to prevent the flow of water"; and of a reservoir: "a place where water is collected and kept for use when wanted".

Therefore, whether or not a reservoir is created by a dam, it is subject to the provisions of Section 669(a) unless exempted under the last sentence thereof. The first portion of the last sentence exempts dams or waterway obstructions which are 10 feet or less in height above the elevation of the stream bed or waterway. This exemption applies in no way to a reservoir, but is intended to control dams or any other structures obstructing a waterway. The second part of this sentence applies solely to a reservoir and exempts any reservoir with a storage capacity of less than one million gallons.

In our opinion, if a reservoir has a storage capacity of a million gallons or more, the necessary permit must be obtained whether or not such reservoir was created by a dam or waterway obstruction of 10 feet or less in height. The Legislature clearly intended that where a quantity of water of a million gallons or more was impounded, the

Water Resources Commission should possess the powers of control specified in this Section, in view of the fact that the public safety and welfare are obviously affected by the impounding in one location of large quantities of water.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

DEPARTMENT OF PUBLIC WELFARE—CHRONIC DISEASE HOSPITALS—WELFARE BOARDS AND NOT THE COUNTY COMMISSIONERS ARE TO DETERMINE THE AMOUNT TO BE PAID BY A PATIENT OR THE RELATIVE OF A PATIENT IN A STATE CHRONIC DISEASE HOSPITAL—COUNTY TREASURERS ARE RESPONSIBLE TO THE STATE FOR AMOUNT SET BY THE WELFARE BOARDS.

February 7, 1956.

Mr. Thomas J. S. Waxter, Director,
State Department of Public Welfare.

We have your recent letters in which you ask for our interpretation of Sections 559 through 564 of Article 43 of the Annotated Code of Maryland (1951 Edition), which are the laws that govern chronic disease hospitals in the State of Maryland. You inform us that the County Commissioners of Wicomico County and the County Commissioners of Prince George's County have passed orders reducing the amount to be paid by relatives for the maintenance and support of patients in chronic disease hospitals of the State, even though the amount to be paid had been determined and specified by the County Welfare Boards of those Counties in accordance with the authority granted to them by Section 562(b) of Article 43.

Sub-sections (a), (b) and (c) of Section 562 of Article 43 of the Code read as follows:

> "(a) For the purpose of determining the eligibility of any person for admission to any chronic hospital and infirmary established under the provisions of this sub-title, it shall be the duty of the County Welfare Board or the Department of Welfare of Baltimore City, as the case may be, to investigate the financial condition of such person and also the financial condition of any relative or other person who may be legally chargeable with his or

her maintenance and support, in order to determine, in each case, the ability of any such person, or of his or her relatives or other persons legally chargeable with his or her maintenance and support, to make payment, in whole or in part, for the maintenance and support of such person while an inmate of such hospital and infirmary. In making such investigation, the County Welfare Board and the Department of Welfare of Baltimore City shall require reports or statements to be made by such person, relatives or other person upon such forms as may be prepared by said County Welfare Board and Department of Welfare of Baltimore City, as the case may be.

"(b) If as a result of such investigation, the County Welfare Board or the Department of Welfare of Baltimore City shall determine that such person, his or her relatives or other persons shall be required to pay for his or her maintenance or support or a part thereof, it shall specify the amount of such payments to be made, which shall not exceed the average per diem cost of maintaining a patient in such hospital, and the times when the same are to be made. The County Welfare Board and the Department of Welfare of Baltimore City shall have the power to require the relatives of any such person or others legally chargeable with his or her maintenance and support, to enter into appropriate and binding agreements with respect to the making of such payments, and may from time to time modify or change the terms thereof, as the circumstances may justify.

"(c) All payments required to be made under the provisions of this section shall be made to and collected by the County Treasurer or Treasurer of Baltimore City, as the case may be, who shall

account for same. Any amounts so collected shall first be applied against the Seventy-five Cents ($.75) per day which the County or Baltimore City are required to pay. Any amount collected over and above Seventy-five Cents ($.75) per day from or on account of any patient shall be paid by the County or Baltimore City to the State Treasurer."

We believe that the law relating to the chronic disease hospitals of this State clearly designates the County Welfare Board, or the Department of Welfare of Baltimore City, as the agency to determine and specify the amount of payments to be made by a patient or by the relatives of a patient for the maintenance and support of that patient while in one of the chronic disease hospitals of this State. There is nothing in the law that gives the Board of County Commissioners for any County any authority to set, modify or alter the amount to be paid by a patient or the relatives of a patient for the maintenance and support of the patient while in a chronic disease hospital, but the law does state that the amount to be so paid is to be determined and specified by the County Welfare Board. We cannot read into the law or add to it something that is not there. See *Rogan v. B. & O. R.R.*, 188 Md. 44. We are, therefore, of the opinion that the County Commissioners of Wicomico County and Prince George's County had no authority to pass any such orders as they did, and that those orders are invalid and of no effect.

Section 562(c) requires the County Treasurer or the Treasurer of Baltimore City to collect all payments required by their respective Welfare Boards of a patient or of relatives of a patient, and after the repayment to the County of the Seventy-five Cents ($.75) per diem per patient which the County is required to pay to the State under Section 563 of Article 43, to account for and pay over the entire balance collected to the State Treasurer. The Treasurer of the County is obligated to the State to collect from

the patient or the relatives of the patient the full amount specified by the Welfare Board of his County, and it is our opinion that the State may hold the Treasurer responsible for the full amount if he fails to collect the same.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Assistant Attorney General.*

DEPARTMENT OF PAROLE AND PROBATION—PAROLE OFFICER'S RIGHT TO CARRY A DEADLY WEAPON IN DISCHARGE OF HIS DUTIES.

March 28, 1956.

Mr. Wallace Reidt, Director,
Department of Parole and Probation.

We have your recent letter requesting our opinion concerning the right of officer personnel of the Department of Parole and Probation to carry weapons in the discharge of their official duties.

The powers and duties of employees of the Department of Parole and Probation are derived from Sections 91-108 of Article 41 of the Annotated Code of Maryland (1951 Ed. and 1955 Supp.). Under Section 91G, any Parole Officer, to whom a warrant for the retaking of an alleged parole violator shall be delivered, is authorized and required to execute such warrant by taking such parolee and returning him to the penal or correctional institution from which he was paroled, in the same manner as a sheriff or a police officer authorized to serve criminal process. You point out that instances may arise when a Parole Officer may be required, as a reasonable precaution against apprehended danger, to carry weapons. You inquire whether the law permits such an officer to carry a weapon in the discharge of his official duties.

Section 44(a) of Article 27 of the Code forbids the carrying of dangerous or deadly weapons of any kind concealed upon or about the person. Sub-section (b) contains exceptions in favor of the following persons:

> (1) "an officer of this State or of any county or city therein who is entitled or required to carry such weapon as part of his official equipment";

(2) "any conservator of the peace who is entitled or required to carry such weapon as part of his official equipment";

(3) "any officer or conservator of some other State temporarily sojourning in this State";

(4) "any special agent of a railway";

(5) "any person who shall carry such weapon as a reasonable precaution against apprehended danger, but the tribunal before which any case arising under the provisions of this section may be tried, shall have the right to judge of the reasonableness of the carrying of any such weapon, and the proper occasion therefor, under the evidence in the case."

It would appear that a Parole Officer does not come within any one of the first four exceptions above noted. Such an officer, under applicable sections of Article 41, is not entitled or required to carry a weapon as a part of his official equipment. Under the fifth exception, each case must be determined by its particular circumstances and the statute leaves to the court the right to judge the reasonableness of the carrying of a weapon and the proper occasion therefor under the evidence in each particular case.

In 5 Opinions of the Attorney General, 95 (1920), this office, in ruling that postmen and drivers employed by the United States Government were permitted under this subsection to carry firearms, said the following, at page 96:

> "Undoubtedly, the protection of the mails is sufficient occasion for the carrying of concealed weapons. It is clearly to the interest of the State of Maryland that the mails transmitted to its citizens shall be protected from robbery. Under these circumstances, I am of the opinion that postmen and drivers in the employ of the United States Government are permitted to carry firearms for the protection of the mails, especially after nightfall and before dawn. The Courts of Maryland will undoubtedly hold that such Government officials

> may carry concealed weapons. However, this statement of the law must be understood to limit the carrying of weapons to men who are actually engaged in collecting or delivering mail. When such officials are in the State of Maryland on other than these duties, they will not be permitted to carry concealed weapons.

In 2 Opinions of the Attorney General, 67-68 (1917), it was ruled that it was reasonable for a Deputy Game Warden to carry concealed weapons while in the discharge of his duties, a ruling which was reaffirmed in 7 Opinions of the Attorney General, 75 (1922).

While ordinarily a parole officer concerns himself primarily with the rehabilitation of a parolee, it must be recognized that violations of parole do occur and that, as a result of his close contacts with a parolee, a parole officer might, in certain instances, be in a position of such particular danger as to require possession of a weapon. For example, such an officer might wish to carry a weapon in instances where a warrant had been delivered to him under Section 91G of Article 41 for the retaking of a parole violator for return to a penal or correctional institution.

Therefore, we believe it reasonable to suppose that any court called upon to hear a matter involving a parole officer's carrying of a concealed weapon would find the action justified within the meaning of Section 44(b) of Article 27, as a reasonable precaution against apprehended danger, assuming of course, that such officer was engaged in the official discharge of his duties. Each such officer who avails himself of this right should be advised that his authority to carry a concealed weapon is limited to the times and places required by his official duties, and then only as a reasonable precaution against apprehended danger, and that the question of the reasonableness of his having a weapon concealed about his person must ultimately be determined by a court in the event of controversy.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

EDUCATION

EDUCATION—PAYMENTS TO CRITIC TEACHERS BY STATE BOARD OF EDUCATION—SAME SYSTEM SHOULD BE APPLIED IN BALTIMORE CITY AS IN COUNTIES.

January 30, 1956.

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

From recent correspondence, we understand that the Superintendent of the Department of Education of Baltimore City has now decided to discontinue as of September 1, 1956, all supplementary payments by Baltimore City to "critic teachers" and to permit the State Teachers Colleges involved to have a more direct voice in the selection and assignment of such teachers, and a closer supervisory contact over them than now exists. As we understand it, a "critic teacher" is one who, in addition to his or her regular teaching duties in the public schools, undertakes to assume the supervision of student teachers studying at one of the State Teachers Colleges. The student teacher, after a period of on-the-scene observation, is eventually permitted to take over classes of the critic teacher under the latter's direct supervision. It has been the practice of the State Board of Education to make annual supplemental payments to such individuals over and above their regular salary, in view of the assumption of these additional duties.

Heretofore, payments to critic teachers in Baltimore City have been made from City funds and have been included in the City Budget; in fact, the position of critic teacher was a higher classification in the promotional system within the City. Under such circumstances, State funds have never heretofore been used to make payments to such individuals in Baltimore City. You now ask whether the State Board of Education should, in view of the change in the system in Baltimore City, undertake to pay City critic teachers in the same manner as it has paid those in the counties in the past.

We can find no provision of law, statutory or otherwise, dealing specifically with such supplemental payments, and it would appear that the payments are within the discretion of the State Superintendent of Schools and the State Board of Education, in pursuance of their general supervisory powers over the State Teachers Colleges under Sections 160 and 161 of Article 77 of the Annotated Code of Maryland (1951 Ed.). In our opinion, even though such payments are discretionary, the State Board of Education cannot discriminate between different areas of the State in disbursing these funds. In other words, it is incumbent upon the Board to make payments to critic teachers in Baltimore City in the same manner as in the various counties, assuming, of course, that the system of payment, selection and assignment of the teachers in effect in Baltimore City is the same as in the counties.

Inasmuch as the Deputy Superintendent of Education for Baltimore City advises that as of September 1, 1956, the City will no longer pay its critic teachers and will permit the payment, selection and assignment of critic teachers to be controlled by the respective colleges, as is the procedure in the counties, the State Board of Education should undertake to treat critic teachers for Baltimore City in the same manner as in the counties. Any other result would amount to an unwarranted discrimination between geographical areas within the State.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

EDUCATION—SALARIES OF SUBSTITUTE TEACHERS MAY NOT BE PAID FROM THE EQUALIZATION FUND.

July 3, 1956.

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

You have requested our opinion in connection with inquiries which have been directed to you from various County Boards of Education concerning the availability of the Equalization Fund created under Section 209(b) of Article 77 of the Annotated Code of Maryland (1955 Supp.), for payment of salaries of substitute teachers.

The language of Section 209(b) applicable in this instance is as follows:

> "The Comptroller shall charge against and pay as hereinbefore or hereinafter provided from the General State School Fund, * * * such special appropriations to be known as an Equalization Fund, as may from time to time, be made by budget bill or supplementary appropriation bill, to the county boards of education of certain counties and to the Mayor and City Council of the City of Baltimore, to enable them to pay the minimum salaries prescribed in this Article for high school and elementary school teachers and the necessary costs of transporting pupils to public schools when such transportation is approved by the State Superintendent of Schools."

Section 6 of By-Law 56, adopted by the State Board of Education, reads, in part, as follows:

> "Every regularly employed teacher who shall submit to the county board of education satisfactory proof of illness requiring absence from school shall be paid the full salary up to ten days for the days absent from school. At the discretion of the county board of education, full or partial salary

for a longer period of absence on account of illness may be paid. * * *".

You have advised us that the general practice throughout the State is for the County Boards to call on substitute teachers to replace regularly employed teachers who are absent due to illness or for other reasons. Since the State Board of Education requires, by virtue of Section 6 of By-Law 56, that regular teachers must be paid their full salary up to ten days during absences from school due to illness, additional funds, other than those appropriated for payment of the salaries of regular teachers, must be made available by the County Boards for the payment of substitute teachers.

The question that arises is whether salaries of substitute teachers may be paid from the Equalization Fund provided for under Section 209(b) in the same manner as minimum salaries for regular teachers. You state that representatives of various County Boards contend that, since the State Board of Education requires the payment of regular teachers' salaries up to ten days for absence from school due to illness, and since substitute teachers must be engaged to conduct classes during such absences, salaries for substitute teachers are mandatory legal requirements which qualify for payment from the Equalization Fund.

In creating the Equalization Fund, the General Assembly, in Section 209(b), limited payments therefrom to County Boards of Education to the following two categories: (1) for the payment of minimum salaries prescribed in Article 77 for high school and elementary school teachers, and (2) for the payment of the necessary costs of transporting pupils to public schools when such transportation is approved by the State Superintendent of Schools. Minimum salaries for teachers are specifically set forth in Section 102 of Article 77, but such minimums apply only to teachers "regularly employed in public schools in the counties and in Baltimore City". Nowhere in Article 77 is there any provision for a minimum or other salary of a substitute teacher, nor has the State Board of Education attempted

to require any uniform salary scale for substitute teachers. We understand that the rate of payments to such teachers varies considerably throughout the State.

It is our opinion that, if the Legislature had intended salaries for substitute teachers to be in the same category as minimum salaries for regular teachers so as to qualify for payments from the Equalization Fund, it would have so specified in Section 209(b). The applicable language of that Section is clear and unambiguous and does not permit the payment from the General School Fund of other than minimum salaries prescribed in Article 77 and certain approved transportation costs.

It has been pointed out to you by representatives of various County Boards that payments to substitute teachers have, in recent years, come to represent considerable sums of money, and that to satisfy the original purpose of the Equalization Fund, payments to County Boards for substitute teachers should be made from the Fund in the same manner as payments for regular teachers are made today. The Equalization Fund was created to enable the various Counties to comply with the State-wide requirements as to minimum teachers' salaries without unduly burdening the taxpayers of a particular County. Since the aggregate value of assessable property varies materially in the different Counties in the State, Counties with a small amount of assessable property would, without the Equalization Fund, be compelled to fix high tax rates to meet the mandatory State requirements as to teachers' salaries. In the case of salaries for substitute teachers, there are no such mandatory requirements making necessary a high tax rate in certain counties. The fixing of salary payments for substitute teachers is within the discretion of the County Board, which may take into consideration local factors in deciding upon the proper amount to be paid.

The mere fact that the State Board of Education, pursuant to the power conferred upon it by Section 16 of Article 77, has enacted Section 6 of By-Law 56, for the purpose of administering the public school system, does not

alter our conclusion. Despite this By-Law, the amount of salary to be paid to substitute teachers is still within the discretion of each County Board. If salaries for substitute teachers qualified for payment from the Equalization Fund, there would be no standard for determining the amounts of such payments to be made to respective County Boards, in view of the differences in rates of pay for substitute teachers which exist throughout the State. In the case of regular teachers, however, there is a set standard, namely the minimum salaries prescribed in Section 102 of Article 77.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

EDUCATION—MATTERS UNDER CONTROL OF COUNTY BOARD OF EDUCATION—COUNTY COUNCIL MAY NOT SELECT SITE FOR NEW SCHOOL NOR DETERMINE ALLOCATION OF SALARY INCREASES AMONG TEACHERS, PRINCIPALS AND SUPERVISORS.

August 23, 1956.

Dr. Thomas G. Pullen, Jr.,
State Superintendent of Schools,
State Department of Education.

You have forwarded to us a recent letter which you received from the Superintendent of the Board of Education of Montgomery County, and have requested our opinion in connection with the questions raised by him.

We understand that the Montgomery County Council at its meeting on June 22, 1956, at which it considered the budget of the Board of Education of Montgomery County, passed the following resolution:

> "BE IT RESOLVED by the County Council for Montgomery County, Maryland, that the following is declared to be an expression as to the intent of the Council in adopting the budget and appropriating funds for the Board of Education:
>
> (1) That the Seven Locks Elementary School not be constructed at the proposed site and that a school in the Bradley Hills-Seven Locks area be constructed at another site as the proposed Seven Locks site, in the opinion of the County Council, is inadequate as to access roads and water and sewer facilities.
>
> (2) That the amount appropriated for salaries in the Division of Instructional Services provides for a six per cent increase in the salaries of all classroom teachers over and above their normal increment based on the pay scale in effect in fiscal 1955-56 and a four per cent increase in the salaries

> of all supervisors and principals over and above their normal increment based on the pay scale in effect in fiscal 1955-56."

You and the Superintendent have raised the following questions:

1. Can the Montgomery County Council select the site for a school?

2. Can the Montgomery County Council fix teachers' salaries?

Section 3 of Article 77 of the Annotated Code of Maryland (1951 Ed.) provides that educational matters affecting a county "shall be under the control of a County Board of Education". Chapter 4 of Article 77 (embracing several Sections) deals with the specific powers and responsibilities of the various County Boards of Education. Section 48 authorizes and empowers the County Boards of Education to maintain a uniform and effective system of public schools throughout their respective counties. Under Section 53(b) they are authorized and empowered, with the approval of the State Superintendent of Schools, to purchase grounds, school sites or buildings, or to sell the same.

Section 36 provides in part as follows:

> "36. The State superintendent of schools shall, subject to the rules and regulations of the State Board of education, pass upon all proposals for the purchase of ground, school sites or buildings, or for the sale of the same, and also upon all plans and specifications for the remodeling of old school buildings or the construction of new school buildings, costing three hundred dollars ($300) or more.* * *."

We understand that the proposed site chosen by the Superintendent of the Board of Education of Montgomery County has been approved by you but that the County Council, as noted above, "expressed its intent" that another site be chosen, because of the alleged inadequacy of the site

chosen by the Superintendent. Nowhere in the Public School Laws of Maryland is there any indication that the selection of a site for a proposed school is in any way the concern of the County Council or other county legislative or administrative body. The County Board of Education and the State Superintendent of Schools are the proper agencies for determining the location of public schools within the State, and such matters are beyond the authority of the county's legislative body. However, it is likewise clear that, once a site has been selected, the decision as to the issuance of bonds or other appropriation of funds for the school building is within the exclusive discretion of the County Council.

As the Court of Appeals said when it construed the school laws in *Coddington v. Helbig*, 195 Md. 330 (1950), at Page 336:

> "Concerning the alleged abandonment of the four high schools, it is sufficient to say that the County Commissioners have no authority to abandon any high school. Except where otherwise provided by statute, educational matters affecting a County are under the control of the County Board of Education. Code 1939, art. 77, sec. 3. Moreover, the Act of 1947, now under consideration, provides that all plans for the erection of new school buildings shall be subject to the approval of the State Superintendent of Schools. There is also a provision in the State Public Education Law that the State Superintendent of Schools shall, subject to the rules and regulations of the State Board of Education, pass upon all proposals for the purchase of grounds, school sites or buildings. Code 1939, art. 77, sec. 30."

Minimum teachers' salaries are provided for by Section 102 of Article 77 (1956 Supp.). Subsection (a) provides that no teacher regularly employed in public schools in the counties and in Baltimore City shall receive salaries less

than the amount provided for in the schedules set forth in other subsections. Subsection (i) deals with payments in excess of the schedules, as follows:

> "(i) *Payments in excess of schedules.*—The county board of education of any county and the board of school commissioners of Baltimore City may, in its discretion, pay to teachers and principals annual salaries in excess of the salaries provided for in this section."

It is clear, therefore, that the amount of salary increases to be paid teachers in the various counties is solely within the discretion of the County Board of Education. Under Section 65 of Article 77, the County Board of Education is required to prepare an itemized and detailed school budget, including "the amount that will be needed to be raised by local taxation". The Board of County Commissioners is "authorized, empowered, directed and required" to levy and collect such tax upon the assessable property of the County as will produce the amount requested to be raised by local taxation in the annual budget of the County Board of Education. The statute further provides as follows:

> "* * * Provided, also, that if the total amount requested for any one school year by the county board of education to be raised by local taxation exceeds a tax levied and collected of 40 Cents on each One Hundred Dollars ($100) of the assessable property in the county and such additional tax is not approved and sanctioned by the board of county commissioners, the county commissioners shall indicate in writing what item or items of the annual budget of the county board of education have been denied in whole or in part, and the reason for the denial in whole or in part of the respective items. * * * ."

The above statute was construed by the Court of Appeals in *Board of Education of Prince George's County v. County Commissioners of Prince George's County,* 131 Md. 658

(1917). In that case, the Board of Education had submitted a budget requesting that an aggregate amount of some $116,000.00 be levied and collected upon the assessable property of the County. The Board of Education appropriated merely some $95,000.00 for the scholastic year in question, without designating the items in the budget which had been denied. The Court of Appeals upheld the right of the Board of Education to secure a writ of mandamus against the County Commissioners requiring them to indicate in writing what items in the budget had been denied and for what reasons. The Court said at Pages 667-668:

> "Having declined to approve and sanction the amount asked for by the Board of Education, it became encumbent upon the County Commissioners, under the expressed terms of the statute, to indicate in writing what items of the budget were denied in whole or in part and their reasons for such denial, and such statement on the part of the County Commissioners is made necessary for the reason that the Board of Education is required by the statute to expend all taxes received by it in accordance with the items of their budget.
>
> "The statute leaves to the discretion of the County Commissioners the allowance of the amount asked for in excess of 40 cents on each one hundred dollars of assessable property in the county, and that discretion cannot be controlled by the courts. But the law imposes upon them the *ministerial duty,* when they do not allow the amount asked for in the budget in excess of 40 cents on each one hundred dollars of assessable property, of indicating in writing what items of the budget are denied and their reasons for such denial. This provision can hardly be said to be directory only. It was designed, not only to guard against an arbitrary refusal of the County Commissioners to levy the amount deemed necessary by the Board of Education for public school purposes, but also to

> advise the County Board of Education of the items to which it is required to limit the expenditure of the school tax. *Worcester Co. v. School Comr's.*, 113 Md. 305 and *Foote v. Harrington*, 129 Md. 123."

In our opinion, the Montgomery County Council, which is the legislative body of Montgomery County exercising the powers conferred in most counties on a Board of County Commissioners, may not, in approving a recommended appropriation for salary increases, direct what portion of such appropriation shall be allocated to teachers and what portion to principals and supervisors. A County Council or Board of County Commissioners has the duty under Section 102(j) to levy sufficient funds to meet the schedule of minimum salaries contained in Section 102. In the event that an appropriation requested to provide for an increase in salaries over the statutory minimum exceeds 40 cents on each $100.00 of assessable property in the County, a County Council or County Commissioners may disapprove portions of the budget submitted, but must indicate in writing what item or items of the budget have been denied and the reason therefor.

The responsibility of a County Council as to the appropriation of the necessary funds for providing increases in teachers' salaries does not permit it to determine the allocation of such funds among teachers and supervisory personnel. The latter function has been placed by the Legislature under the control of the various County Boards of Education.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

ELECTIONS

ELECTION SUPERVISORS—COUNTY COMMISSIONERS—VOTING MACHINE PURCHASE — BIDDING — LOW BID — UNDER FACTS GIVEN, LOWEST BID MAY BE REJECTED IF, IN THE EXERCISE OF AN HONEST DISCRETION, ANOTHER BID SEEMS TO BE BETTER FOR THE OBJECT TO BE ACCOMPLISHED.

January 6, 1956.

Board of Election Supervisors and
Board of County Commissioners
of Garrett County.

Your recent letters point out that the use of voting machines was made mandatory throughout the State, beginning with the regular general election in the year 1956. You further state that your respective bodies have differed on the advisability of selecting machine A, or machine B. From your statement, we understand that the basic issue is whether the lower of two bids must be accepted, and we will, therefore, confine this opinion to that issue.

43 Am. Jur. Public Works and Contracts, Sec. 41 states in part:

> "Public officers in awarding contracts for the construction of public works, the purchase or supplying of materials, etc., perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts, in the absence of fraud or a palpable abuse of that discretion ordinarily will not interfere with their decisions as to the details of entering into a contract, or the acceptance of bids therefor, so long as they conform to the requirements of controlling constitutional or statutory provisions, ordinances, or other governing legislative requirements. In the absence of fraud a determination by the public authorities of whether a bidder has complied with the con-

> ditions imposed by the advertisement for bids is final and conclusive and cannot be reviewed by the courts, although they will interfere with the action of officers in the award of a contract where there is fraud or gross abuse of discretion, particularly with regard to the qualifications of those whose bids are low in price. Even though a board has broad discretion to determine the qualifications of bidders and let the contract accordingly, they may not act arbitrarily, and they must conform to statutory requirements governing the awarding of public contracts. * * * Reason must govern the acts of such officials and courts will not hestitate to interfere when it is clearly made to appear that they have acted arbitrarily, dishonestly, or beyond the reasonable limits of the discretion conferred upon them."

Ordinarily, where there is no difference in quality, suitability or character of the materials to be supplied, the low bidder is to be awarded the contract. 22 Opinions of the Attorney General 626; *Colorado Power Co. v. Municipal Power Co.,* 1 F. Supp. 961; *American Water Corp. v. Florham Park,* 139 Atl. 169. But under proper circumstances, a contract may be awarded to one who is not the lowest bidder. McQuillin on *Municipal Corporations* (3rd Ed.) Sec. 29.73. However, the long rivalry of these two firms in the voting machine field reveals that time after time one firm or the other claims that the varying features of one or the other renders it superior. See, for example, *Automatic Voting Machine Co. v. Board of Chosen Freeholders of Bergen County, et al.,* 199 Atl. 375. The two machines are certainly not exactly alike, and it may be claimed for one over the other, with whatever credence may be warranted, that, despite an ostensibly lower bid by machine A, B's machine is actually cheaper because of transportation costs, or ballot costs, or maintenance and upkeep, or a dozen other matters. See later discussion.

A similar question of necessity of accepting the lowest bid was submitted to this office by the State Roads Com-

mission. In an opinion in 40 Opinions of the Attorney General, 427, this office cited the statute involved (Article 89B, Section 13(a) of the Annotated Code of Maryland (1951 Ed.)), which said: "* * * shall be awarded by the Commission to the lowest responsible bidder, unless in the opinion of said Commission the interests of the State shall be better served by awarding the contract to some other bidder, when this may be done * * *." This statutory reference would seem to be declaratory of the general law on the subject, which seems applicable hereto as we note no pertinent statutory provision in reference to the purchase of voting machines. See *Automatic Voting Machine* case, *supra.*

In the State Roads opinion, this office pointed out that the courts will not interfere with the action of the administrative body in by-passing the low bid in the absence of fraud, collusion, or arbitrary action. To cite an extreme example, suppose an automobile is to be purchased by a body politic. Bids are requested. Automobile A, ordinarily retailing for $2,000 is offered "stripped" at $2,000. Automobile B, ordinarily retailing at $5,000 and universally deemed superior, is offered fully equipped at $2,005. Technically, automobile A is the low bid. But is not automobile B the best bid in the interest of the State?

Along the same lines, the court held officials justified in accepting a higher bid (of better quality) for a fire engine. *Hammonton v. Elvins*, 127 Atl. 241 (N.J. 1925).

McQuillin, on *Municipal Corporations* (3rd Ed.) Sec. 29.73, analyzes the question of awarding the contract to one who is not the lowest bidder by dividing the problem into four classes, depending upon the statutory provision for guidance of the awarding body. These four classes are:

A. Statutory requirement that the contract be let to the "lowest bidder".

B. Statutory requirement that the contract be let to the "lowest responsible bidder".

C. Statutory requirement that the contract be let to the "lowest and best bidder".

D. There existing no law requiring competitive bidding nor that the contract be let to the "lowest bidder" (or any of the phrases akin thereto).

An analysis of the cases in the various categories indicates the result will not vary materially in the various classifications. For the sake of simplicity, however, it would probably be well to determine which classification is involved here.

The statutes providing for the purchase of voting machines make no reference to any necessity for letting the award to the lowest bidder. (Article 33, Secs. 92 and 93, Annotated Code of Maryland (1951 Ed.) as amended by 1955 Supplement, Acts of 1955, Chapters 324, 701.)

Garrett County possesses a statute on the necessity for bids for certain contracts, and awards to the lowest responsible bidder. Chapter 370 of the Acts of 1945. However, this type of statute has been held on many occasions not to apply to the purchase of voting machines. *Jackson v. Norris,* 173 Md. 579, 195 Atl. 576; *Automatic Voting Machine Co. v. Bergen,* 120 N.J.L. 264, 199 Atl. 375 (1938); *Kingsley v. Denver,* 247 P. 2d 805 (1952). Cf *Thrift v. Amidon,* 126 Md. 126 (1915).

We would therefore seem to be considering that class of case where bids are requested, but there is no law requiring competitive bidding nor that the contract be let to the lowest bidder. Such a contract need not be let to the lowest bidder, but may, if in good faith, be awarded to a higher bidder. *Price v. Fargo,* 24 N.D. 440, 456, 139 N.W. 1054; *Gantenkein v. Pasco,* 71 Wash. 635, 129 Pac. 374; *Stubbs v. Aurora,* 160 Ill. App. 351, 360; *Union Paving Co. v. Schenectady,* 74 Misc. 646, 134 N.Y.S. 740. Stated another way, contract awards need not be let to the lowest bidder, when buying (or conversely, to the highest bidder, when selling) in the absence of a statute so requiring. *Application of Ross,* 132 N.Y.S. (2d) 760. And while we have indicated that the

Garrett County statute on awarding bids to the "lowest responsible bidder" does not apply to voting machines, we believe that the same result would ensue if the Garrett County statute was applicable. See, for example, McQuillin, *supra.* Furthermore, when the awarding officers are authorized to reject all bids as in Garrett County, the contract need not be let to the lowest bidder. McQuillin, *supra,* Sec. 29.77.

More particularly, on a number of occasions, courts have indicated, for one reason or another, that it was not necessary to accept the lowest bid in purchase of voting machines. *Kingsley v. Denver,* 126 Colo. 194, 247 P. 2d 805 (1952); *Eggart v. Westmark,* 45 So. 2d 505 (1950); *Higgins v. Green,* 56 R.I. 330, 185 Atl. 686 (1936). Cf. *Automatic Voting Machine Co. v. Bergen,* 120 N.J.L. 264, 199 Atl. 375 (1938).

Almost invariably, the courts point to the factual differences in the competing machines as a justification of the departure from a low bid. Thus in the *Kingsley* case, *supra,* the court said:

> "It is apparent that due to the different methods of construction, the nature of the machines was such that it was impossible to draw specifications to permit competitive bidding, and the council, under the circumstances here, had the right and duty to use its discretion as to the more desirable machine, independent of bid."

And in the *Eggart* case, *supra,* the court, after pointing out that the usual county law as to purchases did not govern voting machines, said that the public authority could reject the low bid after considering the differences in mechanical operation, facility of manipulation, materials of which constructed, effect of climate or environment on machine, wearing quality or any other factors that tended to render either machine more accurate, serviceable, lasting or fool-proof. Thus, the court said, after reference to the fact that both were apparently good machines, that the public authority

had a "perfect right" to judge both machines "by the pattern defined * * * and be guided accordingly."

This general question of the necessity of accepting the low bid is the subject of a lengthy annotation in 27 A.L.R. 2d 917, entitled "Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract". Generally speaking unless specifications contain with definiteness the essential elements for competitive bidding, fixing standards which made compliance necessary, the awarding officials could consider in their judgment and discretion the character, quality, nature and suitability of the material, articles or work even though an applicable provision required that the contract be let to the "lowest responsible bidder". *A fortiori*, this would be true, when, as in the instant case, no such statutory mandate is present.

In summary, the general rule is that the lowest bid may be rejected if, in the exercise of an honest discretion, another bid seems to be better for the object to be accomplished. *Mitchell v. Walden Motor Co.*, 235 Ala. 44, 177 So. 151; *Cyr v. White*, 83 Cal. App. 2d 22, 187 P. 2d 834; *In re Kaelber*, 281 App. Div. 980, 120 N.Y.S. 2d 566.

We trust that the above will be of some help to you in the resolution of your differences for, as previously pointed out, the use of voting machines is made mandatory throughout the State beginning with the regular general election in the year 1956.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

ELECTIONS—FILING DATES FOR CANDIDATES FOR PRESIDENT OF THE UNITED STATES.

February 9, 1956.

Hon. Estes Kefauver,
United States Senate,
Senate Office Building,
Washington, D. C.

You request the opinion of this office as to the last day for filing in the Maryland primaries of 1956 as a candidate for President of the United States.

In our opinion, the last day to file is March 5, 1956.

Article 33, Section 56, of the Annotated Code of Maryland (1951 Ed.) states that candidates for the office of President shall file not less than thirty days before the day of the primary election, which primary election day this year is May 7, 1956.

However, this Section is modified by the later enacted, and hence controlling, Section 146A (f) of Article 33, which, in order to give effect to our Absentee Voting Law calling for printing of the absentee ballots at least fifty-five days before elections, provides as follows:

> "(f) Notwithstanding the provision in Section 56 of this Article, requiring any candidate for the offices of either President or Vice President of the United States to file a certificate of candidacy for said office not less than thirty days before the day of the primary election for the selection of delegates to the State convention which shall select and instruct the delegate of each party to the national convention, the last day for filing such certificate of candidacy shall be the Monday which is nine weeks or sixty-three days prior to the day upon which the said primary election is scheduled to be held."

This day falls on March 5, 1956.

C. FERDINAND SYBERT, *Attorney General.*
DAVID KAUFFMAN, *Asst. Attorney General.*

ELECTIONS—REGISTRATION—RESIDENTS OF FEDERAL RESERVATION ARE NOT MARYLAND RESIDENTS FOR PURPOSES OF THE ELECTIVE FRANCHISE—RESIDENCE AT A FEDERAL RESERVATION CANNOT BE COMPUTED INTO LENGTH OF MARYLAND RESIDENCE.

April 18, 1956.

Mr. Louis P. Jenkins,
Attorney for the Board of Election
Supervisors for Charles County.

Your letter of April 6th states that some former residents of the United States Military Reservation at Indian Head, Charles County, Maryland, have recently moved from that Reservation, where they lived for a number of years, into other parts of Charles County. You inform us that "by November 6, 1956, they will have lived on Maryland soil for more than six months but less than one year."

These present residents desire to register and vote, and you inquire of this office whether they are eligible for registration on your County's registration day of April 24, 1956.

Article 1, Section 1, of the Constitution of Maryland provides that every citizen of the United States of the age of twenty-one 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.

We are informed by the Archivist at the Hall of Records that the Indian Head property in Charles County was ceded to the United States by deeds dated May 14, 1890, and September 15, 1891.

As this office explained in 35 Opinions of the Attorney General, 173, and 36 Opinions of the Attorney General, 129, citing the cases of *Lowe v. Lowe,* 150 Md. 592, 600, and *Bangs v. Fey,* 159 Md. 548, the residents of Federal Reser-

vations are not residents of the State of Maryland for purposes of the elective franchise. Cf. *Tanner et al. v. McKeldin, et at.*, 202 Md. 569, 97 A. 2d 449 (1953).

Therefore, if, as your letter indicates, you are inquiring whether previous residence on a Federal Reservation can be tacked onto present Maryland residence for the purpose of calculating residence as an entirety, the answer is in the negative. Under the Constitution, otherwise eligible persons will be precluded from registering if their residence in the State of Maryland is less than one year at the time of the general election. The residence at a Federal Reservation cannot be computed into length of Maryland residence.

Before concluding this opinion, however, it is necessary to inquire whether the past denial of voting franchise rights to the residents of Indian Head rests on solid footing. The question arises because of Article 96, Section 46, which enlarged the concept of retained State jurisdiction in the absence of express agreement to the contrary. However, this act only applied to lands acquired by the United States *after* 1943 and is, therefore, applicable to the present situation.

Article 96, Section 28, poses a similar question since it provides, in part, as follows:

> "* * * All lands and tenements which may be granted as aforesaid to the United States shall be and continue so long as the same shall be used for the purposes in this section mentioned, exonerated and discharged from all taxes, assessment and other charges which may be imposed under the authority of the State of Maryland; provided, however, that the rights of citizenship and other rights as residents of Charles County of persons domiciled on land owned by the United States at Indian Head shall be continued and enjoyed by them to the same extent as now provided by law for persons domiciled at the Naval Academy at Annapolis as residents of Anne Arundel County."

This act must be construed in the light of its history. It equates the rights of Indian Head residents to Naval Academy residents, but, historically and factually, it is our understanding that Naval Academy residents and Indian Head residents have both been precluded from the voting franchise. This would seem correct for, as pointed out in 36 Opinions of the Attorney General, 129, statutes designed to extend the right of franchise to persons residing on Federal Reservations in one or two counties would be unconstitutional. The Attorney General pointed out in that opinion that such statutes would offend both Section I and Section 5 of Article I of the Constitution. If this situation is to be remedied, the remedy is by constitutional amendment.

See generally 5 Opinions of the Attorney General, 171; 5 Opinions of the Attorney General, 176; 10 Opinions of the Attorney General, 107; 11 Opinions of the Attorney General, 120; 17 Opinions of the Attorney General, 139; 21 Opinions of the Attorney General, 347; 23 Opinions of the Attorney General, 224; 27 Opinions of the Attorney General, 116; and 29 Opinions of the Attorney General, 66.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

ELECTIONS—PERSONS RESIDING ON FEDERAL HOUSING PROJECT LAND INCLUDED WITHIN ELECTION DISTRICT MAY REGISTER AND VOTE.

September 19, 1956.

Hon. John M. Whitmore,
House of Delegates.

In your recent letter you have requested a ruling with respect to the right of the residents of Arundel Estates in Anne Arundel County to register and vote. We understand that Arundel Estates is a housing project developed under the Wherry Act, which authorized private capital to lease Government-owned land and to build thereon for rental purposes. The land is leased from the Government for seventy-five years and the owners and developers pay State and local taxes on the property constructed on such land.

The question of the right to vote of residents of Arundel Estates and certain other similar housing projects located in Anne Arundel County was presented to us in 1952. At that time, we ruled in 37 Opinions of the Attorney General, 208 (1952) that unless the election districts were changed by the Legislature, the residents of those areas could not register or vote. This opinion, in its entirety, is as follows:

> "You ask whether the otherwise qualified residents of three housing developments built on lands within the geographical limits of Anne Arundel County, leased by private entrepreneurs from the Federal Government, are entitled to register and vote in the County. These three are Arundel Estates, Arundeland and Meade Heights. We have heretofore ruled that these developments are subject to Maryland property taxes, and Judge Warnken, sitting in the Baltimore City Court, has sustained that decision. The factors as to the relinquishment of Federal control and the intention that the land in question, for at least the period of the leases, namely seventy-five years, should again be subject to the jurisdiction of the State leads

me to believe that the residents of these areas may register and vote in Maryland. See 35 Opinions of the Attorney General, 173, and 33 Opinions of the Attorney General 202.

"I have more difficulty with the fact that, as I understand it, the Legislature, after the acquisition of the tracts of land from which Arundel Estates, Arundeland and Meade Heights have been carved, eliminated those Federal areas from any district. Thus, the present legislatively created districts in Anne Arundel County do not include the areas now under discussion. By Section 11 of Article 33 of the Code, the Supervisors in every County are authorized to *subdivide* existing districts or designate additional polling places in any such districts or precincts. I find no authority to create any districts or to add to existing districts in a geographical sense. This, I think, must be done by the Legislature.

"I take it, therefore, that unless the areas about which you write are included within the lines of the presently existing districts, the residents of those areas cannot register or vote until the Legislature takes care of this anomalous situation by a change in the districts or by the passage of a statute which would authorize, in any situation such as the present one, the automatic addition of areas released from Federal control to the contiguous existing district."

In other words, it was not the fact that the individuals concerned lived on land leased from the Government which made them ineligible to vote in Anne Arundel County, but the fact that such land was not included within an existing election district. The statute describing the various districts of Anne Arundel County was Chapter 106 of the Acts of 1950, which added a new Section to be known as Section 274-A to the Code of Anne Arundel County (1947 Ed.), being Article 2 of the Code of Public Local Laws of Maryland.

Chapter 203 of the Acts of 1953, enacted the next year after the opinion above quoted, repealed Chapter 106 of the Acts of 1950. Thereafter, by Chapter 662 of the Acts of 1955, the Legislature completely revised the statutory descriptions of the eight election districts of Anne Arundel County by adding Sections 299 to 303-C to the Code of Public Local Laws of Anne Arundel County (1947). The description of District 6, in which we understand Arundel Estates is included, described by metes and bounds an area which included this housing project. However, the statute excepted therefrom "all United States Government property included within said area".

In our opinion, Arundel Estates cannot be considered as "United States Government property" within the meaning of the above quoted language contained in this Act. As the Attorney General pointed out in his opinion, the Federal Government relinquished control for the period of seventy-five years, and this development is subject to property taxes in the same manner as any other real property in Maryland. These factors indicate that Arundel Estates cannot be considered to be United States Government property, but, in fact, is property fully subject to the jurisdiction of the State. The Legislature, in repealing the earlier law describing the election districts of Anne Arundel County, immediately after the rendition of the Attorney General's opinion, indicated its intention to take the action suggested in such opinion to permit residents of this housing development to vote. It would hardly have been consistent with such intention for the Legislature to have excluded this area from the Sixth Election District as being United States Government property. Therefore, it is our opinion that as a result of Chapter 682 of the Acts of 1955, the residents of Arundel Estates may register and vote in the same manner as other duly qualified residents of Anne Arundel County.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

ELECTIONS — STATE CENTRAL COMMITTEE OF POLITICAL PARTY — HOW NUMBER DETERMINED — RULE-MAKING POWER OF STATE CONVENTION OF POLITICAL PARTY— METHOD OF CHANGING NUMBER OF MEMBERS OF A LOCAL STATE CENTRAL COMMITTEE.

October 15, 1956.

Mrs. Ransom R. Lewis, Jr.,
Walkersville, Maryland.

You request information as to the method by which the number of members of the Democratic State Central Committee for a county may be changed.

The number of members of the State Central Committees of each of the major parties depends upon party rules and regulations, and the State Conventions of each party have the authority to determine these rules and regulations. See Section 56 of Article 33 of the Annotated Code of Maryland (1951 Ed.), 6 Opinions of the Attorney General, 193, and 27 Opinions of the Attorney General, 147.

We are advised by the attorney for the Democratic State Central Committee of Maryland, that the Democratic State Convention, at its meeting on May 28, 1956, passed the following resolution:

> "Resolution No. 7: Resolved, that at all meetings of the Democratic State Central Committee for the State of Maryland, whether for the purpose of nominating candidates or for any other purpose, the members of the Democratic State Committees for each County and Legislative District of Baltimore City shall be entitled to cast at such meetings votes equal in number to the then total representation of such County or Legislative District in both branches of the General Assembly."

The attorney pointed out that this resolution merely formalized the long party usage and custom of alloting to each of the State Central Committees of the various political sub-

divisions of the State, when assembled and acting as the Democratic State Central Committee of Maryland, a number of votes equal to the number of representatives which such political subdivision has in both branches of the General Assembly, regardless of the actual number of persons comprising the State Central Committee of such political subdivision.

We are also informed by the attorney that the Democratic State Convention, by the adoption of Resolution No. 3 at its session held on August 30, 1954, provided that thereafter the Democratic State Central Committee of each county and legislative district of Baltimore City was empowered to determine for itself the number of members it should have, and, if it should so desire, to determine the representation of each of the two sexes on the Committee.

The election laws provide that party committees of the major parties shall be selected by the direct vote of the duly registered voters belonging to the parties, by means of primary elections. Section 56, Article 33 of the Code.

Therefore, in view of the aforegoing, it is suggested that any local State Central Committee which desires to change the number of its members should pass a proper resolution to that effect. Thereafter, and well in advance of the last filing date for candidacies in the next primary election, a copy of the resolution, certified by the secretary of the Committee, should be forwarded to the Board of Supervisors of Elections of the county so that it may make provision for the election of the proper number of committee members at said primary.

C. FERDINAND SYBERT, *Attorney General.*

ELECTIONS—VOTING MACHINES—USE OF PAPER BALLOTS IN CASE OF "EMERGENCY" OR "UNUSUAL CIRCUMSTANCES", AND WHERE VOTING MACHINES ARE NOT "AVAILABLE" OR SUPERVISORS OF ELECTIONS ARE "UNABLE TO PROCURE" VOTING MACHINES.

October 22, 1956.

Hon. Theodore R. McKeldin,
Governor of Maryland.

You stated in your letter of October 17th that you have been informed that the Garrett County Board of Election Supervisors has been unable to obtain voting machines for use in the General Election on November 6th. You further state that Garrett County has determined to use paper ballots and you inquire whether this would be in conformance with the election laws of the State of Maryland.

The subject is not wholly without doubt. Under the provisions of Chapter 701 of the Laws of Maryland, 1955 Session, the use of voting machines was made mandatory in elections conducted under the provisions of our election laws, beginning with the regular general election in the year 1956. This was accomplished by adding to Section 92 of Article 33 of the Code a subdivision designated as subdivision (f). (In codifying, however, it was necessary to re-letter this subdivision to (g), in order to admit to the Section another amendment thereto passed at the same session of the Legislature.)

Section 92(a) of Article 33 provides that the Boards of Supervisors of Elections

> "* * * with the approval of, and upon such terms as may be agreed to by, the County Commissioners of their respective counties or the Mayor and City Council of Baltimore City, as the case may be, may purchase, rent, lease or otherwise acquire such number of voting machines as may be required to equip any or all of the polling places in said city or county, as the case may be, * * *".

The present situation arises out of the fact that the Board of Election Supervisors of Garrett County and the County Commissioners of Garrett County disagree as to the proper type of machine to be acquired for use in the County. It is my understanding that a majority of the members of the Board of Election Supervisors favors one make of voting machine, whereas, a majority of the County Commissioners favors another make. The result is an impasse in that the Commissioners have declined to approve the purchase of any machine other than that favored by the majority of the Commissioners, and the Board of Election Supervisors has refused to recede from its position that the other type of voting machine is the one which should be purchased.

The question raised, therefore, is whether these circumstances are such as to allow voting by paper ballots in view of the express provision of the law that voting machines are mandatory.

May we invite your attention to the last sentence of Section 92(g), which reads as follows:

> "Nothing in this sub-section shall be construed * * * to repeal or impair the provisions heretofore enacted for the use of the so-called paper ballot system in the event of emergency or other unusual circumstances."

A statutory provision enacted several years prior to the adoption of Section 92(g) appears in Section 96 of Article 33, as follows:

> "* * * provided, however, that in polling places where the Supervisors do not have available or are unable to procure voting machines, paper ballots may be used, in which case the election shall be conducted in all respects as provided in this Article for elections held by paper ballots, including the appointment of clerks of election."

The inquiry is then whether the circumstances heretofore outlined constitute an "emergency" or an "unusual cir-

cumstance", within the meaning of Section 92(g), or whether the Supervisors "do not have available", or "are unable to procure" voting machines within the purview of Section 96.

The right of franchise is so important that we would hesitate to take the position which would have the effect of disfranchising voters of an entire County of our State. It is perfectly apparent that protection must be accorded the right of the citizen to express his choice by ballot, and that every reasonable effort should be made to so construe the statutes as to avoid penalizing the voter. We have here a square conflict between the law which makes the use of voting machines mandatory, and a clause which indicates that paper ballots may be used in the event of an emergency or unusual circumstance. In addition, the Supervisors do not in fact have available, and to date have been unable to procure, voting machines.

We do not believe the present situation rises to the proportion of an emergency, since obviously the question has been before the authorities of Garrett County since the adoption of Chapter 701 of the Acts of 1955. Whether the facts constitute an "unusual circumstance" is not so clear. Clearly, as to the voter, the unavailability of voting machines for the General Election is the result of an "unusual circumstance", since the inability of the officials of the County to resolve between themselves the controversy over the type of machine to be acquired is hardly an ordinary circumstance. In any event, the Supervisors "do not have available", and have been "unable to procure", voting machines. We, accordingly, feel constrained to hold that the present situation is such an unusual circumstance as to warrant the use of paper ballots.

I think it should be said, however, that the General Assembly might well consider legislation which would have the effect of preventing any such impasse in the future, so that the voters will be reasonably assured that there will be available to them voting machines for their use.

C. FERDINAND SYBERT, *Attorney General.*

ELECTIONS—RESIDENCE—WIFE OF SERVICE MAN WHO IS RESIDENT OF MARYLAND THOUGH STATIONED IN ANOTHER STATE IS LEGALLY QUALIFIED TO REGISTER AND VOTE IN COUNTY IN WHICH HER HUSBAND RESIDES.

October 23, 1956.

Mr. John M. Robb,
Attorney to Board of
Election Supervisors for
Allegany County.

We acknowledge receipt of your letter of October 16th in reference to a question concerning the right of a wife of a service man, whose residence is in Cumberland, Maryland, to register and vote in the forthcoming election.

We understand that the woman in question in March of 1954 was married in Texas to a service man who was temporarily stationed in that State, but whose residence was in Cumberland, Maryland. In December of 1954, the couple returned to the man's Cumberland residence for three weeks, and then once again went back to Texas where the husband resumed his service duties. In August, 1956, the husband was discharged, whereupon the couple moved back to Cumberland where they now make their home. The wife has never registered to vote in Texas nor elsewhere, and we understand that she has applied for registration in Allegany County prior to the closing of the books of your Board.

It is clear that the residence of a husband for voting purposes determines the residence of a wife. 5 Opinions of the Attorney General, 196 (1920). This office has likewise ruled that one who enters the Military Service does not lose his residence for voting purposes in the county from which he enlists, and if he has been continuously in the Military Service prior to his return to the county of his residence, he should be allowed to register in that county. 13 Opinions of the Attorney General, 109 (1928).

In our opinion, the woman in question assumed the residence of her husband at the time of her marriage, and even though the marriage took place in Texas, if the husband was properly a resident of Allegany County, the wife would be legally qualified to register and vote in that County after the period of one year.

In 13 Opinions of the Attorney General, 116 (1928), a wife lived with her husband on Military Reservations following her marriage. In answering an inquiry concerning the right of the wife to register and vote, this office said the following:

> "Persons who enter the military or naval service do not lose their voting residence in the State where they had their residence at the time of enlistment. So long as the husband and wife live together as such, the residence of the wife follows that of the husband. If, therefore, the husband of the lady in question was a resident of the State of Maryland at the time of his enlistment in the army, and has not acquired a residence in any other State, then both he and his wife are entitled to vote in this State."

In that case, the wife was a resident of Maryland prior to her marriage, while in the present case she was not. Since a wife assumes the residence of the husband on marriage, this fact would appear to be immaterial.

ALEXANDER HARVEY, II, *Assistant Attorney General.*

EXECUTORS AND ADMINISTRATORS

EXECUTORS AND ADMINISTRATORS—INVENTORY OF PERSONALTY—ADMINISTRATORS OF WIDOW ARE NOT ENTITLED BY SECTION 239 OF ARTICLE 93 TO EXCLUDE HER JEWELRY FROM PERSONAL INVENTORY.

December 10, 1956.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

We have your recent communication inquiring whether in our opinion jewelry belonging to a certain decedent must be included in the inventory of personalty to be filed on behalf of the estate. We understand that the decedent was a widow whose estate includes, in addition to stocks, bonds, furniture and cash, some $875.00 worth of jewelry which she possessed for her personal use. Attorneys for the Administrators contend that because of the provisions of Section 239 of Article 93 of the Annotated Code of Maryland (1951 Ed.), the jewelry in question should be excluded from the inventory of personalty to be filed with your office.

Section 239 lists certain types of property which shall be deemed and taken for assets in the hands of an Administrator, but excepts "those things which are denominated heir-looms and the ornaments and jewels of a widow proper for her station, and the clothing of the family". The above provision first appeared in the law in Chapter 101, Sub-Chapter 7, of the Acts of 1798, as follows:

> "* * * (except those things which are denominated heir-looms, and the cloaths of a widow, and ornaments and jewels proper for her station, and the cloathing of the family,) * * *".

When this act was passed by the Legislature in 1798 and up until the passage of the first Married Women's Acts in Maryland (Chapter 161 of the Acts of 1841 and Chapter 293 of the Acts of 1842), the legal existence of a wife under the common law was completely merged in that of the hus-

band, and the personal property of the former became vested immediately and absolutely in the husband and he could dispose of it as he pleased. *Carroll v. Lee,* 3 Gill & J., 504 (1832); *Bayne v. State,* 62 Md. 100 (1884); 26 Am. Jur., *Husband and Wife,* Sec. 3.

The wife's articles of wearing apparel and all personal ornaments, such as jewels, suitable to her rank or station in life, were called her "paraphernalia", the ownership of which remained in the husband during his life. *Farrow v. Farrow,* 65 Atl. 1009 (N.J. Eq., 1907); 41 C.J.S., *Husband and Wife,* Sec. 23. However, at the husband's death, it was generally recognized that paraphernalia of the wife did not pass to his representatives as did other personalty, but to the wife, subject only to the rights of the husband's creditors if he died indebted. *Howard v. Menifee,* 5 Ark. 668; 26 Am. Jur., *Husband and Wife,* Sec. 53.

It would appear that the Legislature, by the language of the 1798 Act quoted above, intended to exclude from administration as a part of the husband's estate, among other specified items, paraphernalia of the wife, in view of the fact that such personal property, though considered property of the husband, passed directly to the wife. In the first Maryland Code, the Code of Public General Laws of 1860, Chapter 101 of the Acts of 1798 was codified as Section 220 of Article 93 and the words "and ornaments and jewels proper for her station" were changed to read "and the ornaments and jewels of a widow proper for her station". This language has remained the same through subsequent codifications down to the 1951 Code. In our opinion, the slight change in wording did not change the original legislative intent of excluding from a husband's estate jewelry and personal ornaments worn by the wife but owned by the husband during his life.

We do not believe that the exception contained in Section 239 of Article 93 applies to instances where a widow owning jewelry is the decedent and her personal representative seeks to exclude such jewelry from administration. There would be no logical reason for the Legislature to exempt

from administration jewelry of a widow and not that of a spinster or of a married woman who predeceased her husband. Therefore, it is our opinion that the jewelry in question should be included in a supplemental personal inventory to be filed by the Administrator and that, accordingly, such jewelry is subject to regular administration, including the payment of the proper inheritance tax.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

EXECUTORS AND ADMINISTRATORS—SUBSTITUTED EXECUTOR UNDER CODICIL HAS SAME POWERS AS ORIGINAL EXECUTOR UNDER WILL. INHERITANCE TAX—GIFTS IN CONTEMPLATION OF DEATH.

December 13, 1956.

Mr. E. Randolph Burgess,
Register of Wills for Kent County.

We acknowledge receipt of your letter of November 20, 1956, posing two questions that have arisen in your office concerning the same estate.

We understand that the will in question contains the following clause:

> "I hereby appoint X to be the Executor of this Will and to serve as such without bond."

Admitted to probate with the will was a codicil providing as follows:

> "1. Now I hereby revoke the appointment of X as Executor of my said Will and I appoint Y, son of the late X, to be the Executor thereof in the place of the late X.
>
> "2. In all other respects I confirm my said Will."

You ask whether the provision in the will permitting the Executor to serve without bond applies to Executor Y as well as to Executor X.

A codicil which is intended to modify one provision of the will does not operate as a modification or revocation of other provisions. Page on *Wills,* Vol. 1, Sec. 467. The codicil in question did not revoke the entire clause in the original will appointing X the Executor. The codicil merely substituted Y for X as Executor, and in all other respects

confirmed the will. In our opinion, therefore, Executor Y has the same right as Executor X of serving without bond. Of course, in Maryland where a testamentary provision permits the Executor to serve without bond, a court will require the posting of a nominal bond to cover payment of taxes and assessments in any event. *Lee v. Price,* 12 Md. 253; Reed on *Wills and Administration in Maryland,* page 182.

You further inquire whether certain gifts made by the decedent approximately two months prior to his death are taxable as made in contemplation of death. The decedent was eighty-two years of age and in the hospital when he made a gift of $2,000. to his sister and $500. each to four nephews and nieces. The Executor contends that these gifts were not made in contemplation of death because the sister had made a request of decedent for the money, stating that she was in dire need of same, and because the decedent felt that he should make a gift of the same amount to the other branch of his family.

Under Section 150 of Article 81 of the Annotated Code of Maryland (1951 Ed.), to decide whether a transaction was made in contemplation of death, you must determine, first, whether there was a transfer of a material part of the decedent's property; second, whether it was in the nature of a final disposition or distribution; third, whether it was made within two years prior to death; and fourth, whether it was a bona fide sale made for an adequate and full consideration in money or money's worth. 27 Opinions of the Attorney General, 408 (1942); 31 Opinions of the Attorney General, 229 (1946).

If the first three conditions are satisfied and the transfers were not bona fide sales, the transfers are deemed to have been made in contemplation of death and the burden is upon the Executor to furnish sufficient facts to overcome this presumption. This determination must be made by you in accordance with the facts as presented to you. In our opinion, the facts furnished by the Executor and set forth

in your letter are hardly sufficient to overcome the statutory presumption and would, in fact, tend to confirm the presumption that these gifts were made in contemplation of death.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

EXPLOSIVES

EXPLOSIVES—PERSONS WHO PURCHASE LOOSE SMOKELESS POWDER TO LOAD THEIR OWN CARTRIDGES AND GUN SHELLS MUST HAVE LICENSES REQUIRED BY ARTICLE 48A, SECTION 309(C).

May 18, 1956.

Mr. John H. Coppage,
Deputy Insurance Commissioner.

You have inquired whether a company which handles ammunition for small arms may sell smokeless powder in small quantities to persons who wish to load their own cartridges and gun shells. Your specific inquiry is whether the exclusion contained in Section 309(a) of Article 48A, which excludes from the definition of explosives "fixed ammunition for small arms", may be extended to cover the sales of small quantities of smokeless powder.

In our opinion, fixed ammunition means ammunition in which the shot is attached to the powder charge and the definition cannot be extended to permit the sale by a retailer or manufacturer of smokeless powder to persons who wish to manufacture their own cartridges and gun shells. The very fact that the powder is separate from the shot indicates that the person buying the same intends to create fixed ammunition after purchasing the component parts.

The company making the inquiry is a licensed dealer under Section 309(d) of Article 48A, and has further inquired whether purchasers who attempt to buy smokeless powder loose are required to be licensed as manufacturers under Section 309(c). The definition of manufacturer expressly includes "*any person,* who is engaged in the manufacture of explosives or *who otherwise produces any explosive.*" (Emphasis supplied.) This definition is very broad and clearly includes within its scope *any* person who manufactures or produces explosives. The person purchasing the smokeless powder for the purpose of making cartridges and shells is, to our mind, clearly required to be licensed.

NORMAN P. RAMSEY, *Deputy Attorney General.*

FEDERAL RESERVATION—FORT CARROLL—JURISDICTION OF STATE OVER LAND CEDED TO FEDERAL GOVERNMENT—RE-CESSION—SOVEREIGN IMMUNITY.

July 2, 1956.

Hon. Blanchard Randall,
Secretary of State,
Annapolis, Maryland.

We have your letter enclosing a communication from Colonel Ray Adams, Corps of Engineers, U.S. Army, in connection with the proposed return by the Federal Government to the State of Maryland of the property known as Fort Carroll, which is located in the Patapsco River at the entrance to the Baltimore City harbor. You have requested that we review the legal background of the cession of this property by the State of Maryland to the United States, and you ask what is the State's obligation to take the property back and whether, if the State does accept this property, it may be liable in the future for damages resulting from shipping accidents which might occur because of the position of Fort Carroll.

It is established that a State may cede to the United States its jurisdiction over lands, and the cession may be absolute or qualified. *Fort Leavenworth R. Co. v. Lowe,* 114 U.S. 525 (1885); *Ackerley v. Commercial Credit Co.,* 111 F. Supp. 92 (1953). Clause 17, Section 8, Article I of the United States Constitution gives Congress the power to exercise exclusive legislation over all places ceded by a State for the erection of forts, magazines, arsenals, dockyards and other needful buildings. There is no doubt that, where Congress exercises the power of exclusive legislation over territory acquired by the United States with the consent of a State Legislature, the State thereby loses jurisdiction over such territory which is no longer, in legal contemplation, a part of the State. *Arapajolu v. McMenamin,*

113 Cal. App. 2d 824, 249 P. 2d 318 (1952). It is also clear that Congress may re-cede or return to a State any jurisdiction over such property which is not inconsistent with the Federal Government's use. *Idem.*

Chapter 59 of the Laws of Maryland, 1846-1847, provided for the cession to the United States by the State of Maryland of Fort Carroll, as follows:

> "Be it enacted by the General Assembly of Maryland, that the consent of the State of Maryland be, and the same is hereby given to the United States, to erect works of fortification on Soller's Point Flats, in the Patapsco river, and that the right of jurisdiction is hereby ceded to the United States, over any works of fortification, that may be erected by them, on the said Soller's Point Flats in the Patapsco river; said jurisdiction to extend in all directions one-fourth of a mile beyond any part of the works, and their appendages."

Subsequent to the passage of that Act, fortification structures were erected by the United States on Soller's Point Flats, which were thereafter named Fort Carroll. Under the Act, the jurisdiction of the Federal Government over this property extends in all directions a quarter mile beyond any part of the fortifications and their appendages.

Be Section 1 of Chapter 743 of the Acts of 1906, presently Section 31 of Article 96 of the Annotated Code of Maryland (1951 Ed.), the Legislature gave blanket consent, in accordance with Clause 17, Section 8 of Article I of the Constitution of the United States, to the acquisition by the Federal Government of land required for "arsenals or other public buildings * * * or for any other purposes of the government". Section 2 of the 1906 Act further provided that exclusive jurisdiction in and over any land so acquired by the United States should be thereby ceded for all purposes except the service upon such sites of all civil and criminal process of the courts of the State, but further provided that "the jurisdiction so ceded shall con-

tinue no longer than the said United States shall own such lands". Section 3 of this Act exempted such land from all State, county and municipal taxation "so long as the said lands shall remain the property of the United States when acquired as aforesaid, and *no longer*". (Emphasis added.) Sections 2 and 3 of the 1906 Act have been codified as Sections 35 and 36 of Article 96 of the Code.

It is our opinion that the General Assembly, in enacting the above legislation, expressed a clear statutory policy that when the United States transferred to any one title to lands that the State of Maryland had ceded to it, jurisdiction should return at once to the State. We believe that, even though this policy was not expressed until the 1906 enactment, it would apply to a transfer of the Fort Carroll property, though originally ceded to the United States in 1847. Therefore, in the event that the Federal Government conveys Fort Carroll to a grantee who is willing to accept such conveyance, whether such grantee is the State of Maryland or a third party, exclusive jurisdiction over such property immediately is vested in the State.

However, we do not intend to suggest that the State is compelled, by the statutory language quoted hereinabove or by any other provision of law, to accept title to property owned by the Federal Government and offered to the State. For any number of reasons, the State of Maryland, like any other possible grantee or donee, may decline to take title to real property which it is under no legal compulsion to accept, and the fact that such property is within State borders or may formerly have been owned by the State does not alter the State's freedom of choice in this regard.

If the State agreed to take title to Fort Carroll, its sovereign immunity would, in our opinion, be sufficiently broad to defeat claims made against it as the result of accidents suffered by shipping because of the position of the property in the Patapsco River. It is a firmly established principle that the State and its various departments and agencies cannot be sued in its own courts without its con-

sent. *State v. Wingert,* 132 Md. 605 (1918) ; *State v. B & O. R.R. Co.,* 34 Md. 344 (1871) ; aff'd 88 U.S. 456 (1875). The rationale behind this principle is stated in *Mayor & City Council of Baltimore v. State, to the Use of Blueford,* 173 Md. 267 (1937) at p. 271:

> "* * * The reason for the immunity is that, to subject the state to the coercive control of its own agencies would not only be inconsistent with its sovereignty, but would so hamper and impede the orderly exercise of its executive and administrative powers as to prevent the proper and adequate performance of its governmental functions. So it was said in *State v. Balto. & O. R. Co., supra:* 'This immunity belongs to the State by reason of her prerogative as a sovereign, and on grounds of public policy. Parties having claims or demands against her, must present them through another department of the Government—the Legislature—and cannot assert them by suit in the Courts.' * * *"

In the absence of an Act of the Legislature permitting suits to be brought against the State for damages to ships at Fort Carroll, the sovereign immunity of the State would prevent the successful assertion of claims of this nature.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

GOVERNOR—SPECIAL POLICEMEN—EMPLOYEES OF CORPORATION OPERATING ARMORED CAR SERVICE DO NOT QUALIFY FOR APPOINTMENT AS SPECIAL POLICEMEN.

June 14, 1956.

Mr. James P. Brock,
Administrative Assistant to the Governor.

We have your letter of May 25th enclosing a letter from the attorneys of a recently formed corporation which proposes to engage in the armored car service business. You have requested our opinion in connection with an application which has been made on behalf of two employees of this corporation to the Governor for appointment as special policemen under Sections 316-322 of Article 23 of the Annotated Code of Maryland, 1951 Edition.

In our opinion, the above statutory provisions were not intended to apply to employees of an armored car service. This office has previously construed these provisions on several occasions, and in 30 Opinions of the Attorney General, 53 (1945) Attorney General William C. Walsh, in discussing Sections 337 to 343 of Article 23 of the 1939 Code, which are the same Sections referred to hereinabove, said the following:

> "* * * As originally enacted, the authority only extended to persons who were to act as policemen for the protection of property for corporations owning or using any railroads, steamboats, canal, furnace, colliery or rolling mill in this State, but by Section 343, enacted by Chapter 217 of the Acts of 1918, authority to issue such commissions was extended to the employees of any corporation, firm or individual maintaining or operating in this State any factory, warehouse, store house or other type of business mentioned in the Act.

"The entire law obviously contemplates that these special policemen shall act for the protection of property of the corporation or person employing them, and for the preservation of peace and good order on their respective premises, and I am unable to find anything in its provisions which indicates that the law was intended to authorize the issuance of such a commission to a person who wants to police the public highways, with the view to preventing violations of the motor vehicle law.

* * *

" * * * It is clear that the law contemplates that the commissions authorized are to be issued to *persons who are engaged in protecting the private property of the corporation, firm or individual employing them,* or in preserving peace and good order on their premises, and there is no indication that such commissions are to be issued to persons engaged in public safety work, or *in other work requiring the performance of general police duties.*" (Emphasis added.)

See also 5 Opinions of the Attorney General, 80 (1920) and 21 Opinions of the Attorney General, 295 (1936).

In the present instance, the applicants will be acting for the protection of property entrusted to their care and not for the protection of property owned by the corporation. In addition, we do not believe that a corporation operating an armored car service is one of the types of corporations included within the various categories listed in Section 322.

For these reasons, we conclude that the applicants in question do not qualify for appointment as special policemen under the statutory provisions referred to hereinabove.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

LEGISLATION—JOURNALS—SENATE JOURNAL NEED INCLUDE ONLY THE ENTRIES THAT THE CONSTITUTION REQUIRES TO BE MADE THEREIN—CONSTITUTION DOES NOT REQUIRE JOURNAL TO SHOW THE SUSPENSION OF THE RULES TO COMPLY WITH SECTION 27 ARTICLE III OF CONSTITUTION—THE SAME LEGISLATURE HAS THE POWER TO CORRECT OR COMPLETE ITS JOURNAL.

February 6, 1956.

Hon. Warren Browning and Hon. Hervey G. Machen,
House of Delegates,
State House, Annapolis.

You have requested our opinion as to whether the failure of the Senate Journal to show that the rules were suspended to allow House Bill 505 of the 1955 Session of the General Assembly to pass on second reading on the same day as the first reading in the Senate would be sufficient proof from which the courts could find that the bill was not passed in accordance with Article III, Section 27 of the Constitution of Maryland. The Senate Journal shows that House Bill 505 was read twice in the Senate on the legislative day of March 25, 1955. Those readings were the first and second readings of the bill in the Senate. The third reading in the Senate also occurred on the same day but the printed Senate Journal shows that the rules were suspended by the yeas and nays of two-thirds of the members to make the third reading possible.

Article III, Section 27 of the Constitution of Maryland reads as follows:

> "Any bill may originate in either House of the General Assembly and be altered, amended or rejected by the other, but no bill shall originate in either House during the last ten days of the session, unless two-thirds of the members elected thereto shall so determine by yeas and nays; nor

> shall any bill become a law until it be read on three different days of the session in each House, unless two-thirds of the members elected to the House where such bill is pending shall so determine by yeas and nays, and no bill shall be read a third time until it shall have been actually engrossed or printed for the third reading."

The principle is well established in Maryland that compliance with Section 27 of Article III of the Constitution will be presumed by the courts, especially with respect to enrolled and authenticated Acts, unless such presumption is rebutted by competent evidence. *Washington County v. Baker,* 141 Md. 623; *Wyatt v. State Roads Comm.,* 175 Md. 258; *Redwood v. Lane,* 194 Md. 91. In the present instance, as far as we can determine, the only evidence which might indicate that the rules were not suspended by the Senate to permit the second reading of House Bill 505 on the same day as the first reading is the fact that there is no entry in the Journal of that date to show such suspension. The Court of Appeals has said that it is settled law in this State that an authenticated statute cannot be impeached by legislative journals alone, or by mere parol evidence. *Fouke v. Fleming,* 13 Md. 413 at 414; *Ridgely v. Baltimore City,* 119 Md. 567; *Miggins v. State,* 170 Md. 454. When it is made clearly to appear by the evidence that a particular Act, although authenticated, has never in fact been passed in accordance with the constitutional requirements, then the court may look behind the authenticated Act. *Berry v. Baltimore and Drum Point Railroad Co.,* 41 Md. 446 at 462; *Redwood v. Lane, supra.*

In the case of *Wyatt v. State Roads Comm., supra,* it was questioned whether a statute was enacted in compliance with the constitutional requirements of Article III, Section 27 of the Constitution, that no bill shall become a law until it be read on three different days of the session in each House, unless two-thirds of the members elected to the House where such bill is pending shall so determine by yeas and nays. In that case, the bill received its first and

second readings on April 3, 1937, in the House, but the House Journal contained no entry showing a suspension of the rules for the purpose of permitting the second reading on the same day. The bill was passed on third reading and final passage on April 5th. The court in that case said, at page 264:

> "The objection that there was no suspension of rules for the second reading as well as for reception of the committee report, is one which may rest on clerical entries rather than on actual occurrences, and the observations of the court in *Thrift v. Towers,* 127 Md. 54, 61, 95 A. 1064, seem especially appropriate. On so narrow a question, the presumption of adherence to the constitutional requirements should prevail over the mere form of the clerk's entry."

The above case seems to be clearly in line with the question presented by you, and it is our opinion that the lack of an entry in the Senate Journal showing the suspension of rules for the purpose of having a second reading on the same day as the first reading would not, in itself, be sufficient evidence for the court to find that the bill was not passed in accordance with Article III, Section 27 of the Constitution. If, of course, there is any clear and convincing evidence which would actually show that the rules were not suspended for the purpose of the second reading, it is believed that the court would then decide that the bill was not passed in accordance with the mandate of the Constitution.

In the case of *The National Capital Park and Planning Commission v. Blanchard Randall,* 209 Md. 18, the appellant, in his brief, cited the case of *Redwood v. Lane, supra,* as authority for the proposition that the omission from the Senate Journals of a notation showing suspension of the rules to allow the second reading on the same day as the first is in and of itself sufficient evidence for the court to overrule the presumption of the validity of a duly enrolled authenticated Act. In *Redwood v. Lane,* the

Senate Journal failed to record the yea and nay vote of the members of the Senate on the final passage of the Act, although Article III, Sections 22 and 28 of the Constitution of Maryland require that yeas and nays be recorded on final passage. We feel that that case can be distinguished from the *Wyatt* case, in that the court found that the Constitution required the Journals to contain yea and nay votes of members on the final passage of a bill. There is no requirement included in Article III, Section 27, of the Constitution that the yea and nay vote to suspend the rules to permit the reading of the same bill more than once on the same legislative day be recorded in the Journal of either House.

In *Ridgely v. Baltimore City, supra,* the Court of Appeals said:

> "* * * The Constitution requires the Journal to contain certain definite things, but it does not require amendments, or proposed amendments to be entered upon the Journal. Whatever the Journal contains over and above those things required by the Constitution to be shown therein, are entered in obedience to the direction of each house."

In 82 C.J.S. Sec. 45, it is said:

> "* * * and it has been held that where the Constitution is silent as to whether a particular act, which is required to be performed in the passage of a bill, shall be entered on the journal, it is left to the discretion of either house to enter it or not as it may see fit."

See also 40 L.R.A. (N.S.) 1.

There is nothing in the Constitution that requires the suspension of the rules to read a bill more than once on the same day to be recorded in the Journal. It is our opinion, therefore, that the failure to make the entry in the Journal of the suspension of the rules is of no effect if the rules were in fact suspended.

You also ask whether or not the Senate may at this time correct the Journal of the previous session to show the suspension of the rules which you understand actually took place just prior to the second reading, but which the Journal Clerk failed to enter in the Journal.

In 82 C.J.S., *Statutes,* Sec. 45, it is said:

> "The same legislature has power to correct its record and journal so as to make them speak the truth, and when corrected the journal shall stand as if it was originally so made. The power to determine the correctness of its journal rests solely in the legislative body."

See also 50 Am. Jur., *Statutes,* Sec. 147; *Richmond County v. Farmers Bank,* 152 N.C. 387, 67 S.E. 969.

The facts upon which the proposed change would be based are those which would ordinarily be exclusively within the knowledge and possession of the House of the Legislature making the change. It would be a duty of the legislative body to correct mistakes and to supply omissions in those Journals to see that they are in fact correct. If not corrected, they would be misleading, with the possibility of unfortunate results.

The error here involved is in the Senate Journal. The applicable facts with respect to the correctness of the Journal entries is within the knowledge of the Senate. It would appear that the right to correct the error would lie in the Senate. See *Integration of Bar Case,* 244 Wis. 8, 11 N.W. 2d 604, 151 A.L.R. 586. The correction of a printed document, such as that of the legislative journal of either of the branches of the Legislature is, however, a matter of such grave importance, in our opinion, that no such correction should ever be lightly made. Although, as a matter of law, the power to correct may exist in that branch of the Legislature in whose journal the error appears, we would suggest as a matter of policy and to protect against hasty action in such matters, that any such correction might ap-

propriately be signified by a Joint Resolution of the two bodies.

Article 17 of the Constitution provides for the election of the two bodies making up our General Assembly, namely, the Senate and House of Delegates, every four years. The same Legislature holds office for four years in this State. We are of the opinion that, since the present Legislature is the one which made the Journal entries at the 1955 session, it may now change the entries in its Journals as long as it does so to make them conform to the truth.

May we suggest, in the interest of orderly procedure, that it would seem advisable, since this alleged error has been brought to the attention of the Legislature, that steps be taken to correct the Journal before submitting the bill to a vote, as it would seem appropriate that any alleged defects in the legislation be corrected before the matter is again submitted for the consideration of the two branches of the Legislature.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

LICENSES—SALES—UNFAIR CIGARETTE SALES ACT—LICENSING OF WHOLESALERS AND RETAILERS UNDER UNFAIR CIGARETTE SALES ACT AS EXPRESSION OF LEGISLATIVE INTENTION IS INTERPRETED DEEMED TO BE PROSPECTIVE AND PRORATED AS TO WHOLESALERS; RETROSPECTIVE AND FULL AS TO RETAILERS.

April 24, 1956.

Mr. Joseph O'C. McCusker,
State Comptroller's Office,
and
Mr. Edward J. Dyas,
Chief License Inspector.

You have requested our opinion on the application of licensing requirements under Chapter 90 of the Acts of 1956, relating to "Unfair Cigarette Sales Act"; Article 83, Sections 115A to 115L, inclusive; and "Licenses", Article 56, Sections 61A to 61-I, inclusive.

Chapter 90 of the Acts of 1956, the "Unfair Cigarette Sales Act", adds a number of new sections to the Code, which are described in this Bill as "relating to unfair trade practices and unfair competition in the sale of cigarettes, and providing for enforcement through licensing of cigarette vendors and other remedies and sanctions for violation". The purpose of the Act is to prevent sales of cigarettes below cost made with intent to injure a competitor or competitors, or with intent to destroy or substantially lessen competition. (Sec. 115A). The Act provides that it is intended "to be exclusive and complete with respect to the sale of cigarettes". (Sec. 115J). The vital remedy for violation of the Act is provided (Section 115H (b)) in the administrative power of the Comptroller of the Treasury to revoke or suspend the special cigarette vendor's license, which the Act requires for the first time in Maryland, and for which detailed provision is made by Secs. 61A through 61-I.

Section 3 of Chapter 90 provides "that this Act shall take effect July 1, 1956". This is not the routine provision, under which June 1st is designated the effective date, as it would be under the Constitution even if the statute contained no clause as to date of taking effect, but is a special and unusual provision, indicating that the Legislature specifically considered the problem of effective date and desired to defer that date only one month, and no more, from the date that normally would apply. Inasmuch, nevertheless, as the body of the Act (Sections 61A and B) provide that the licenses created thereby shall expire on the 30th day of April in each year, question has arisen as to whether, notwithstanding the designation of the effective date of the Act, the issuance of the licenses should be postponed until the beginning of the next full license period, i.e., until May 1, 1957.

In our opinion, the legislative intent was that licenses should be issued as of July 1, 1956, the effective date of the Act, to run until April 30, 1957; that the fee for the special wholesaler's and vending machine operator cigarette license, required by Section 61B, should, for this ten month period be 10/12 of $250.00, or $208.33; and that the fee for this period for the special retailer's cigarette license, provided by Section 61A of Chapter 90, should be $2.50.

The question is controlled by the reasoning of *Read Drug & Chemical Co. vs. Claypoole*, 165 Md. 250. In this case the Legislature added a new section to Article 56, "Licenses", which provided for additional license fees for the privilege of opening, establishing, operating or maintaining certain types of stores or mercantile establishments which were already operating as of the effective date of the Act under a trader's license, theretofore issued. The question in the *Claypoole* case, as here, was whether a pro-rata amount of the additional fee was payable for the period between the date (June 1) designated as the date on which the Act was to take effect and the end of the trader's license year (which was April 30 of the following year), or whether the requirement of additional fee for the trader's license would be

deferred until the expiration of the trader's licenses which had already been issued.

First, as the Court made clear, the question is entirely one of statutory construction, and not of constitutionality. The sole question is whether or not the Legislature has manifested an intention as to the date when the new licenses are to be issued. On this point the Court said (165 Md. 254-6):

> "In approaching this question, its proper solution is largely controlled by determining whether the act is isolated and independent legislation, or is a component part of the body of legislation now in force, as codified in article 56 of the Code.* * *.
>
> "There is nothing contained in Section 65A, or in any other part of chapter 542 of the Acts of 1933, providing for the obtention of a trader's license. Neither does it independently make provision by whom and in what manner the collection is to be made, or for the enforcement of the penalties for failure to obtain said license or pay the fees prescribed. * * *.
>
> "* * * The fees provided for by the act of 1933, effective June 1, 1933, are declared to be in addition to the fees required by the other sections of article 56. Upon the payment of these additional fees, the applicant is given no additional license; that is to say, he can do nothing which he might not have done under the license previously secured. * * * The general rule of construction is that a legislative act imposing an additional tax, becoming effective during a current tax year, does not become operative until the beginning of the next or succeeding tax year. * * * Such a rule seems to us to be fair and reasonable; and, where the legislative language is ambiguous, open to two interpretations, one of which would be in accord with a fair and reasonable intention, and the other opposed thereto, we feel constrained to adopt the former. * * *".

The present statute is the direct opposite of the statute considered in the *Claypoole* case on all of the points mentioned in the above quoted language as being crucial to the determination of the question. Chapter 90 of the Acts of 1956 creates an entirely new license not heretofore existing in Maryland. The special wholesaler and retailer licenses issued under the Act are completely different from any license any wholesaler or retailer has already paid for. The purpose of the license is to aid in the enforcement of the "Unfair Cigarette Sales Act", which promotes what the Legislature has considered to be an important economic objective of the State in an important sector of business enterprise. The license fees are charged not for revenue but for the purpose of applying them "to cover the expenses of administration of the licensing program and the enforcement of the 'Unfair Cigarette Sales Act' ". (Sec. 61D). The present statute contains detailed provisions as to the person by whom, and the manner in which the license fees shall be collected. (Secs. 61A and B) ; and Sec. 61-I is a complete and self-contained provision for penalties for violation of the license provisions.

Moreover, the preamble of Chapter 90 reinforces the conclusion that the Legislature's expression of intention in the clause as to taking effect was purposeful and deliberate. The preamble recites that the evils against which the Act is aimed, namely, "advertising, offering to sell or sale of cigarettes below cost, with the intent of injuring a competitor or competitors, or of substantially lessening or destroying competition, is an unfair, deceptive, destructive and unethical business practice *which has been and is demoralizing and disorganizing the distribution of cigarettes.*" (Emphasis supplied.) The preamble concludes that "the public welfare will be promoted by the prohibition of such practices in the distribution of cigarettes and the effective enforcement of such prohibition". It is inconceivable that the Legislature, being desirous of eliminating these evils, which it regarded as currently detrimental to the welfare of the State, would have postponed the only really "effective enforcement" provisions for almost a year,

beyond the effective date of the statute. The licensing provisions are rather an integral part of a legislative plan which, taken as a whole, requires prompt action to remedy a current evil. To adopt any other interpretation would be to impute to the Legislature an intention which is the antithesis of a fair and reasonable intention rather than one "which would be in accord with a fair and reasonable intention".

The principles of statutory construction followed with reference to the effective date of licenses in the *Claypoole* case was discussed by the Court of Appeals in *Robey v. Broersma,* 181 Md. 325, 29A. 2d 828. That case also involved the question of the issuance of a license pursuant to a law that went into effect later than the licensing period. In such a situation, since the Act in question, which was Chapter 209 of the Acts of 1941, was made a part of the license article of the Code, as is the Act in question here, the Court of Appeals pointed out, at page 831, that Article 56, Sec. 1 "* * * provides that where licenses are issued later in the year than the 1st of May, a ratable sum shall be charged". Further, the Court of Appeals said that "in case the Act became a law after the 1st of May, *or in a later month,* there would be no difficulty in the issuing of licenses thereunder for the remainder of the year". (Emphasis supplied.)

The reasoning behind these principles is to put into effect the intention of the Legislature, which should not be thwarted by the differing dates provided for the effectiveness of the statute itself, and the licensing system used throughout the State. The Court said, at page 832, "It would be an absurdity to say that, because possibly one month of the first license year could not be collected, then the whole act must be stricken down and the purpose of the Legislature thwarted. That purpose was to provide an annual license, and that purpose can and should be carried out."

As to the fee to be charged for the wholesaler's license, the statute is very clear. Sec. 61G provides:

> "On application of a wholesaler for a special cigarette license for any part of a year the fee shall be prorated to the nearest month."

Under this language, there can be no question but that wholesalers, as defined in the Act, must apply for their license on the effective date of the Act and must pay a fee prorated to the nearest month. The license, therefore, would run from July 1, 1956, through April 30, 1957, and the fee should be $208.33, which is 10/12 of the annual fee of $250.00.

As to the retailer's license fee, from July 1, 1956, the Act provides:

> "61G. Transfer and Surrender of Licenses; Proration of Fees. The special retailer's cigarette license shall not be assignable or transferable, but where the business, either retail or wholesale, or both, of any licensee devolves by operation of law, as in case of death, bankruptcy, receivership or incompetency, the Comptroller shall extend the license to the legal successor of the licensee without charge. A wholesaler's special cigarette license shall be assignable to any purchaser of the licensee's cigarette business upon payment of a fee of $10.00. Upon voluntary surrender of a wholesaler's special cigarette license by a licensee against whom no disciplinary proceedings are pending, a prorata amount of the license fee based upon the unexpired term of the license shall be refunded. On application of a wholesaler for a special cigarette license for any part of a year, the fee shall be prorated to the nearest month. There shall be no refunds or proration with respect to retailer's special cigarette licenses."

It is clear from the above provision that the Legislature has made a distinction between the wholesaler's license and the retailer's license with respect to proration of fees, primarily because of the substantial amount required for the

former and the negligible amount required for the latter. Because of the administrative difficulties involved in refunds and proration of fees for the retailer license, which costs only $2.50, the Legislature has manifested its intention that the retail license fee for any fraction of the year shall be the entire $2.50.

As we pointed out in 40 Opinions of the Attorney General, 467, taxation (or licensing) is ordinarily deemed to be prospective rather than retrospective. Where, however, as here, the Legislature manifests a clear intention that the imposition shall be retrospective, such retrospective legislation is valid and constitutional if it does not otherwise offend constitutional principles. 36 Opinions of the Attorney General, 135.

You further inquire whether Section 61G is applicable to vending machine licensees. A reading of the Act in toto leads us to the opinion that it is. The statute indicates that vending machine operators owning and operating more than 40 vending machines will be subject to the provisions relating to wholesalers; those of less than 40 machines will be subject to provisions relating to retailers.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

LICENSES—TRADING STAMPS—CRIMINAL LAW—RETAILER, AS SUCH, DEALING IN HIS OWN STAMPS NOT SUBJECT TO TRADING STAMP LICENSE, BUT IF ALSO MANUFACTURER, MUST PAY MANUFACTURER'S LICENSE FEE. ONLY ONE LICENSE NECESSARY FOR ENTIRE STATE. RETAILER DEALING IN OWN STAMPS NOT SUBJECT TO BONDING REQUIREMENT AND SOME REDEMPTION REQUIREMENTS. STAMPS MAY BE REDEEMED ELSEWHERE THAN AT PLACE SALE, BARTER OR TRADE WAS MADE.

July 5, 1956.

Mr. Edward J. Dyas,
Chief Inspector State Licenses,
State License Bureau.

We have your letter in which you request our opinion concerning various phases of trading stamp licenses. The retail company from which these questions originated, we understand, is one which manufactures or packs some of the products it sells. We further understand that the company involved will deal directly with the public, rather than a trading stamp company, using a tape or cash register plan, which may be defined as a store-operated program whereby the consumer saves sales slips instead of stamps to become eligible for premiums. A recent monograph on this subject, entitled "Trading Stamps", by Harvey L. Vredenbury (1956), says of this device: "The basic plan is identical with a stamp plan except that sales or cash register slips are accumulated instead of trading stamps". Cf. 52 Am. Jur., *Trading Stamps;* 87 C.J.S., *Trading Stamps and Coupons;* See also, May 19, 1956, issue of Business Week.

Your first question is addressed to the necessity for a license. Section 160 of Article 56 of the Annotated Code of Maryland (1951 Ed.) provides:

> "Every person, firm, association and corporation of this State or carrying on business therein, who shall sell or deliver any stamps, coupons, tickets,

> certificates, or other similar devices which are or may be redeemable for merchandise, other than a manufacturer or packer issuing such stamps, coupons, tickets, certificates, labels or other similar devices around or in connection with his, their or its own products, to any other person, firm, association or corporation, in connection with any sale by such other person, firm, association or corporation, of any goods, wares or merchandise, shall before so doing take out an annual license therefor and shall pay an annual license fee of Five Hundred Dollars; and every manufacturer or packer who shall furnish, sell or deliver any such stamps, coupons, tickets, certificates, labels, or other similar devices with or in connection with the sale of his, her or its own manufactured or processed products to any other person, firm, association or corporation shall, before so doing, take out an annual license therefor and pay an annual license fee of Fifty Dollars."

A perusal of this statute as it applies to the instant case indicates clearly that since the company, although principally a retailer, manufactures some of its own goods, the company is obligated to pay the manufacturer's annual license fee of $50.00. However, it would not seem obligated to pay the $500.00 license fee, since it does not supply stamps to others in connection with the sales of others.

You further inquire whether it is necessary to have a license for each county in which such operations occur, or whether one license would cover the entire State. In 5 Opinions of the Attorney General, 311 (1920), we ruled that the payment of one license fee by a trading stamp company would suffice for the entire State, and we deem it consonant with that opinion to hold likewise for those possessing a $50.00 license.

The retailer then poses to you several questions concerning the application of various portions of Article 27 dealing with trading stamps. While Article 27 is entitled

"Crimes and Punishments", and questions of this nature might more appropriately be asked of this Department by a State's Attorney, we shall reply herewith for your transmission to the company, rather than requiring a re-routing of the inquiry.

The retailer first inquires as to Article 27, Section 643. That Section states:

> "No person or association of persons shall, either directly or indirectly, by agent or otherwise, use or hold for use, or sell any stamp commonly called a trading stamp, or any ticket, check, promise or assurance, express or implied, or any other scheme or device of the kind or character described in the preceding section, and thereby prohibited to be used or held for use, or to be sold when the same, instead of or in addition to the manner of redemption therein described, is to be or may be presented to or redeemed by the person or association of persons selling, bartering or trading the goods, wares or merchandise as in said section set forth, *at any other place than that where said sale, barter or trade was made,* or in any manner than by something certain and known to the purchaser at the time of said sale, barter or purchase; provided, however, that nothing contained in this or the preceding section is intended to prevent any manufacturer from offering any gift or present to any purchaser of his products." (Emphasis supplied.)

The retailer wishes to know if by this Section it is precluded from redeeming the cash register receipts at any place other than the particular store where they were issued.

We consider this question to have been resolved by the case of *State v. Hawkins,* 95 Md. 141, 51 Atl. 850 (1902), where the predecessor statute was approved except insofar as it undertook to make it a criminal offense merely to have the stamps or other articles redeemed "at any other place

than where such sale, barter or trade was made". This portion of the statute is, therefore, invalid if it purports to prohibit redemption elsewhere and the retailer is not so inhibited in his place of redemption.

The retailer notes that Section 645 states:

> "No person, firm or corporation shall sell or issue any stamps, trading stamps, cash discount stamps, check, ticket, coupon or other similar device, which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices shall have legally printed or written upon the face thereof the redeemable value thereof in cents."

It inquires whether it would be sufficient to have stamped or printed on the receipt the relationship of the cash register total to the redeemable value of the stamp. It asks:

> "For instance, if the cash register receipts were to be redeemable on a basis of one-five hundreth of the total sale reflected on the cash register receipt, would it be sufficient to have an impression made thereupon, either by stamp or by cash register key, of words to this effect: 'This receipt is redeemable in cash for one-five hundreth of the total sale represented?' "

In our opinion, this would suffice as meeting the manifest legislative intention that the consumer should be informed of the redeemable value of the stamp or device presented to him.

The retailer also inquires as to whether Section 647 is applicable to him. That Section provides:

> "Any person engaged in any trade, business, or profession who shall distribute, deliver or present

to any person dealing with him, in consideration of any article or thing purchased, any stamps, trading stamps, cash discount stamps, check, ticket, coupon or other similar device which will entitle the holder thereof on presentation thereof, either singly or in definite number, to receive either directly from the person issuing or selling the same as set forth in the preceding section, or indirectly through any other person, shall, upon the refusal or failure of the said person issuing or selling the same to redeem the same, as set forth in the preceding section, be liable to the holder thereof for the face value thereof, and shall, upon presentation, redeem the same either in goods, wares or merchandise, or in cash, good and lawful money of the United States of America, at the option of the holder thereof, and in such case, any number of such stamps, trading stamps, cash discount stamps, checks, tickets, coupons or other similar devices, shall be redeemed as hereinbefore set forth at the value in cents printed upon the face thereof, and it shall not be necessary for the holder thereof to have any stipulated number of the same before demand for redemption may be made, but they shall be redeemed in any manner, when presented, at their value in cents printed upon the face thereof, as hereinbefore provided."

As to this Section, the retailer contends:

"A strict reading of Section 647, when read together with Section 646, leads to the conclusion that the retailer issuing his own stamps or redeemable cash register receipt incurs no obligation under this section. Our view of Section 646 is that it applies to trading stamp companies, and perhaps manufacturers, but it is not intended to apply to retailers issuing their own stamps or other devices in connection with sales to consumers. But as we read Section 647 literally, it only appears to apply

> to retailers issuing such devices entitling the holder to receive items directly or indirectly 'from the person issuing or selling the same as set forth in the preceding section.' Further, the obligation under Section 647 does not arise until after refusal of the trading stamp company to redeem the stamp or other device. Accordingly, in the case of cash register receipts, which are issued originally by the retailer itself, the obligation under Section 647 would never come into being."

As we have previously said, the Sections involved are parts of our statutory criminal law. As such, they are, of course, penal in nature. It is axiomatic that penal statutes are construed strictly. *Ruth v. State,* 20 Md. 436. As has been said in later years, courts are committed to a strict construction of legislation imposing criminal penalties in favor of the citizen-defendant, and against the State. *Wanzer v. State,* 202 Md. 601, 97 A. 2d 914; *Weinecke v. State,* 188 Md. 172, 52 A. 2d 73.

It is also true that a penal statute must not be construed so strictly as to defeat the obvious intention of the Legislature. *Parkinson v. State,* 14 Md. 184, 74 An. Dec. 522; *U. S. v. Stone,* (D.C.-Md.), 188 Fed. 836. However, in this case the statute does not in terms apply to retailers, and to hold that it should be applied to retailers in order to give effect to what we might surmise to be the legislative intent, is to insert by construction an additional class of persons and possible offenders who are presently omitted. While we have stated that the licensing provisions for trading stamps (Article 56, Section 160) and the penal provisions herein discussed are to be construed as in *pari materia,* (27 Opinions of the Attorney General, 248), this would not permit an unwarranted extension such as that here under discussion since, as was indicated in *Cearfoss v. State,* 42 Md. 403:

> "* * * No man incurs a penalty unless the act which subjects him to it, is clearly, both within the spirit and letter of the statute. Things which do

> not come within the words are not to be brought within them by construction. The law does not allow of constructive offenses. . .".

The Court further said therein that:

> "Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction, for the purpose of either *limiting* or *extending* their operation."

Specifically, the Court decried "mere arbitrary conjecture".

To insert retailers into the language of the statute is to supply an omission. While the question is far from free of difficulty, we do not believe it appropriate for this office to do so on the basis of its inference, surmise or speculation. Cf. *Kurtz v. Capital Wall Paper Co.*, 61 A. 2d. 470. The natural import of language in a statute should not be disregarded unless some imperative reason is found in the statute for enlarging or restricting its meaning. *State Tax Commission v. Potomac Electric Power Co.*, 182 Md. 111, 32 A. 2d. 382. And this is especially true where to extend the enactment would be by way of a subtle and forced interpretation. *Schmiezl v. Schmiezl,* 186 Md. 371, 46 A. 2d. 619; *Maguire v. State,* 192 Md. 615, 65 A. 2d. 299. Hence, although it could be argued that the Legislature should have made these statutes more comprehensive by including retailers, *U.S. v. Weitzel,* 246 U.S. 533; *U.S. v. Shapiro,* 113 F. 2d. 890, 130 A.L.R. 147; *State v. Richmond* (Tenn), 100 S.W. 2d. 1, we do not believe that they should be construed to include persons other than those which are clearly described and provided for. 82 C.J.S. Statutes, Section 389. As was said in *State v. Fleming,* 173 Md. 192, 195 Atl. 392, "Courts will not extend the punishment to cases not plainly within the language used". It has, moreover, been said that the designation of one class of persons as subject to statute exempts or exonerates all other persons, and the court will not extend the statute. *Board of Education of Zaleski School Dist. v. Boal,* 104 Ohio St. 482, 135 N.E. 540; *Commonwealth v. Franklin Athletic Club* (Pa.), 41 Berks Co. 125.

Finally, the retailer inquires as to his status in connection with Section 650 of Article 27. That Section provides:

> "It shall be unlawful for any person, firm or corporation to engage in or carry on the business of issuing or selling to merchants or other dealers any stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device as provided in Sections 642, 643, 645, 646, 647 and 649 of this article, unless prior to doing so, said person, firm or corporation issuing or selling the same, shall have entered into a bond to the State of Maryland, in the penalty of Twenty-Five Thousand Dollars, with security to be approved by and said bond to be filed with the Clerk of the Superior Court of Baltimore City or with the Clerk of the Circuit Court for the county in which such stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device shall be issued, sold or given; and to be recorded by said clerk at the cost of the person, firm or corporation giving such bond, conditioned for the faithful performance by the person, firm or corporation executing such bond, of each and all the obligations incurred in connection with the issue of such stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device; and in the event of failure at any time to comply with any of the obligations of said stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device, by the person, firm or corporation executing said bond, the holder of such stamp, trading stamp, cash discount stamp, ticket, check, coupon or other similar device shall be entitled to maintain a suit on such bond to recover the amount of the loss sustained by him by reason of such default."

As stated therein, a bond is required of "any person, firm or corporation to engage in or carry on the business

of issuing or selling to merchants or other dealers any stamp, trading stamp . . . or other similar device". The retailer is not in such a position, for he issues stamps to the consumer only, and not to any merchant or dealer.

Thus, we are constrained to conclude, in view of the canons of construction previously discussed, that the statute establishing the bond requirement has a gap insofar as retailers dealing in their own stamps are concerned, and is not applicable to such retailers.

Our conclusions in respect to the inapplicability of some of these statutes to retailers is further buttressed by the case of *State v. Seney Company,* 134 Md. 437 at 439 (1919), where the Court stated: "The license fee referred to is not required from merchants issuing and redeeming their own stamps. . .". The principle of *pari materia* as extended to the criminal statute would further tend to corroborate our holding that retail merchants are not subject to Sections 647 and 650. There is, furthermore, a canon of statutory construction which states that where the Legislature acts with respect to a statute already construed by the Court of Appeals, it is presumed to do so with knowledge of such construction. *Gibson v. State,* 204 Md. 423, 104 A. 2d. 800. The stamp statutes discussed above have been the subject of legislation and codification on several occasions since the *Seney* case in 1919, and no modification of the concept therein expressed has been made.

These gaps in protection for the consumer public may well be due to the historical fact that at the time of the passage of these statutes the practice of retailers dealing in their own stamps was a rare, if not non-existent, phenomenon, and the "trading stamp company" as such was the object of the legislation. Whatever the occasion for the hiatus, however, legislative consideration of this problem would seem to be appropriate, and we shall direct a copy of this opinion to the Legislative Council.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Assistant Attorney General.*

LICENSES—REAL ESTATE BROKERS—A NON-PROFIT CORPORATION WHICH IS REGULARLY ENGAGED IN SUBDIVIDING AND SELLING LAND IN BUILDING LOTS OR SITES AT A PROFIT IS REQUIRED TO BE LICENSED.

July 23, 1956.

Mr. William G. Nicholson,
Executive Secretary,
Real Estate Commission of Maryland.

We have your recent letter in which you ask whether or not it is necessary for a non-profit corporation to obtain a real estate broker's license, or employ a licensed real estate broker, to sell its own real estate. The non-profit corporation to which you refer was formed in 1953, to engage in the establishment of a systematic and orderly development of a community which was established upon lands given to the corporation, and to furnish any and all other necessary community services that the corporation could afford.

Shortly after its formation, the corporation began to acquire by purchase other contiguous parcels of land which it subdivided into lots, along with the original gift to it. The corporation has, since its formation, regularly engaged in the selling of such subdivided lots at a profit, and has been applying the income therefrom first to the return of the purchase price of the land to the corporation and using the balance for civic purposes to improve the community. As the area is not subject to any public zoning restrictions, the corporation imposed a set of stabilizing convenants and restrictions upon the community and provided that the lands therein could not be subdivided into less than five acre parcels, forbade commercial and noxious use of the land, and otherwise restricted the use to residential purposes.

The corporation has, in addition to selling its own land, entered into agreements with the owners of neighboring lands to help them sell their properties in return for the placing by the neighboring owners of similar covenants and

restrictions on the use of their land. The corporation contemplates other purchases and sales of land as it becomes necessary to control the development of lands surrounding the present community. The corporation's work was at first carried on by volunteers, but now it employs personnel on a fee or hourly basis to supervise the development of the community, its civic projects, and to make the sales of the old and new properties acquired by it.

It is because the corporation involved is a non-profit corporation, and because it is selling its own real estate that you raise the question whether or not it is a real estate broker within the meaning of the Maryland statute.

Section 219(a) of Article 56 of the Annotated Code of Maryland (1951 Ed.) defines a real estate broker as *"any person, association, co-partnership or corporation,* foreign or domestic, who for another and for a fee, commission or any other valuable consideration sells, purchases, exchanges, leases, rents or collects rent for the use of real estate or who attempts or who offers by verbal solicitation, advertisement or otherwise to perform any such function or who is regularly engaged in the business of dealing and trading in real estate or leases and options thereon, or who is engaged in the business of sub-leases and options thereon, *or who is engaged in the business of sub-dividing and selling land in building lots or sites, whether such real estate is located in this or any other State or the District of Columbia."* (Emphasis supplied.)

Sub-sections (b) and (e) of Section 219 read as follows:

> "(b) *'Real estate salesman'* shall mean any person licensed to perform on behalf of any licensed real estate broker any act or acts authorized by this subtitle to be performed by a real estate broker. (1955 Supp.)
>
> "(e) *Acts constituting person, real estate broker or salesman.*—Any person, partnership, association, or corporation, who, for another, in consideration of compensation, by fee, commission,

> salary, or otherwise, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, does, offers or attempts or agrees to do, engages in or offers or attempts or agrees to engage in, either directly or indirectly, any single act or transaction contained in the definitions of a real estate broker or real estate salesman in subsections (a) and (b) of this section, whether said act be an incidental part of a transaction, or the entire transaction, shall constitute such person, partnership, association, or corporation a real estate broker or real estate salesman within the meaning of this subtitle." (1956 Supp.)

Sub-section (f) (4) of Section 219 reads as follows:

> "(f) (Exceptions) The terms 'real estate broker' and 'real estate salesman' shall not include: * * *
>
> "(4) owners or lessors of property in the management and sale of such property *unless their principal and regular business is that of purchasing, selling, exchanging or trading in real estate* and options and leases thereon; * * *" (Emphasis supplied.) 1951 Ed.

The basic question to be answered to determine whether or not the corporation is a real estate broker is whether or not it is principally and regularly engaged in the business of purchasing and selling real estate or of subdividing and selling land and building lots or sites. If the Board determines as a fact that the corporation in question is principally and regularly engaged in purchasing and selling real estate or is engaged in subdividing and selling land and building lots or sites, then it is our opinion that the provisions of the Act are applicable to it, and that it must have a real estate broker's license, and its salesmen must have real estate salesmen's licenses. Applying the test to the corporation in this case, we believe that the Board must come to the conclusion that it is principally and regularly

engaged in buying and selling real estate and in subdividing and selling building lots and sites and thus falls within the terms of the statute, and that it is therefore necessary that it acquire a real estate broker's license. The fact that the corporation was formed as a non-profit corporation, we feel, is of little significance, since it is regularly engaged in business for a profit as a real estate broker and the statute provides no exemption for a non-profit corporation when it is so engaged.

There can be no doubt that any employee of the corporation, who sells real estate belonging to the corporation and is compensated for the services so rendered, falls within the definition of a real estate salesman and must be licensed.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

MEDICAL EXAMINERS—DEATH CERTIFICATE—OPINION AS TO "MANNER OF DEATH" IS NOT JUDICIAL DETERMINATION —EXPRESSION OF PHYSICIAN'S OPINION ONLY.

May 4, 1956.

Dr. Russell S. Fisher,
Chief Medical Examiner.

It is the duty of the Medical Examiners of this State to investigate the death of any person who dies in a suspicious or unusual manner. You request our view as to whether the Medical Examiners are required to record an opinion concerning the manner of death (such as homicide, suicide, accident, etc.), as distinguished from the medical condition causing the death.

The Department of Post Mortem Examiners was established by Chapter 369 of the Laws of 1939, which repealed the laws regarding coroners. Article 22, Section 6, of the Annotated Code of Maryland (1951 Ed.) states that the Medical Examiner "shall fully investigate the essential facts concerning the medical causes of death". Section 7 states "if the cause of such death shall be established beyond reasonable doubt such Medical Examiner shall so report * * *". As you point out, neither of these Sections refers to the "manner of death".

Section 5 of the Post Mortem Examiners' Law states:

> "It shall be the duty of the Chief Medical Examiner, the Assistant Medical Examiners and the Deputy Medical Examiners to attend to all the medical functions now devolving upon the coroners and post mortem physicians in Baltimore City, or upon coroners or Justices of the Peace, acting as Coroners, in the several counties of the State, and to perform all the duties imposed upon them by the provisions of this Article."

The principal duty of the coroner was to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death in his county. The office and power of a coroner were "principally judicial". However, in most jurisdictions, as in Maryland, the coroner has been supplanted by the Medical Examiners "who are able men trained in the science of medicine". The Coroner's Jury was to determine the "manner of death" by inquiring into all material circumstances connected with the death, and to inquire how, in what manner, and by whom or what the body "which lies dead came to its death". Since you do not have the power to summon a jury or hold an inquest, it is our opinion that it is not in your province to judicially determine the "manner of death", as the courts have the responsibility for making this determination.

However, in filling out the Death Certificate required by Article 43, Section 18, of the Annotated Code of Maryland (1951 Ed.), we note that the physician last in attendance upon the deceased or the Medical Examiner is called upon to express an opinion on Line 22 of the Death Certificate relating to the "manner of death". Inasmuch as this is clearly an opinion expressed for whatever value it may have for vital statistics and other non-judicial purposes, as authorized in Article 43, Section 17, *supra,* we feel it is proper and necessary for you, and any doctor required to fill out a Death Certificate, to comply with Article 43, Section 18, in expressing your opinion as to the "manner of death". We believe that the Bureau of Vital Statistics of the Baltimore City Health Department and the State Health Department should be advised that the wording of Line 22 of the Death Certificate should be so stated as to clearly indicate its content to be an expression of the physician's opinion only.

C. FERDINAND SYBERT, *Attorney General.*

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

MERIT SYSTEM—MILITARY LEAVE OF ABSENCE LIMITED TO FIFTEEN DAYS REGARDLESS OF TYPE OF TRAINING.

January 4, 1956.

Mr. Russell S. Davis,
Commissioner of Personnel.

Your letter of November 14, 1955, requested our opinion in connection with the military leave that a State employee may take under the provisions of Section 42 of Article 65 of the Annotated Code of Maryland (1951 Edition). This statute provides as follows:

> "All officers and employees of the State, County or political subdivisions thereof who shall be members of the organized militia or of the Army, Navy, Air or Marine Reserve shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense or other training ordered or authorized under the provisions of this Article, or under any law of the United States, during such time as they are on inactive duty training, for not to exceed fifteen days annually; provided, however, if any members of the organized militia are ordered to active duty under authority of the Governor they shall be entitled to leave of absence without loss of pay, time or efficiency rating for such time while actually serving under such active duty orders in addition to the fifteen-day period specified above."

You inquire whether a member of the Maryland National Guard, who is concededly entitled to military leave for two weeks' annual field training with his National Guard organization without loss of pay, time or efficiency rating, may also be entitled to military leave for an additional two

weeks for active duty and for training purposes as an individual. We have examined the extract copies of orders published by the Military Department of the State of Maryland under which an employee of the State was made subject to both types of training.

In our opinion, the right of a State employee to be entitled to a period of training which would be "free time" and would not result in loss of pay, time or efficiency rating, is strictly a statutory right. In 21 Opinions of the Attorney General, 473 (1936), this office held that this statute would prevail against a regulation of the State Employment Commissioner to the contrary.

However, the statute is explicit in stating that such leave of absence without loss of pay, time or efficiency rating shall not exceed fifteen days annually. The language of the statute includes time during which a State employee may be engaged in field or other training authorized under the provisions of Article 65, as well as training under any law of the United States. Therefore, whatever the type of training (assuming, of course, that the National Guard has not been ordered to active duty by the Governor in an emergency), the maximum amount of free time available to a State employee for military training is fifteen days.

We understand that your office has pursued such a policy for some time, and it is our conclusion that such policy is in accord with the provisions of the quoted statute.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

MERIT SYSTEM—POWERS OF COMMISSIONER OF PERSONNEL —COMMISSIONER HAS NO AUTHORITY TO INVESTIGATE DISCIPLINARY SUSPENSION OF THIRTY DAYS OR LESS WHERE NO SALARY INCREASE INVOLVED.

February 10, 1956.

Mr. Russell S. Davis,
Commissioner of Personnel.

We have your recent letter posing a question relating to the authority of the Commissioner of Personnel to investigate a disciplinary suspension of thirty days or less imposed by an appointing authority under Section 31 of Article 64A of the Annotated Code of Maryland (1951 Ed.).

As you point out, Section 27(b) and (c) of Article 64A (1955 Supp.), as now written, provides that, subject to the approval of the Commissioner and not otherwise, automatic increases in salary must be forfeited if any employee has been suspended for disciplinary purposes pursuant to the provisions of Section 31 of the Article. The effect of these provisions is that, in every case where forfeiture of an increase in salary is involved because of a disciplinary suspension, whether such suspension exceeds thirty days or not, the Commissioner has the power to determine whether the suspension is justified, and the further power to change or modify the suspension.

You have now asked whether, in a case where an automatic salary increase is not involved because the employee is at the maximum of the appropriate salary scale, the Commissioner has the authority to investigate a thirty day disciplinary suspension given by an appointing authority.

Section 31 of Article 64A of the Code provides as follows:

> "The appointing authority may for disciplinary purposes suspend an employee. Every such suspension shall be without pay; provided, however, that the Commissioner shall have authority to

> investigate the suspension of every person suspended for a period aggregating more than thirty days in any calendar year, and in case of his disapproval he shall have power to restore pay to the employee so suspended. With respect to his employees the Commissioner shall be deemed the appointing authority and the Governor shall act in the place and stead of the Commissioner for the purpose of this section."

It will be noted that there is no language in this Section giving the Commissioner the power to investigate a suspension of thirty days or less, either on his own initiative or upon request of the employee suspended. The legislative intent is clear that a suspension of an employee by an appointing authority for disciplinary purposes for a period of thirty days or less shall not be subject to review by the Commissioner, assuming, of course, that no automatic salary increase is involved. The authority granted the Commissioner in Section 27(b) and (c) is limited to situations where automatic salary increases are involved and, accordingly, does not affect the provisions of Section 31 except in that limited class of cases.

The Maryland Merit System Rules which were promulgated by the Commissioner pursuant to Section 10 of Article 64A, and which became effective in June of 1955, do not, and indeed cannot, alter the clear legislative purpose of Section 31 in this respect. Rule 46, "Disciplinary Suspension", provides as follows:

> "The appointing authority and in his absence the officer acting in his place, subject to the action of the Commissioner, may for disciplinary purposes suspend without pay any employee in his organization unit from the performance of his duty for a period not to exceed thirty days in any calendar year on account of misconduct, negligence, inefficiency, insubordination, disloyalty, or any other reason satisfactory to the Commissioner;

> provided, however, that the Commissioner shall have authority to investigate the case of any employee suspended for a period aggregating more than 30 days. Such suspension shall be made only as provided in Sections 27 and 31 of Article 64A. In each case, written notice of the suspension shall be made on the form provided by the Commissioner, which states the reasons for the suspension and the duration thereof and the action by the Commissioner, and shall be given to the suspended employee or mailed to his last known address. The other copies of such form shall be furnished forthwith to the Commissioner. The employees so suspended may appeal to the Commissioner for an investigation of such suspension. After investigation, the Commissioner shall determine whether the suspension is justified and shall approve, change or modify the suspension accordingly to such determination."

This rule specifically provides that suspension shall be made *only* as provided in Sections 27 and 31. The rule cannot be construed to add to the powers conferred upon the Commissioner by authorizing him to investigate all disciplinary suspensions whether in excess of thirty days or otherwise. The next-to-last sentence of the rule permitting an employee "so suspended" to appeal to the Commissioner for an investigation of "such suspension" must refer to suspensions for a period aggregating more than thirty days. Any other construction of this rule would constitute an attempt to grant powers to the Commissioner not provided for in Section 31 of Article 64A. The powers of the Commissioner under the statutes cannot, of course, be broadened under the rule making power, in such fashion as to conflict with the statute. The rules in effect prior to June, 1955, contained a provision in Rule 53, relating to suspension, which purported to permit the Commissioner to investigate all suspensions on petition of the employee suspended or upon his own initiative. This provision, which

had the effect of granting a power not within the controlling statute, was deleted when the rules were amended last year, so that the present rules as here construed have been brought into conformity with the authority granted the Commissioner by statute.

In summary, therefore, it is our opinion that Sections 27 and 31 of Article 64A of the Code, together with Rule 46 of the Merit System Rules, authorize the Commissioner to investigate all suspensions made by an appointing authority *involving forfeiture of an automatic increase in salary*. Where a salary increase is not involved, the Commissioner has no power to investigate or review a suspension made by an appointing authority of thirty days or less, but the Commissioner may investigate the case of any employee suspended for a period aggregating more than thirty days.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

MERIT SYSTEM—STATE EMPLOYEES—PERSONNEL—UNIVERSITY OF MARYLAND MERIT SYSTEM— UNDER AUTONOMY ACT (CHAPTER 14 OF ACTS OF 1952) BOTH INSTRUCTIONAL AND NON-INSTRUCTIONAL SALARIES AT THE UNIVERSITY ARE FREE OF STANDARD SALARY BOARD RULES, REGULATIONS AND CONTROL.

May 14, 1956.

Mr. Russell S. Davis,
Commissioner of Personnel.
Re: University of Maryland—Merit System Problem

Since the passage of Chapter 14 of the Laws of Maryland of 1952, known as the University of Maryland "Autonomy Act", problems have occurred and recurred with respect to the status of employees of the University of Maryland. The situation has given rise to decided problems of administration in the office of the Commissioner of Personnel, and has been the subject of some complaint and comment by sundry employees of the State.

The problem which causes the greatest trouble is the relative freedom which the University has assumed exists with respect to the salaries of persons employed by the University. This has taken a number of forms. On the theory that the School must compete for its personnel with similar institutions in other States, the University has made salary adjustments as to practically all persons in its employ, which adjustments do not conform to Standard Salary Board limits for the same or similar classifications in the State service. Some employees of the University are granted minor pay adjustments in the form of bonuses or increases which exceed Standard Salary scales, by resolution of the Board of Regents. In other cases, where the University has wished to increase the salary of a particular job or employee by more than a nominal amount, it has accomplished its objective, whether the person concerned was at the time of the adoption of the Autonomy Act a member of the Classified Service, or was thereafter employed, by removing

that person from the Classified Service, either by "promoting" such employee to the instructional staff, or by transferring the person to a classification which is not known to exist in so far as the State Commissioner of Personnel is concerned. After such person has served a short period of time on the instructional staff or in the newly created classification, the University "designates" the job held as a part of the Classified Service. The University purports to act under the authority of the Autonomy Act, and notifies the Commissioner of Personnel that it wishes a particular category thereafter to be recognized as a Classified Position. Very many of these alleged transfers to new jobs really are only for the purpose of masking a pay raise to a person who performs no function substantially different from that which he theretofore performed. In effect, the University disregards Standard Salary Board pay scales by the simple process of changing the name of the job.

This freedom to discriminate gives rise to morale problems among the University's employees, in that other occupants of a Classification from which one man is selected for preferred treatment resent the preference shown. Needless to say, to the extent that these facts are known, other Classified employees of the State, outside the University, who are in the same job category as the person receiving preference, resent the preference received by the one employee. The whole structure of the Merit System is weakened by having the University free from the controls which apply to and restrict other State employees.

In order to resolve the conflict, it is necessary to consider the factual and statutory background of the relationship between the Merit System and the University.

The Merit System (Article 64A of the Code) antedates by some years the University's Autonomy Act. Article 64A of the Code was enacted by Chapter 41 of the Acts of 1920, and became effective on January 1, 1921. As it was conceived, the Merit System set up the "Classified Service", which, as defined in Section 1 thereof, "means and includes

all offices of profit or trust, and all places of employment, whether permanent or temporary, in the service of any State officer, department, commission, board or institution" other than military, and those specifically enumerated exceptions found in Section 3 of Article 64A. The definition of "Classified Service" is broad enough to include the personnel of the University unless they are to be excluded by virtue of other provisions of law. The specific exclusions which are set out do not cover the University of Maryland, unless it be considered that the Commissioner of Personnel might determine, with the Governor's approval, to exclude positions which "require medical, engineering, scientific, educational or expert training and qualifications".

The scope of the quoted exclusion was the subject of considerable study in the months immediately preceding the effective date of the Merit System. Dr. Wood, then President of the University, in an exchange of correspondence with the then Commissioner, Mr. Yellott, expressed the thought that all personnel of the University should be exempt. Although the exact action taken as a result of the discussion between October of 1920 and January of 1921 is a bit unclear, it seems that the ultimate conclusion of the Commissioner of Personnel (*apparently* with the Governor's approval) was that the *teaching staff* of the University should *not* be included in the Classified Service. Otherwise, however, the University was in the Classified Service. The Supervisors of Nurses and Assistant Supervisors of Nurses at the University of Maryland Hospital were treated as performing teaching duties and they also were excluded from Classified Service. Suffice it to say, over the years prior to 1952, in the administration of the Act, the Commissioner did not seek to exercise control over the University's instructional personnel, nor over the nurses, but did control other employees of the University. What has been here said is founded upon the correspondence files of the Commissioner of Personnel covering the formative period of the Merit System.

By Chapter 385 of the Acts of 1939, Section 13A, there was introduced into the Merit System the "Standard Salary Board". The express purpose of the Board, as set forth in Section 13B of that Act, was to establish pay plans for various classes of positions in the Classified and Unclassified Service, to the end that all positions in the State service involving comparable duties, experience, responsibility and authority should be paid in accordance with a Standard Salary Schedule. The pay plans when formulated and adopted were *given the force of law*. The Standard Salary Board, of course, continues in the law to date, and the provisions with respect thereto may be found in Article 64A, Sections 24 through 27, 1951 Code, 1955 Supplement thereto, and Chapter 87 of the Acts of the General Assembly of Maryland, 1956 Session.

In 1952, therefore, when the Legislature was considering the Autonomy Act, the University, except for its instructional personnel, was within the jurisdiction of the Commissioner of Personnel and the Standard Salary Board. As will appear by reference to the 1951 Edition of the Code, an express exception from Standard Salary Board control was made on behalf of the faculty of the University of Maryland (and other colleges). That provision, which appears in Section 25 of Article 64A (1951 Ed.) reads, in part, as follows:

> "Provided, however, that positions upon the faculties of the University of Maryland * * * but not the non-instructional personnel of such institutions, shall be excluded from said pay plan and from the jurisdiction of the State Employees Standard Salary Board."

It is necessary, in light of the situation then existing, to look to the history and background of the Autonomy Act in order to determine the effect of that Act upon the then existing structure of control of University Employees by the Commissioner of Personnel. The Autonomy Act had a stormy career. A bill designed to grant autonomy to the

University came on for consideration by the General Assembly of Maryland in the 1951 Session. It was originally couched in the style of a proposed constitutional amendment. During the legislative process, for reasons not here important, it was amended into the form of an ordinary bill. In that form it passed the Legislature as House Bill 681, and was submitted to the Governor for signature. A large amount of public discussion and comment was occasioned by the Bill. Eventually, the Governor vetoed it.

In explaining the veto, the Governor, in a memorandum attached to his letter returning the Bill to the Speaker of the House, discussed generally the objections he found to the Bill. In summary, it can be said, in so far as the veto message pertains to the present inquiry, that the Governor was critical of any legislative measure which would free the University from all regulation in the selection of employees. He did not take exception to the fact that academic persons were exempt from the Merit System, but stated his objection to broad exemption of ordinary employees, such as stenographers, clerks, bookkeepers, maintenance people, watchmen, messengers, etc. from the Merit System. Of immediate importance is that section of the Governor's veto message in which he commented on the effect of House Bill 681 on civil service rights of employees. This veto message appears in the Laws of Maryland of 1951, at pages 2139 through 2144. At 2140, the Governor made the following comment.

> "In support of the bill, it has been pointed out that it specifies that employees, though not required to be under civil service, shall, nevertheless, have protection against injustice by resort to an appeal. This protection they will have anyway if they remain in the civil service system, and there is no reason for exempting the University from the requirement binding on all other agencies of the State that positions shall be filled from civil service lists, and that selections shall not be subjected to the danger of political or personal favor-

itism. The grave apprehension expressed to me by the Maryland Classified Employees Association, and the individual employees of the University of Maryland, as to the consequences of House Bill 681 to their job security, and privileges, deserves consideration.

"This bill would allow the University to pay its non-academic employees, chosen without regard to civil service, more than people of the same qualifications and in the same classifications and performing the same duties, are paid in other State offices. It has been suggested in defense of this provision that the salary scales established by the Standard Salary Board are inadequate for employees living in the Washington area. The plain answer is that the Standard Salary Board has power, under existing law, to authorize differentials to meet special conditions such as this is represented to be. If the facts sustain the claim, the Standard Salary Board should be applied to for appropriate action. Such a matter should not be determined at the will of one-man whose decision is beyond review."

It will be noted that the Governor's objections were based on (1) the failure to provide for the filling of positions from civil service lists, and (2) the freedom which was granted the University to act without regard to the Standard Salary Board.

No effort was made in the 1952 Session to override the veto of House Bill 681 of the prior Session. There was, however, introduced in the 1952 Legislature another autonomy measure, House Bill 26. This Bill had the same underlying purpose and *substantially* the same provisions as its predecessor. The controversy concerning vetoed House Bill 681 had wrought some changes in the form of the Autonomy Act, however. For example, the vetoed Bill had not specifically provided that the appointment of personnel by the

University should be free of the provisions of Article 64A. The Bill, as submitted in 1952, was similar to the 1951 Bill in that it expressly spelled out the freedom of the University from the control of any other State Board, bureau, State department or commission, in substantially the same language as had House Bill 681. There was, however, added to the 1952 Act a provision which freed from Article 64A the University's *appointing power,* but contained the significant provision "after appointment, all employees *in positions which are so designated* by the University shall be *regarded and treated* as Classified employees of the State, to have all the rights and privileges accorded to Classified employees under the provisions of" the Merit System. The Act then went on to provide "*Such Classified employees* shall have the right of appeal as provided by law in any case of alleged injustice; shall be paid salaries *not less than* are paid in similar classifications in other State bureaus and departments; shall retain their vacation privileges, their retirement status and benefits under the State Retirement System". (Emphasis supplied.) In the course of the Legislative process, a further amendment was added to House Bill 26, which read, in part, as follows:

> "All employees and employment classifications included within the Classified Service of the State as of June 1, 1952, *shall remain in and be a part of the Classified Service,* and the University shall not designate them, or any part of them, as anything other than part of the Classified Service." (Emphasis supplied.)

It was further provided that the University could not abolish existing classifications without prior approval of the Commissioner of Personnel.

This Bill passed both Houses and was submitted to the Governor for signature. Again the Governor vetoed. The veto message is found at pages 351 to 359 of the Laws of Maryland of 1952. In commenting on the problem here presented the Governor made the following pertinent observations, at page 354:

"2. Why should non-academic employees be selected without the merit system? It is surely not enough to answer that once they have been chosen without the merit system, they will be blanketed in. It is difficult to see why stenographers, clerks, bookkeepers, maintenance people, watchmen, messengers—in fact, all outside the teaching staff—should not be selected under merit system rules like employees in other departments. One can readily understand the perfectly human impatience of an appointing officer with restrictions imposed upon him by a merit system. Nevertheless, public opinion favors the civil service system for other than academic employees. This system was not established in our State and in other State and City governments idly, to harass the appointing power, but because it was deemed necessary to prevent patronage abuses for political and other purposes unrelated to the public good. Experience has shown that the civil service, with all its faults, is preferable to the spoils system. Why should the established practice be abandoned by the University, and what reason shall we give to other departments who come seeking similar immunity from restraint in the selection of employees?

"3. Why should the University, alone among State departments, be free to pay any amount it pleases in excess of what the Standard Salary Board fixes for similar employment in other departments? There is no rational justification for allowing the University to pay its non-academic employees, chosen without regard to civil service, more than people of the same qualifications and in the same classification and performing identical duties in other State offices."

It will be observed, therefore, that in the Governor's opinion the Bill passed by the 1952 Session still had the basic weaknesses with respect to selection of employees

and the control by Standard Salary Board which had existed in the vetoed Bill in the 1951 Session. This veto was overridden by a vote of 86 to 29 in the House, and by a vote of 29 to 0 in the Senate on March 4, 1952, and accordingly, took effect on June 1, 1952, as Chapter 14, in accordance with its terms.

The structure of Chapter 14 is such that the interpretation thereof is difficult. By its general form, it provides for the addition of a new sub-section to Section 240 of Article 77 of the Annotated Code of Maryland (1951 Ed.), title "Public Education", sub-title "University of Maryland", the sub-section to be identified as sub-section (d). (Upon codification, it became sub-section (e), however, in order to afford space for still another amendment which preceded Chapter 14.) By the new sub-section, it was provided that the University, specifically the Board of Regents thereof, "shall exercise with reference to the University of Maryland, and with reference to every department of same, all the powers, rights, and privileges that go with the responsibility of management, including the power to conduct or maintain such departments or schools in said university and in such localities as they from time to time may deem wise; and said board shall not be superseded in authority by any other State board, bureau, department or commission, in the management of the University's affairs, with the following exceptions: * * *". There were then exceptions made to the broad provision. One such exception (which, as a matter of grammar, is not worded in the form of an exception) expressly exempted the University from Article 64A of the Code, in the matter of appointments as heretofore pointed out. The other named exceptions do provide (as a matter of grammar) for minor limitations upon the express freedom from restraint given by the broad statement heretofore quoted. The other exceptions deal with control of income; audit of expenditures; the right of certain State officers to sit with the Board of Regents; the requirement that annual reports be made; the requirement that requests for appropriations be submitted to the De-

partment of Budget and Procurement; and, in Section (7) thereof, the exceptions again took the form of an express grant of power, by providing that the Board of Regents may appoint to all positions theretofore existing or thereafter created at the University, and permitted the Board to delegate such power to the President, if it wished.

What occurred, therefore, upon the passage of Chapter 14, was that the University was granted a sweeping exemption from control by other State departments, bureaus, boards and commissions. As respects the Merit System, although the statement is categorized as an "exception", in fact, the exception spells out plainly the freedom of the University from control in so far as *appointment* of employees in any and all positions at the University is concerned. The only elements of the "exception" which seem in any way to restrict the University's freedom are those elements which grant protection to existing classifications and accrued rights of Classified employees as of June 1, 1952. Further, those employees appointed after the effective date of the Act were protected in their rights of appeal, their salary scales, vacation privileges, retirement status, other retirement benefits, and other rights *after their job has been designated by the University as one entitled to such rights.*

An analysis of the Act leads to these preliminary conclusions:

1. That the University has the untrammeled right to appoint any person to any position without regard to the Merit System.

2. Those employees appointed after June 1, 1952, in categories *so designated* by the University are to be "regarded" and "treated" as Classified employees, with the rights and privileges accorded a Classified Employee under Article 64A. (It should be noted that the Act does not state that those persons *are in fact* Classified employees; on the contrary, it says they are to be *regarded* and *treated* as such.)

3. Employees and employments in Classified Service at the University as of June 1, 1952, *remain in and are a part of* the Classified Service. The University has no power to remove either the classifications or the occupants of such jobs from the Merit System.

4. As to salaries paid persons appointed after June 1, 1952, to positions so designated by the University, they shall be *not less than* are paid similar classifications in other State Departments. (This further indicates that those appointees filling positions after June 1, 1952, are not in fact Classified, but are to be *treated* as Classified.)

5. Since the Standard Salary Board falls within the category of "any other State Board", from which the University is expressly granted exemption, the University's pay scales are no longer subject to Standard Salary Board Control. (Although the Standard Salary Board is an integral part of the Code provisions with respect to the Merit System, it is a body separate and apart from the Commissioner of Personnel; hence the "exception" which deals with freedom from control under Article 64A would not affect the University's freedom from Standard Salary Board control.)

From what has been said, it will be seen that the effect of Chapter 14 is to preserve those classifications of University personnel existing prior to the effective date of the Act and to preserve the rights of those employees holding jobs within those classifications. Freedom from control by the Standard Salary Board was extended over all positions at the University as of the effective date of the Act, both as to then employees and as to future employees.

Since the passage of the Autonomy Act, the University has acted upon the assumption that it is free from the Standard Salary Board. As we have heretofore indicated, we believe this conclusion was correct as of the effective date of the Autonomy Act. Since the legislation which gave the freedom is subject to amendment by later enactments of the General Assembly, this freedom would not necessarily continue in the event the Legislature withdraws that area of exemption from the University.

Since the passage of the Autonomy Act, the University has further acted upon the assumption that it is free to designate into the Classified Service, classifications and categories devised by the Board of Regents to meet special problems of the University. Some of these categories have been devised for the purpose of avoiding salary restrictions which the University felt were imposed upon it by virtue of the fact that a particular named employee occupied a particular classified position. We do not believe the University's view with respect to its right to designate new classifications into the Classified Service is correct. This is a power retained by the Legislature. We further believe, as heretofore indicated, that the University, as of the effective date of the Act, as in the case of any private employer, had the right to disregard Standard Salary Board restrictions upon *any* occupant of *any* position at the University. This was true at the time of the adoption of Chapter 14 and would remain true in the absence of legislation to the contrary.

The legal basis for our doubt as to the University's right to designate categories into the Merit System is the fact that in the early days of the Merit System Law, it contained a provision which permitted the Governor, by executive order, to add to the Classified Service offices and places of employment not theretofore included in the Service, as he thought advisable. Article 64A, Section 25, 1939 Ed. Code. This provision of the law was, however, held unconstitutional as a delegation of legislative power to the Executive Department, in the case of *Ahlgren v. Cromwell,* 179 Md. 243. Accordingly, the Legislature, by Chapter 490 of the Acts of 1947, recognizing the constitutional invalidity of the provision, repealed the same. In our opinion, it would be clearly unconstitutional, in view of the decision in the *Ahlgren* case, for the Legislature to delegate to the University (an agency of the State), the right to "blanket in" classifications created by the University. That power remains in the Legislature alone. We are of the opinion, therefore, that what is created is a hybrid organization of

University of Maryland employees, consisting of those persons employed subsequent to June 1, 1952, into positions so designated by the University, who are to be *regarded* as, but who are not in fact, Classified employees. This is unwieldy. To construe the Act as delegating the legislative power to the University to designate categories to be included in the Merit System, however, would bring it into conflict with constitutional provisions as interpreted in the *Ahlgren* case. We believe, therefore, that the Act should be interpreted as setting up this rather anomalous category of persons who are neither Classified nor Unclassified. This group has, in addition to the normal employees' rights, a right to "appeal as provided by law" in any case for alleged injustice and to receive salaries not less than are paid similar classifications in other State Departments. In addition, they retain vacation privileges and retirement status. They are *not*, however, Classified employees, though they enjoy the same rights and privileges.

As to job classifications and persons who held Classified jobs at the University as of June 1, 1952, however, they may not be removed from Classified Service but remain therein, and the persons may be freely transferred inside that system. If a person so in Classified Service accepts employment with the University in categories of classifications other than the recognized classifications, however, he will go out of the Classified Service and enter either the category of Unclassified persons or the category of persons with classified benefits who are neither Classified nor Unclassified, as heretofore set out. The University may not of its own motion, however, remove either their job classification or the person from the Classified Service.

In so far as the Commissioner of Personnel is concerned, therefore, he is to deal with and treat those employments and persons in the State's employ at the University as of June 1, 1952, as the "Classified Employees" at the University of Maryland. Persons thereafter appointed to a job within the Classified Service categories become Classified Employees, but others fall into the category of University

of Maryland employees and obtain Classified Service benefits only if the University designates their job as entitled to protections heretofore indicated to be applicable thereto. Persons in the Classified Service who are transferred with their own consent to new positions out of the Classified Service after June 1, 1952, go out of the Classified Service and become part of the second designated group, to wit, University of Maryland employees, dependent for Classified rights upon the action of the University in designating the job as one with such rights.

It may be argued that the *Ahlgren* case has the effect of rendering that portion of Chapter 14 which deals with the right of the University to "designate" positions into the Merit System unconstitutional. We have chosen as a matter of statutory interpretation to adopt a view which would hold the provision constitutional. We believe this course of action is required by that maxim of statutory construction which enjoins one construing statutes to seek to harmonize the statute with constitutional provisions. Sutherland, *Statutory Construction* (3rd Ed.) Section 6202, 50 Am. Jur. "Statutes", Section 1701, pp. 149-152. We believe, however, that it may fairly be said that the same result would obtain whether we treat that portion of the statute as constitutional or deny it constitutional validity. Clearly, the provisions permitting the designation by the University of positions entitled to be treated and regarded as entitled to benefits similar to those in the Classified Service are distinct and separate from the remainder of the statute. The intent of the Legislature may be gathered from the remainder of the statute, not considering the provisions here under discussion, and accordingly the unobjectionable part would be enforced. *Robey v. Broersma,* 181 Md. 325; *Welch v. Colgan,* 126 Md. 1.

Since the provision here under discussion is separable, and since its alleged invalidity would not affect the remaining provisions of Chapter 14, even in the absence of a severability clause we would be warranted in enforcing the balance of the statute. *McKeldin v. Steedman,* 203 Md. 89,

103. Evidence that it is a matter of no consequence whether the section be deemed unconstitutional, or interpreted in the manner heretofore set forth, will be found in the further discussion of the immediate problems presently under consideration.

Coming, therefore, in light of the background, to the problems presently posed, and our opinion with respect thereto, the problems and our views may be stated as follows:

1. May the University, under the powers purportedly given by Chapter 14 of the Acts of 1955, designate into the Classified Service the general staff nurses, the head nurses, the supervisors of nurses, and the nurses' aides at the University Hospital?

In our opinion, if the provision of the statute with repect to the power of the University to "designate" persons as entitled to classified benefits is construed in accordance with our views heretofore set forth, there is no power in the University to bring those persons into the Classified Service. The University may designate those jobs as jobs which may be "regarded" and "treated" as Classified; however, they will not be *in* the Classified Service. If the statute be construed as unconstitutional with respect to the designation provision, there would similarly be no power in the University to bring those persons into the Classified Service.

2. Should the Commissioner of Personnel maintain classification numbers for positions at the University which have been created by action of the Board of Regents subsequent to June 1, 1952?

In our opinion, any position created by action of the Board of Regents, which was not a recognized position at the time of the passage of the Autonomy Act, is not a proper subject for the Classification System of the Commissioner of Personnel. All such categories fall within either (a) University of Maryland employees only, not entitled to Merit System rights; or (b) University of Maryland employees entitled to certain Merit System rights

as a result of designation by the University under the powers given by Chapter 14. Again, the approach taken to the statute with respect to the powers of the University to designate is immaterial, since the same conclusion would result. In the event the statute be considered unconstitutional in that regard, the University would have no right to direct the creation of any new Merit System Classifications. If the views herein expressed are adopted, the University still would have no right to impose the new classifications upon the Merit System, but persons occupying them would be assured benefits similar to those of civil service because they are "regarded" and "treated" as classified; they do not, however, become Classified Employees.

3. Are the salaries of employees of the University subject to the Standard Salary Board pay plans?

In our opinion, Chapter 14 clearly indicates the legislative intent to free all categories of employees at the University, both instructional and non-instructional, from the control of the Standard Salary Board. This freedom remains unless subsequent legislative action shall again subject the University to the Standard Salary Board. The one basis for such an argument which appears from an examination of the applicable law is founded on the action of the 1953 Session of the Legislature in amending Section 25 of Article 64A. At that time, they included in the repeal and re-enactment that portion of Section 25 which is quoted at page 3 hereof. The inference which may be raised from this action of the Legislature is that the University's non-instructional personnel have been again brought under the jurisdiction of the Standard Salary Board. Strict statutory interpretation gives weight to this argument. We are of the opinion, however, that technical rules of statutory interpretation must, in the present instance, yield to the clear legislative intent which is evidenced by the Autonomy Act. In repealing and re-enacting Section 25, the Legislature did not expressly refer to the Autonomy Act. It did not purport in any way to add an exception to the sweeping exemption of the University from control of other State Boards. Under

the circumstances, therefore, we conclude that the repeal and re-enactment of Section 25 should not be accorded that significance which might, as a matter of technical statutory construction, ordinarily be given that legislative action. We do not believe the Legislature intended this repeal and re-enactment to be a later expression of its intent with respect to the control by the Standard Salary Board of salaries of non-instructional personnel at the University of Maryland. Accordingly, in our opinion, both instructional and non-instructional salaries at the University remain free from Standard Salary Board rules, regulations and control.

C. FERDINAND SYBERT, *Attorney General.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

MERIT SYSTEM—REGULATIONS OF STATE BOARD OF HEALTH —DISTRIBUTION OF APPROPRIATIONS FOR LOCAL HEALTH SERVICES—PAYMENT OF SALARIES OF EMPLOYEES OF COUNTY HEALTH DEPARTMENTS UNDER RULES OF STANDARD SALARY BOARD—CREDIT FOR PRIOR EMPLOYMENT.

November 14, 1956.

Mr. Russell S. Davis,
State Commissioner of Personnel.

We acknowledge receipt of your recent letter posing certain questions arising under that portion of the State Board of Health regulations relating to the inclusion within the State Merit System of employees of County Health Departments.

By Joint Resolution No. 12, the 1953 General Assembly requested the Committee on Medical Care of the State Planning Commission to study the question of establishing a State public health policy as to the respective financial responsibility of the State and of the several counties. The Committee on Medical Care thereupon named a special Sub-Committee to review the financing of Maryland's health activities and to recommend a State-wide policy which would eliminate inequities in the distribution of State aid to the counties.

The recommendations contained in the report of this Sub-Committee were acted upon by the Legislature at its 1956 Session, when it adopted in the Budget Bill (Chapter 42) the formula suggested by the Sub-Committee for distributing among the counties of Maryland the sums appropriated for general local health services. This formula was designed to determine on an equitable basis the relative responsibility of the State and local governments for financing each County Health Department, and the State Board of Health was authorized under this appropriation to promulgate rules and regulations for the implementation and application of same. Acting pursuant to such authorization,

the State Board of Health included among the regulations it adopted on July 1, 1956, the following:

"Personnel

> Salary amounts considered for matching will be limited to the amounts paid to persons employed under the State Merit System or persons employed under the Merit System of a county which has a legally constituted home rule authority as enacted by the General Assembly of Maryland; however, persons who are employed as full-time members of a County Health Department, but are not State Merit System employees on July 1, 1956, will be given a grace period until July 1, 1961 and salary amounts paid them will be in the matching category. During the 'grace period,' the amount for matching will be limited to the salary they would receive in the current period if they had originally been employed under the State Merit System in the classification to which the State Commissioner of Personnel allocated their duties."

The problem that has arisen is whether employees of the County Health Departments, who have qualified as Merit System Employees, must be required under certain circumstances to accept a reduction in salary as a result of their classification under the State Merit System. You have enclosed a copy of a letter from the Health Officer of Anne Arundel County to Mr. Clemens W. Gaines, Chief of the Bureau of Management of the State Department of Health, in which two particular cases are cited. The individuals in question are fully qualified sanitarians who have been employed by the Anne Arundel County Health Department for several years. They have not been Merit System employees and you note that when they are brought within the State Merit System they must, under applicable rules of the Standard Salary Board, receive the beginning salary specified for their classification, which will be somewhat less than they are now receiving. It has been suggested by coun-

ty officials that the difference between what these employees are now receiving and what they would receive as Merit System employees could be supplied from local sources. However, under the State Board of Health regulation quoted hereinabove, such supplementary payments would become non-matching, and would have to be paid by such local sources.

In your letter you ask:

1. Whether employees of a local Health Department must receive full compensation through the State Treasurer in order to qualify as Merit System employees;

2. Whether the aggregate salary paid such employees after they have attained Merit System status must be in conformity with amounts prescribed by the Standard Salary Board; and

3. Whether the Standard Salary Board may adopt a regulation providing full credit under the State Merit System for time during which a person has been employed in a County Health Department, or whether such credit could be given only by appropriate legislation.

At the outset, it must be determined whether Merit System law permits individuals such as these County Health Department employees to receive, on entering the System, compensation from State sources greater than the minimum rate of pay prescribed for the classification in which employed. Rule 13 of the Rules of the Standard Salary Board prescribes the standards for determining the rates of pay for Merit System employees on entrance, change in scale from institutional to general, transfer, horizontal change, promotion and demotion, as defined by Merit System Rules. Under the definition of these categories contained in Rule 1 of the Maryland Merit System Rules, the act whereby employees of a County Health Department join the Merit System clearly constitutes "entrance" into the system. Rule 13A of the Standard Salary Board Rules relates specifically to entrance into the system, and provides that "no

person appointed to any position shall enter State service at a compensation exceeding or less than the minimum rate of pay prescribed for the classification in which he is employed", subject to certain exceptions which relate to an emergency area and which are not applicable under the present circumstances. There is, therefore, little doubt that the individuals in question must enter the Merit System at the minimum rate prescribed for their classification, no matter how many years they may have been employed by their respective county.

The first two questions which you pose, concerning the legality of payments from local sources to Merit System employees, may be considered together. In 28 Opinions of the Attorney General, 146 (1943), Attorney General William C. Walsh was asked whether compensation might be paid to certain employees of the State Department of Health, in addition to the salaries provided for in the Standard Salary Scale. One of the two different situations presented involved employees of the Department of Health who were full-time employees of the Department of Health, but were paid additional salaries by their respective County Commissioners for performing duties coincidental with those performed by them for the State. The additional compensation was paid directly to them and did not pass through the State Treasury. Attorney General Walsh held, citing 20 Opinions of the Attorney General, 595 and 606 (1935), that employment of an individual such as a health officer by both the State and by a County at the same time was not illegal. At page 148-149, he said the following:

> "In our opinion, the validity of these rulings and their controlling applicability to the facts now involved have not been changed by the enactment of the Standard Salary Schedule Law. Chapter 395 of the Acts of 1941 which created the Standard Salary Board and provided for its powers and duties, directed that all positions in the Classified and Unclassified Services of the State involving comparable duties, experience, responsibilities and

> authorities shall be paid in accordance with the Standard Schedule for such positions. Pursuant to this statutory mandate, the Salary Standards Board set up classifications for each position in the State Service, and established rules which, according to the statute, have, when approved by the Governor, the force and effect of law. These rules and schedules, in effect, provide that every employee shall receive a salary established for the classification in which he is found, and that no employee shall receive for his services in such classification and employment more than is set out by the law for that employment. No prohibition is added by the law against dual employment, nor additional compensation for work done in addition to the duties regularly prescribed and performed by those in the particular classification in return for the established compensation.
>
> "We express no opinion as to the long range propriety and wisdom of the performance of extra curricular duties or of dual employment. This, in the final analysis, is a matter of policy for the heads of Departments and the Executive, Legislative, and Fiscal officers of the State to pass upon. * * *"

We conclude that the aforegoing Opinion is controlling with respect to the first two questions which you have posed. The employees involved in the present case, like those in this previous ruling, are individuals who would be paid additional salary by a county for performing duties coincidental with those performed by them for the State. Such additional compensation would be paid directly to them and not through the State Treasury. Our conclusion in this regard is supported by the fact that the sections of the Merit System Law relating to the Standard Salary Board have been amended several times since said Opinion of Attorney General Walsh. The most recent amendment was Chapter 87 of the Acts of 1956, which reconstituted the

Standard Salary Board. None of these amendments added any statutory prohibition against dual employment, nor against additional compensation for duties performed for a county coincidental with those required by a particular classification. Where a statute has been amended following an interpretation by the Attorney General, it may be assumed that the Legislature has acquiesced in the contemporaneous construction by the Attorney General. *Tawney v. Supervisors of Elections*, 198 Md. 120 (1951); *Popham v. Conservation Commission*, 186 Md. 62 (1946).

Therefore, it is our opinion that employees of a local Health Department are not required to receive their total compensation through the State Treasurer in order to qualify as Merit System employees. Likewise, after such individuals have attained Merit System status, payments to them from local sources for services coincidental with those performed by them for the State need not be in conformity with amounts prescribed by the Standard Salary Plan. Of course, under the applicable State Board of Health regulation, any such payments will not qualify as matching funds under the statutory formula for apportionment of the State appropriation for general health services in the counties.

The final question to be considered is whether the Standard Salary Board, under the power conferred upon it by Section 27(a) of Article 64A of the Code (1956 Supp.), may formulate a rule providing that service for a county may be deemed service for the State under the Merit System Law, so that an individual entering the State service will receive credit for prior service rendered for a county. In our opinion, the Standard Salary Board does not have the power to permit service for political subdivisions of the State to qualify as State Service under Merit System Law. There is no provision in Section 25 of Article 64A, relating to the duties and powers of the Board, suggesting that employment by an employer other than the State may be counted as State service, so that an individual so employed may on entering the Merit System have all the longevity

benefits available to employees of the State itself. If the Board had such power, there is no reason why it would be limited to political subdivisions, but would extend to semi-public and private employers as well. We do not believe that the Legislature intended that the Board would be empowered to so extend the benefits of the Merit System.

In our opinion, before employees of a County Health Department would be entitled to receive credit for such employment on entering the State Merit System, it would be necessary that legislation be enacted specifically providing for same. The Legislature is in a position to consider what type of service should qualify for such credit in accordance with the objectives of the present formula for apportionment of the State appropriation for local health services. In the absence of such legislation, personnel entering the State Merit System are not entitled to receive from State funds a salary in excess of the minimum provided by the Standard Salary Plan, other than as provided in Rule 13A.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

MOTOR VEHICLES—FINANCIAL RESPONSIBILITY—COLLISION INSURANCE CARRIERS WHO HAVE SUCCEEDED TO THE RIGHTS OF THEIR INSURED TO RECOVER DAMAGES NEED NOT BE A PARTY TO A RELEASE UNDER FINANCIAL RESPONSIBILITY LAWS.

January 30, 1956.

Mr. Frank Small, Jr.,
Commissioner of Motor Vehicles.

You inform us that in the past attorneys representing insurance companies carrying collision insurance on motor vehicles have filed letters with you showing that such insurers have subrogation rights arising out of motor vehicle collisions involving persons insured by such collision insurance carriers. Thereafter in some cases the owners, having obtained settlement from their insurance companies under their collision policies, have executed notarized full releases from liability to the owners of the other vehicles involved in the collisions, with the result that operators' permits and registration certificates of the released owners have not been suspended by your office under Section 119 of Article 66½ of the Annotated Code of Maryland (1951 Ed. and 1955 Supp.).

The attorneys for the insurance carriers contend that you should not accept such a release unless a representative of the insurance carrier likewise signs the release. You also inform us that in the majority of cases, however, you are unaware of the subrogation rights of the insurance carriers until after the releases have been accepted by you.

You ask whether or not you have authority to refuse to accept releases, otherwise proper, signed by the persons who suffered the damages or injuries in such collisions when the insurance carriers are not a party to such releases.

Section 119 of Article 66½ of the Code was designed to expedite the removal from the highways under certain circumstances of uninsured and financially irresponsible operators and owners of motor vehicles. The Act requires the Department, within 90 days after receipt of an accident report, to suspend the license of each operator and all registrations of each owner of a motor vehicle in any way involved in such accident unless there is a compliance with either Section 119 or 120 of Article 66½. Section 120 provides, in part, that the suspension shall remain in effect until evidence satisfactory to the Department has been filed with it showing that the owner and operator of the vehicle has been released from liability with respect to all claims for injuries or damages resulting from the accident.

The insurance carriers, by their subrogation contracts, are put in no better position than their insured. If the insured has released his rights against the other persons involved in the collision, then the collision carrier succeeds to no rights against the persons so released. The recourse, if any, of the insurance carrier will be against its own insured, rather than against the persons so released.

It is our opinion that the controversy which has arisen is one of which you may not take cognizance. The Act is silent respecting collision insurance and, while we do not mean to approve a practice which may result in the destruction of the insurer's right of subrogation by the deliberate act of the insured, the Act authorizes you to rescind the suspension when satisfactory evidence of a complete release from liability has been presented to you, but it does not go beyond that point and authorize you to construe written instruments and to determine the rights and liabilities as between the parties.

We are therefore of the opinion that you should accept the releases if they are proper in form and all persons suffering damage or injury in the collisions are parties to

the release and that you should not revoke the operator's permit or registration certificate in those cases, even though the insurance carriers are not a party to the release.

C. Ferdinand Sybert, *Attorney General.*

Stedman Prescott, Jr., *Asst. Attorney General.*

MOTOR VEHICLES—TITLING TAX EXEMPTION TO CONSULAR OFFICERS ALSO INTENDED TO INCLUDE DIPLOMATIC OFFICERS.

May 29, 1956.

Mr. Frank Small, Jr.,
Commissioner of Motor Vehicles.

We have your recent letter in which you ask who is a consular officer, within the meaning of Chapter 56 of the Laws of 1956, which amended Section 28(d) of Article 66½ of the Annotated Code of Maryland, to exempt any foreign consular officer who is a national of the foreign state appointing him, and who is not engaged in any business, trade or profession within the United States, from the payment of the excise tax (the titling tax) provided for in that Section.

Technically, consular and diplomatic officers are not one and the same, but it is our opinion that it was the intention of the Legislature in passing Chapter 56, *supra,* to exempt both from the payment of the excise tax provided for in Section 28(d), *supra.* Prior to the passage of Chapter 56 by the Legislature, this office had consistently ruled that treaties between the United States and foreign nations, granting an exemption from all taxes levied upon the person or property to diplomatic and consular officers did not afford an exemption from the Maryland motor vehicle titling tax. We were advised by the State Department that the collection of this tax by the State of Maryland from diplomatic and consular officers was having an adverse effect upon relations between the United States and foreign nations. It was at the instance of the State Department that Chapter 56 was enacted for the purpose of exempting both diplomatic and consular officers of foreign nations from the tax.

It is our opinion that any member of the staff of any consular or diplomatic officer of a foreign government,

working directly under the control and orders of said consular or diplomatic officer, is entitled to such exemption. You will have to look to the facts in the case of each individual who applies for the exemption and determine whether he is entitled to the exemption. Whether the person applying be a secretary, military attaché, clerk or domestic servant, if his service furthers and is related to the functions of the ambassador or consul, as the emissary of his country to our own country, then he is entitled to the exemption. The duties of the person, even when merely social or personal, if they contribute to the efficient performance of the important duties of the recognized representatives of a friendly state, make him an officer within the meaning of the statute. Government officials of foreign countries who are present here to transact business with private persons or organizations which are in no way connected with our government, are not to be granted the immunity. The advice of the State Department of the United States on the question should be accepted by you in deciding whether the person making application for the exemption is entitled thereto.

In *Haley v. State,* 200 Md. 72 at 84, the Court of Appeals said:

> "*Diplomatic status is a political question and a matter of state; the finding of the Secretary of State must be accepted unquestioned.* * * * 'the decision of the executive department as to whether a person is a member of a foreign mission or of its personnel is conclusive upon the courts'."

The immunity of the agent or servant acting for the diplomat is the privilege of the diplomat and not that of the agent or servant. It is only because it was felt necessary for the purposes of state and to preserve the relationship between our government and that of the foreign government that this exemption was granted. As we said before, consular officers are not usually diplomatic officers, but are assigned to represent a foreign government in this country for the purpose of protecting and promoting that

government's interests, and those of its citizens and subjects who are doing business here. We are of the opinion that it was the intention of the Legislature to include diplomatic officers as well as consular officers and that both are exempt under the statute.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

MOTOR VEHICLES—SUBSTITUTED SERVICE OF PROCESS IS VALID WHEN AN ACCIDENT OCCURS ON A FEDERALLY OWNED HIGHWAY WITHIN THE LIMITS OF THE STATE OF MARYLAND.

June 12, 1956.

Judge Grover Lee Small,
Trial Magistrate for Prince George's County.

We have your recent letter in which you ask whether or not substituted service of process upon a non-resident motorist, by service on the Secretary of State, is sufficient to give the Maryland courts jurisdiction, when the automobile accident occurred on that portion of the Washington-Baltimore Parkway which is federally owned.

Chapter 83, Laws of Maryland, 1956, became effective June 1, 1956, and amended Section 113(a) of Article 66½ of the Annotated Code of Maryland to read as follows:

> "The acceptance by a non-resident individual, firm, or corporation of the rights and privileges of using the roads and highways of Maryland, as evidenced by his, their, or its operation of a motor vehicle on any of the public highways within the limits of this State, shall be deemed equivalent to an appointment by such non-resident individual, firm or corporation of the Secretary of State, or his successor in office, to be his, their or its true and lawful attorney upon whom may be served all lawful processes in any action or proceeding instituted, filed or pending against him, them or it, growing out of any accident or collision in which said non-resident may be involved, while operating or causing to be operated, a motor vehicle on such public highway or elsewhere within the boundaries of the State of Maryland, including but not limited to property owned by individuals, firms, corporations or the federal government; and said ac-

ceptance of the rights and privileges of using said highways or the operation of said motor vehicle by said non-resident individual, firm or corporation, as hereinbefore provided, shall be a signification of his, their or its agreement that such process be of the same legal force and validity (except as hereinafter provided) as if served on him, them or it personally."

Prior to its amendment, Section 113(a) read as follows:

> "The acceptance by a non-resident individual, firm, or corporation of the rights and privileges of using the roads and highways of Maryland, as evidenced by his, their, or its operation of a motor vehicle on any of the public highways within the limits of this State, shall be deemed equivalent to an appointment by such non-resident individual, firm or corporation of the Secretary of State, or his successor in office, to be his, their or its true and lawful attorney upon whom may be served all lawful processes in any action or proceeding instituted, filed or pending against him, them or it, growing out of any accident or collision in which said non-resident may be involved, while operating or causing to be operated, a motor vehicle on such public highway and said acceptance of the rights and privileges of using said highways or the operation of said motor vehicle by said non-resident individual, firm or corporation within this State, shall be a signification of his, their or its agreement that such process be of the same legal force and validity (except as hereinafter provided) as if served on him, them or it personally."

It has been established that a State, in the exercise of its police power, may declare that a non-resident motorist, by the use of the highways within that State, does thereby impliedly appoint a designated official of the State (the Secretary of State in Maryland) his agent on whom process

may be served in any action growing out of an accident in which the non-resident is involved while operating a motor vehicle in that State. It has been held that this form of notice is sufficient to satisfy the requirements of due process as long as the defendant is afforded an opportuntity to defend himself. *Hess v. Pawloski,* 274 U.S. 352; *Assurance Corp. v. Perkins,* 169 Md. 269. The terms of Chapter 83, Laws of 1956, clearly express the intention of the Legislature to permit substituted service of process on a non-resident motorist, after June 1, 1956, even when an automobile accident occurs on federally owned property within the State.

The question then arises whether or not there can be substituted service of process if the accident occurred on a federally owned highway prior to June 1, 1956, the effective date of the amendment to Section 113(a). It is our opinion that, prior to its amendment, the language of Section 113(a) was broad enough to cover accidents that occurred on federally owned highways within the limits of the State of Maryland. If the non-resident were personally served with summons while in the State, it is clear that the Maryland courts would have jurisdiction over him, regardless of whether the accident occurred on a State-owned highway or on a federally-owned highway. The substituted service provided for by the statute is also made within the limits of the State of Maryland. The agent of the non-resident motorist (the Secretary of State of Maryland) is to be served within the boundaries of the State.

The words "as evidenced by his, their or its operation of a motor vehicle on any of the public highways within the limits of this State" in the statute, do not restrict the use of substituted service of process to cases where a State highway is used. The language is broad enough to cover any and all public highways within the boundaries of the State, whether they be State or federally owned. We believe the purpose of the amendment contained in Chapter 83 was to clarify, rather than to change Section 113(a), as it

existed before. Section 2(57) of Article 66½ of the Code, reads as follows:

> "(Street or Highway.) The terms 'street', 'highway', 'roads', 'public highway' or 'public roads' shall include 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 and the term shall include roads and driveways of State Hospitals and other State Institutions."

Clearly, the Washington-Baltimore Parkway is a public highway, within the meaning of the definition in Section 2(57) above.

We then come to the question as to whether or not the State may by statute require a non-resident motorist to consent to accept substituted service of process in a State court when he operates his vehicle on a federally-owned highway within the State.

In *Knott Corp. v. Furman,* 163 Fed. 2d 199, a citizen of the Commonwealth of Massachusetts sued a Delaware Corporation in a federal court in the Commonwealth of Virginia for injuries she received in a hotel fire. The defendant operated a hotel on a federal military reservation at Old Point Comfort, Virginia. The plaintiff effected service upon the Delaware corporation under a corporate statute of the Commonwealth of Virginia, which reads as follows:

> "3. If any such company shall do business in this State without having appointed the Secretary of the Commonwealth its true and lawful attorney as required herein, it shall by doing such business in the State of Virginia be deemed to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney for the purposes hereinafter set forth."

The Corporation claimed the service was ineffective because it was doing business only on federally owned property

within the State of Virginia. The Court said that there was no difference in the application of the statute because the Corporation was doing business on a Federal Reservation, and that the Corporation was presumed to have consented thereby to the consequences prescribed by State laws with respect to service of process. The doing of business by foreign corporations within the Reservation was held to have the same effect, so far as submitting itself to jurisdiction for the service of process is concerned, as doing business elsewhere in the State. The Court said that corporations doing business on the reservation came in contact with the citizens of Virginia and did business with them the same as other foreign corporations elsewhere within the State, and that there was the same reason for making them amenable to process in the local courts, and that any act which might be legally taken as an acceptance of service elsewhere in the State might be so taken within the Federal Reservation.

We can see no difference in substance between the implied consent required by the Virginia statute in *Knott Corp. v. Furman, supra,* and the implied consent in the case of a non-resident motorist operating on a federally owned highway. In each case, there is a waiver and consent to service by the person on the federally owned property. It is therefore our opinion that a non-resident motorist who has been involved in an automobile accident on a federally owned highway within this State may be served by substituted service of process in accordance with Section 113(a) of Article 66½, whether the accident occurred before or after June 1, 1956.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

MOTOR VEHICLES — EVIDENCE — THE COMMISSIONER OF MOTOR VEHICLES MAY USE A RUBBER STAMP TO AFFIX HIS SIGNATURE WHEN CERTIFYING ABSTRACTS OF RECORDS OF THE DEPARTMENT OF MOTOR VEHICLES.

July 26, 1956.

Mr. Alger Y. Barbee,
State's Attorney for Montgomery County.

We have your recent letter in which you ask whether or not the Commissioner of Motor Vehicles may properly use a rubber stamp bearing his signature in lieu of his actual handwritten signature, in certifying abstracts of the records of the Department of Motor Vehicles, as authorized by Article 66½, Section 170 of the Annotated Code of Maryland (1956 Supp.). Section 170 reads, as follows:

> "The Department shall upon request furnish any insurance carrier or any person or surety a certified abstract of the record of any person subject to the provisions of this article, which abstract shall fully designate the motor vehicles, if any, registered in the name of such person; and if there is no record of any conviction of such person of a violation of any provisions of any statute relating to the operation of a motor vehicle or of any injury or damage caused by such person as herein provided, the Department shall so certify and every such certification shall be admissible in any proceeding in any court in like manner as the original thereof. The Department shall collect for each such certificate the sum of one dollar, but no charge shall be made for any record required or requested by any court or State department."

A certification by a public officer is an authoritative attestation in writing, signed by the attesting officer, which is by law made evidence of the truth of the facts therein contained for certain purposes. There is no particular form

in law that such certificates must take in the absence of a statute providing for a particular form. *Doherty v. McDowell,* 276 Fed. 728 at 730. Section 170 does not provide who in the Department of Motor Vehicles shall make the certificate, the form of the certificate, or the method by which the person certifying the abstract of the record shall apply his signature to the certificate. A signature is whatever mark, symbol or device one may choose to employ as representative of himself. Signing does not necessarily mean a written signature, as distinguished from a signature by mark, print, stamp or by the hand of another. *Assessors of Boston v. Neal* (Mass.), 40 N.E. 2d 893. It has generally been held that a signature may be written by hand, printed, stamped, typewritten, engraved, photographed, lithographed, or cut from one instrument and attached to another, if done with the actual intent of the person signing to adopt it as his signature. In the absence of a statute directing that a certification be under the "hand" (which in legal parlance means handwriting or written signature) of the officer making it, the method of affixing his signature is of little importance, as long as it is his intention to adopt whatever is affixed as his true signature. *Weiner v. Mullaney* (Cal.) 140 P.2d 704; *Cumming v. Landes,* 140 Iowa 80, 117 N.W. 22; *Lancaster v. Wilkerson,* 143 Ky. 226, 136 S.W. 217; *McGrady v. Munsey Trust Co.* (D.C.) 32 A.2d 107; *Packard v. United States,* (D.C.) 77 A.2d 19; *Tabas v. Emergency Fleet Corp.,* 9 Fed. 2d 648.

The courts throughout are generally in accord in holding that a rubber stamp signature, even of a judicial or court officer, is a sufficient authentication, fulfilling the requirements of a signature, when such rubber stamp has been adopted by the issuing officer as his signature. Annotation in 30 A.L.R. 703, and cases there cited.

In an earlier opinion of this office, 40 Opinions of the Attorney General, 282, we did rule that a criminal warrant could not be signed by the use of a rubber stamp, but that it must be signed with the handwritten signature of the

officer authorized to issue the same. That ruling, however, was based upon certain requirements of the Constitution of the State of Maryland, and also the seriousness of the nature of the instrument there being signed. In this case, there are no constitutional or statutory requirements that the signature of the certifying officer be in his own handwriting. It is therefore our opinion that the Commissioner of Motor Vehicles may affix his signature to certify abstracts of the records of the Department by the use of a rubber stamp, in lieu of his actual handwritten signature, and that such a certified abstract is admissible in evidence in the courts of this State.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

MOTOR VEHICLES—REGISTRATION—PERSONS RESIDING IN AND EMPLOYED IN THE STATE OF MARYLAND MUST REGISTER MOTOR VEHICLES WITH THE STATE EVEN THOUGH OWNED BY A NON-RESIDENT IF KEPT AND DRIVEN IN STATE—ONLY EXCEPTION IS WHEN RESIDENT OF MARYLAND IS EMPLOYEE OF NON-RESIDENT OWNER OF THE VEHICLE.

November 20, 1956.

Sergeant David W. Kuhn,
Traffic Division,
Baltimore County Police Department.

We have your recent letter in which you inform us that there are persons from foreign States who are living in and have taken up regular employment in Maryland, but who attempt to evade titling taxes and registration fees in Maryland, by registering their vehicles in the names of other persons who are actually residents of their home States. You ask if they violate the law of the State of Maryland by keeping and driving the vehicles here in the State of Maryland.

Section 22(a) of Article 66½ of the Annotated Code of Maryland (1951 Ed.) requires every vehicle moved upon the highways of this State, with certain exceptions which do not apply to this case, to be registered here. This means that all vehicles operated upon the highways of this State must be registered unless specifically exempted by Section 22 (a), or by Sections 55, 56 and 57 of Article 66½. Sections 55, 56 and 57 permit exemptions from registration by reciprocal agreement in certain cases for non-residents.

Sections 55 and 56 of Article 66½ provide for the exemption of non-resident owners from registration under a reciprocal agreement between the home State of the non-resident and this State. The exemption granted by Sections 55 and 56 was only intended to apply to the vehicles of non-resident owners which are kept and generally operated by the non-resident owners in their home State. It was not

intended to apply to vehicles of non-resident owners kept and driven in Maryland. Those sections provide that any non-resident owner who takes up permanent residence here must register his vehicle here within 30 days. Section 57(a) provides that non-residents who temporarily reside in this State in excess of three months in any year are not to be exempted. Section 2(a)(43) of Article 66½ makes every non-resident who maintains a temporary residence in this State and accepts any employment or engages in any trade or profession in this State a resident for purposes of Article 66½, regardless of his residence for other purposes. Section 57(d) permits the exemption, from registration by reciprocal agreement, of a vehicle of a non-resident owner which is regularly kept and operated in this State, only when the vehicle is operated by a Maryland resident employed by a non-resident owner. It can be seen from Section 57(d) that residents of Maryland, other than those who are employees of non-residents, who keep and operate automobiles owned by non-residents must register those vehicles here. If vehicles owned by non-residents which are kept and operated here were exempt from registration there would be no purpose to the exemption provided by Section 57(d).

Since the persons to whom you refer are residents of the State of Maryland for purposes of Article 66½, and since the exemption of vehicles owned by non-residents, kept and driven by residents of this State is limited by Section 57(d) to situations in which the non-resident owner is the employer of the resident of the State of Maryland, the vehicles they are keeping and operating here must be registered in this State or it constitutes a violation of Article 66½ on their part.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

NATIONAL GUARD—MEMBERS OF NATIONAL GUARD WHO ARE EMPLOYEES OF STATE OR POLITICAL SUBDIVISION ARE ENTITLED TO RECEIVE FULL PAY DURING ANNUAL FIFTEEN DAY TRAINING PERIOD IN ADDITION TO MILITARY PAY.

October 24, 1956.

Mr. Thomas B. Finan, City Solicitor,
City of Cumberland.

We acknowldge receipt of your letter of October 16, 1956, asking our opinion concerning the proper interpretation of Section 42 of Article 65 of the Annotated Code of Maryland (1951 Ed.). We understand that this summer certain employees of the City of Cumberland participated in the annual fifteen-day training period of the Maryland National Guard. Such employees contend that under the above-mentioned Section they are entitled to full pay from the City while they are members of the Maryland National Guard. On the other hand, the City contends that it is required to pay such employees only the difference between their camp pay and what they would have received as City employees had they not gone to camp.

Section 42 of Article 65 provides, in part, as follows:

> "All officers and employees of the State, County or political subdivisions thereof who shall be members of the organized militia * * * shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense or other training ordered or authorized under the provisions of this Article, or under any law of the United States, during such time as they are on inactive duty training for not to exceed fifteen days annually; * * *."

In our opinion, the words "without loss of pay" in the above statute mean without loss of pay from the State, County or political subdivision employing the individual concerned. The fact that an employee may receive other pay for his military duties during the training period does not relieve the municipal agency employing him from paying all of his regular salary. Any such payment to a member of the organized militia, made in consideration of his military activities, is supplementary to the employee's salary from the State, County or political subdivision concerned.

In 21 Opinions of the Attorney General, 657 (1936), this office held that as to employees on a per diem or hourly basis, the State Roads Commission would be required, under the terms of this statute, to pay them their average weekly wage. In the situation which you have presented, we understand that the employees in question receive a regular salary.

ALEXANDER HARVEY, II, *Assistant Attorney General.*

PEOPLE'S COURT—PEOPLE'S COURT JUDGE MAY ISSUE HABEAS CORPUS AD TESTIFICANDUM.

November 14, 1956.

Hon. Allen E. Buzzell,
Associate Judge of the People's Court
of Baltimore County.

We have your letter in which you raise the question of whether an Associate Judge of the People's Court of Baltimore County has authority to issue a writ of *habeas corpus ad testificandum* directing the Warden of the Maryland House of Correction to produce an inmate who is a defendant in a civil proceeding pending in the People's Court of Baltimore County.

The People's Court of Baltimore County was created by Chapter 672 of the Laws of 1955, and gave to this Court exclusive original jurisdiction at law in all civil cases where the damages claimed did not exceed $500.00, and was intended to replace and supersede the jurisdiction of the Justices of the Peace in civil matters. The title of the act states that the act is for the purpose of "... establishing a People's Court of Baltimore County, and prescribing the number, qualifications, tenure, and method of selection of the Judges of said Court, and their powers, duties and compensation; ...". A careful reading of the entire act fails to reveal an express grant of power or authority for the issuance of a writ of *habeas corpus ad testificandum.*

The writ of habeas corpus is a time-honored and venerable writ which antedates the Magna Charta and is protected by both the United States Constitution and the Constitution of the State of Maryland. However, indiscriminate employment of the writ would do nothing to safeguard liberty, but would do much to complicate and defeat orderly procedure. The General Assembly has recognized that the writ

itself should be issued by a limited number of persons, and by Article 42, Sections 1 and 2 of the Annotated Code of Maryland (1951 Ed.) there has been granted authority for the issuance of the writ to a limited number of judicial officers. Such authority is now vested in the Circuit Courts for the respective counties and the Chief Judges thereof, the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City, the Circuit Court and Circuit Court No. 2 of Baltimore City, and the Baltimore City Court and the Chief Judges thereof. (The portion of Section 1, *supra,* granting original jurisdiction to the Judges of the Court of Appeals in habeas corpus cases, was held unconstitutional in *Sevinskey v. Wagus*, 76 Md. 355).

In the case of *State v. Mace*, 5 Md. 337 (1854), the Court of Appeals considered the issuance of the writ of *habeas corpus ad testificandum.* By the provisions of the constitution of Maryland of 1851, the Court of Common Pleas of Baltimore City was a court of limited and specified jurisdiction, namely, having civil jurisdiction in all cases above $100.00 and not exceeding $500.00, appeals from judgments of the Justices of the Peace, and applications for benefit under the insolvency laws. By the Acts of 1853, the General Assembly conferred upon the Court of Common Pleas the right to issue the writ of habeas corpus. In discussing this, the Court of Appeals held that this was an unconstitutional grant of power by the General Assembly, but in so concluding went on to say:

> "In denying to the Court of Common Pleas the right to issue a writ of habeas corpus, we, of course, are to be understood as referring to that writ *cum causa,* and not to the writ of *habeas corpus ad testificandum. All courts* have the right to issue this writ, it being a power indispensable to the trial of causes." (Italics supplied.)

See also Annotated Cases 1915-D, 1029.

By the provisions of Article 4, Section 41(b) of the Constitution, the Legislature is granted authority to es-

tablish People's Courts in any of the counties. The above recited section of the Constitution refers to the People's Court as a "Court". The Court of Appeals recognized the People's Court of Baltimore City as a constitutional court in *Lambros v. Brown,* 184 Md. 350. However, this is in no way intended to indicate that we construe a Justice of the Peace to be a "Court". In *Charles Co. v. Wilmer,* 131 Md. 705, 708, it was expressly held that the office of Justice of the Peace is not a "Court".

The writ of *habeas corpus ad testificandum* may not be issued indiscriminately, however, but must only be issued in the sound discretion of the court upon a showing that the prisoner is a material witness to the cause, that his testimony is relevant, material and admissible, and that his attendance will not place an undue burden upon the Warden or other person entrusted with his security. 58 Am. Jur., Page 29.

We are of the opinion that if the Petitioner shows good cause for attendance at the trial of the case pending before you as Judge of the People's Court of Baltimore County, you are vested with authority to issue the writ of *habeas corpus ad testificandum.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

JOSEPH S. KAUFMAN, *Assistant Attorney General.*

PHYSICAL THERAPY

PHYSICAL THERAPY—EXTENT TO WHICH UNLICENSED TECHNICIANS MAY HELP LICENSED PHYSICAL THERAPISTS IN PRACTICE OF PROFESSION.

December 21, 1956.

Mr. Clemens W. Gaines, Secretary,
Board of Physical Therapy Examiners.

The Board of Physical Therapy has referred to this office a request for a ruling on the question of whether unlicensed technicians, working in hospitals or industrial clinics on a salary basis, are engaged in the unlawful practice of physical therapy when their work is done under the supervision and direction of a licensed physical therapist or physician. To assist in the formulation of a reply, you have furnished us with statements as to the administrative organization of several such clinics.

In one of these clinics the work is carried on in several different rooms located together in the clinic. A licensed therapist is always present in the clinic, and in each of the two major treatment rooms, to assume responsibility for the work. However, some of the work is done by technicians in other rooms at times when the responsible licensed therapist is not in the room. In other clinics, the licensed therapist is always in attendance and the instructions or directions given are, as a rule, given verbally and by actual demonstration.

In these circumstances, the legality of the acts performed in any particular clinic by a technician would depend upon a detailed review of the facts in each case. From the material furnished, we cannot state that the work carried on in any of the clinics definitely constitutes the unlawful practice of physical therapy. These technicians do not hold themselves out individually as practitioners; if they did, their acts might be unlawful even though carried on under the supervision of a licensed therapist. *State v. Paul,* 56

Neb. 369, 76 N.W. 861; *State v. Reed,* 68 Ark. 331, 58 S.W. 40. In each of the cases you pose there is a licensed therapist —or physician, who under the law has the authority of a licensed therapist—who is, and must be responsible for each treatment administered.

The ultimate test as to whether the acts performed by the unlicensed person constitute the unlawful practice of physical therapy is whether that person is attempting to exercise any of the skills required to perform the treatments specified by Section 565 of Article 43 of the Annotated Code of Maryland, as constituting the practice of physical therapy. The licensing provisions presuppose the existence of such skills, and are included in the law in order that persons requiring treatment by physical therapy may be assured the treatment is administered properly. Each act performed by an unlicensed technician must be judged individually as to whether the technician is attempting to exercise any of the skills that distinguish physical therapy.

It is our opinion that there is no reason in law why the work of administering certain physical therapy modalities could not be done by unlicensed persons so long as it is done under the supervision and personal direction of a licensed responsible individual. The latter would have to use his skill in such matters as determining what treatment is to be given, to what degree, for what period of time, to precisely what part of the body of the patient, et cetera. In *State v. Cornelius,* 200 Iowa 309, 204 N.W. 222, it was held that an unlicensed medical assistant could not prescribe for a patient, even when supervised. However, such technical matters as operating ultra-violet ray lamps, whirlpool baths, etc. in the manner specified by the licensed person would not be practicing physical therapy, since the physical therapy involved in such treatment is the exercise of skill by the licensed person who is directing the activity. See *Doumitt v. Diemer,* 144 Ore. 36, 23 P.2d 918; *People v. Hoxzey,* 260 Mich. 648, 245 N.W. 543. Presumably such treatments as massage and other modalities requiring direct contact with the patient could be done by an unlicensed

technician if skill as to the manner of treatment can be supplied by the licensed supervisor responsible for the treatment.

There may, of course, be certain modalities in physical therapy that cannot be administered with the proper degree of skill by a technician no matter how close the supervision or detailed the directions from the licensed person. In such a case, the unlicensed technician could not practice those modalities under any circumstances. For example, it has been held that in the practice of medicine certain acts could not be done by an unlicensed person even when under the direction and supervision of a licensed physician. *State v. Young,* 215 S.W. 499 (Mo.); *State v. Carlisle,* 30 S.D. 475, 139 N.W. 127.

In the clinics referred to, where the work is carried on by technicians only when a licensed therapist or physician is in attendance and personally giving instructions or directions, with actual demonstration, it would appear that the responsible person is in a position to exercise the physical therapy skills required, although that conclusion might depend upon the modalities being used and the skill required in their application. Where unlicensed technicians work in separate rooms, the possibility of unlicensed practice is greater, but again the modalities being employed, and the control of the responsible licensed person would be determinative.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

POLICE

POLICE COMMISSIONER—POLICEMAN ACCIDENTALLY KILLED AT HOME IS NOT COVERED BY DEPARTMENT REGULATION PROVIDING FINANCIAL ASSISTANCE FOR WIDOWS OR CHILDREN OF MEMBERS OF DEPARTMENT KILLED WHILE "ON ACTIVE DUTY".

April 27, 1956.

Mr. James M. Hepbron,
Commissioner of Police.

We have received from you a copy of the Police Department regulation, dated August 18, 1950, relating to financial assistance to be provided to the widow and/or children of any member of the Department who is killed or dies of injuries sustained while on active duty. You have asked our opinion concerning whether this provision would apply to the patrolman who recently was accidentally killed in his home. We understand that the patrolman in question was proceeding down the stairs in his house, partially dressed in his uniform, preparatory to leaving the house and going on duty, when he slipped and fell and was killed by the discharge of his pistol.

Prior to August 18, 1950, the regulation in question provided for the payment of $2,500 to the widow and/or children of any member of the Department who was killed or died of an injury sustained in line of duty as "the result of violence while attempting to or actually making an arrest". On the above-mentioned date, the regulation was amended to read as follows:

> "For the purpose of providing immediate financial assistance, approximately $2,500.00 will be paid to the widow and/or children of any member of the Department who is killed or dies of injuries sustained *while on active duty.* In similar cases, where there is no widow or children, approxi-

mately $2,500.00 will be paid to the estate of the deceased member." (Emphasis supplied.)

In our opinion, a member of the Department is not on "active duty" while making preparations in his own home for reporting for duty. Whether or not a policeman is covered by this regulation after having left his home and before arriving at his specific post is a different question which we will not undertake to answer in the absence of a specific set of facts. However, to hold that an accidental death occurring in the home constitutes one sustained "while on active duty", where the policeman was making preparations for going on active duty, would mean that financial assistance would be provided in practically every case where a policeman was killed or died of injuries. We do not believe that the regulation was intended to be so all-embracing that it would apply in every case where a member of the Department was wearing his uniform in his home either before or after a tour of duty.

In support of our conclusion, we refer you to the California case of *Dillard v. City of Los Angeles,* 118 P. 2d 345, 348. In that case, a police officer, after having arrested a person suspected of theft and while taking him to the police station, was attacked and knocked to the floor of his car before the prisoner was subdued by a fellow officer. Thereafter, the officer, while in the police station, was seen to be ill and was directed to go home about two hours before his period of duty expired. While driving his car home, he collided with a parked car and sustained injuries from which he died. The court held that this policeman was not "on duty" as a police officer at the time of his death so as to entitle his widow to a pension, notwithstanding the general order of the Department providing that a police officer is considered as being on duty twenty-four hours a day, in the absence of proof to the contrary.

The words "active duty" in your regulation are even more restrictive than the words "on duty" in the afore-

mentioned case. As we construe these words, a patrolman must be actively engaged in the performance of his duties at the time of death or injury before his widow and/or children would be entitled to the benefits provided.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

PORT AUTHORITY

PORT AUTHORITY—INDEPENDENCE OF CONTROL BY PRIOR BUDGET AND BY DEPARTMENT OF PUBLIC IMPROVEMENTS.

June 20, 1956.

Robert W. Williams, Esq.
Chairman,
Maryland Port Authority.

In connection with assuming office as Chairman of the Maryland Port Authority, you have made inquiry whether the Port Authority is subject to the provisions concerning the operational budget, as set up in Article 15A, Sections 15-23 of the Code of Public General Laws (1951 Ed. and 1956 Supp.), and whether any construction work undertaken by the Authority should be regulated by the Department of Public Improvements, as set forth in Article 78A, Section 16 of the Code of Public General Laws, (1951 Ed.).

It is apparent from the broad scope of powers given to the Port Authority in Section 5 of Article 62B, Chapter 2, Laws of Maryland, Extra Session of 1956, that the Authority was intended to operate with a substantial degree of independence, in order that it might carry out its functions with the flexibility ordinarily found in business concerns. The Authority is given heavy responsibilities with regard to development of port facilities and port traffic in Maryland, and in Section 23, it is stated that the Article shall be liberally construed to effect the purposes thereof. The purposes are clearly set out in Section 1, and the economic history of the development of Maryland ports, particularly the Port of Baltimore, as well as the threat to water-borne traffic that exists from several sources at the present time, make it clear that the Legislature intended the Authority to be able to use its powers quickly and effectively, without being delayed or hindered in its operations by subjecting its activities to the diligent, if time-consuming, scrutiny of other Departments.

1. *Budget.* Article 15A, Sections 15-23 set out generally the duty of the Director of Budget and Procurement "to continuously study and analyze the needs of the several departments, boards, commissions, bureaus, divisions, institutions and agencies of the State, and all private associations, corporations or institutions which receive any funds appropriated by the State for any purpose whatsoever; and to continuously study and analyze the current progress of revenue receipts in relation to such needs." Article 62B, as enacted by Chapter 2, Laws of Maryland, Extra Session of 1956, is obviously intended, in spite of the above provisions generally applicable to all State agencies, to permit the Port Authority to establish its own budget in any manner it may see fit. In Section 5(k), it is authorized to fix and revise the rates, fees, rentals and other charges which it collects for use of the facilities under its control. It is also authorized, under Sections 5(n) and (o) to hire an Executive Director and other employees and agencies at salaries entirely within its own discretion. Section 13 makes the rentals and other rates, fees and charges made by the Authority free from supervision of any Department, Board or Bureau of the State. In Section 19, the Authority is required to submit to the Governor and the General Assembly each year a report of its activities for the preceding year, showing a complete operating and financial statement of its operations. The Authority also is required to have an annual audit of its books and accounts made by certified public accountants. From all of these provisions and others concerning generally the powers of the Authority, it is apparent that the Legislature intended that the Authority not be subject to a preliminary budget, but rather that the funds specifically made available to the Authority, to which funds the Authority is limited, be budgeted as the Authority alone should see fit. The Legislature apparently has determined that it will be satisfied with the annual report required in Section 19.

The above opinion is not to say, however, that the funds held by the Port Authority are not State funds. Such funds

should be deposited to the account of the State of Maryland, for the specific purpose outlined in Article 62B. Generally these funds fall into three categories. First, there are proceeds from the special obligation bonds authorized in Section 8 of Article 62B, which the State Treasurer is authorized to pay out only upon warrants of the State Comptroller for the purposes specifically set forth in Section 8. Obviously, such funds cannot be disbursed by the Treasurer except for the purposes named, and in order to control such disbursements, the Treasurer must be satisfied that the disbursements are being made for the purposes named.

Secondly, there are revenues received by the Port Authority from the proceeds of the corporation tax imposed by Section 2 of Chapter 2, Laws of Maryland, Extra Session of 1956, after allowance for the sinking fund required to be set up in Section 8(e). These funds are described in Section 9 as the monies remaining for credit to the Maryland Port Authority Fund after the transfers required to be made to the sinking fund.

Thirdly, there are the revenues to be received by the Port Authority from the operation of its facilities. The funds secondly and thirdly described are subject to the discretion of the Port Authority only, and should be paid by the Comptroller upon warrants or vouchers of the Port Authority for the purposes described in Article 62B. So long as the expenditures are made for those purposes, there should be no control by the Department of Budget and Procurement or the Comptroller over the expenditure of such funds.

2. *Public Improvements.* Article 78A, Section 16, Annotated Code of Maryland (1951 Ed.) provides that the Department of Public Improvements shall select and obtain architects and engineers to prepare plans and specifications for all public improvements, examine and approve all plans and specifications, inspect and approve materials, equipment and methods used in making public improvements, and review maintenance and operation of such im-

provements. Under Article 62B the Port Authority is given broad powers to construct, reconstruct, rehabilitate, improve, maintain, repair and operate port facilities, and to designate the character of all port facilities and improvements which the Authority may hold. Section 5(f) and (g). The Authority is also given in Section 5(s) the power to make and enter into all contracts and agreements necessary or incidental to the performance of its duties. Considering the broad powers here described and additionally described above, it is apparent that the Port Authority would have power to make its own improvements without supervision of the Department of Public Improvements if the Authority would be handicapped in subjecting its plans and its construction activities to the scrutiny and supervision of the Department of Public Improvements. As a practical matter, it appears that such would be the case. The type of facilities which would be constructed by the Port Authority is of a highly specialized nature and not within the usual activities of the Department of Public Improvements. In view of these facts and of the apparent severe handicap to the Authority if it were to be subjected to the control and supervision of the Department of Public Improvements, it is our opinion that the Authority is not intended to be subjected to such scrutiny and supervision.

In connection with the relation of the Port Authority to other State departments, we also call your attention to our informal opinion to the Commissioner of Personnel of May 1, 1956, pointing out that under provisions of Section 5(o) of Article 62B, all full-time employees, except the Executive Director and traveling representatives, are subject to Merit System, except that the Authority has power to fix salaries and compensation independent of the Standard Salary Board. We expressed the opinion that this means that the appointment of all personnel, except those specifically covered by transfers from the City of Baltimore, or specifically excluded, is subject to all conditions of the Merit System, including eligibility lists, the approval of the Commissioner for appointment pending examination, etc.

We advised that these positions were intended to be Merit System positions, but not subject to the Standard Salary Board.

If further questions arise in connection with the administration of the Port Authority, they must be answered individually on the basis of the particular facts involved.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

PRISONERS—PROCEDURE FOR ARRANGING FOR PRISONERS IN MARYLAND STATE PENITENTIARY TO TESTIFY IN COURT-MARTIAL PROCEEDINGS.

May 11, 1956.

Lieutenant George E. Goodwin,
Potomac River Naval Command,
Receiving Station,
Washington, D.C.

We acknowledge receipt of your letter of May 7, 1956, with respect to the prosecution of J. C. Bush, stewards mate, third class, U. S. Navy, in a general court-martial at the Potomac River Naval Command. You advise that you wish to have Arthur C. Powers, who is presently a prisoner in the Maryland State Penitentiary, testify in the court-martial proceedings.

You may interview Powers at a convenient time at the Maryland Penitentiary. Please contact Warden Vernon L. Pepersack at the Penitentiary, 954 Forrest Street, Baltimore 2, Maryland, and he will be glad to arrange for a time for you to interview Powers at the Penitentiary.

With respect to requesting the appearance of Powers as a Government witness in the court-martial proceedings, it will be necessary for you to prepare a petition, addressed to the Criminal Court of Baltimore City, setting forth the facts and requesting the Court to pass an order authorizing the Warden to permit Powers to testify in this case. The order accompanying the petition should specify that the prisoner will remain in the custody of a guard of the Maryland Penitentiary at all times until he is returned to the institution. If you will prepare such a petition and order and submit same to us, we shall be glad to note our approval thereon and return same to you for presentation to the

court. After the order has been signed, the Warden will make the necessary arrangements after receiving a certified copy of the order.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

PROFESSIONAL ENGINEERS—ILLEGAL TO IMPROPERLY REPRESENT SELF AS ENGINEER OR AS EMPLOYING ENGINEER.

September 7, 1956.

Mr. J. W. Gore, Secretary,
State Board of Registration for
Professional Engineers and Land Surveyors.

I have received your letter regarding the interpretation of the law governing Professional Engineers and Land Surveyors, insofar as those who may or may not "use in connection with his name or otherwise assume, use, or advertise any title or description tending to convey the impression that he is a Professional Engineer".

You state that many firm names contain the words "engineer", "engineers" or "engineering" in their advertisements in the telephone directories, newspapers or periodicals, and where the firm name does not contain the above language, the advertising matter in conjunction with the firm name uses language to imply that they employ engineers.

Section 1 of Article 75½ of the Annotated Code of Maryland (1951 Ed.) states:

> "It is hereby declared that, in order to safeguard life, health and property, and to promote the public welfare, any person practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice in this State, engineering or land surveying, as defined in the provisions of this Article, or to use in connection with his name or otherwise assume,

> use, or advertise any title or description tending to convey the impression that he is a professional engineer or a land surveyor, unless such person has been duly registered under the provisions of this Article."

The term "practice of engineering" is defined in Section 2 of Article 75½, *supra,* as "any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects. * * *".

The question is whether a firm or person who uses the word "engineer" or "engineering" in connection with their name is in any way representing himself to be a professional engineer or implies that he is or holds himself out as practicing or offering to practice engineering.

It is our opinion that a person or firm who represents to the public by telephone directories or by advertisement that he is an engineer or employs an engineer, and who in fact does not, would be in violation of Article 75½ and subject to the penalties under Section 19 of that Article.

Further, it is our opinion that the Maryland laws do not contain any provision authorizing the practice of professional engineering by corporations but only provides for the licensing of individuals. It is the intent of the Maryland law that the practice of engineering shall be considered as a profession and hence such a practice cannot be within the powers of any corporate bodies. However, there is nothing to prevent licensed engineers associating themselves, if not together, with laymen, for the purpose of

conducting any legitimate business, as long as that association or corporation per se does not engage in the practice of engineering.

NORMAN P. RAMSEY, *Deputy Attorney General.*

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

REGISTERS OF WILLS

REGISTERS OF WILLS—CONSTITUTIONAL LAW—STATUTORY SCHEDULE OF FEES AND CHARGES OF REGISTER OF WILLS IS, UNDER CONSTITUTIONAL PROVISION, MANDATORY, AND NOT MERELY PERMISSIVE.

April 25, 1956.

Mr. H. Stanley Clark,
Register of Wills for
Anne Arundel County.

You call our attention to Senate Bill No. 134, Chapter No. 67 of the Acts of 1956, which, under Section 23 of Article 36 of the Annotated Code of Maryland (1951 Ed.) increased the schedule of fees chargeable by law by the several Registers of Wills of this State.

You point out that the Bill reads as follows:

> "The various Registers of Wills in the State shall be entitled to charge and collect for the performance of their duties the fees hereinafter specified, as follows:"

There follows a list of increased fees for taking probate of wills, etc.

You ask whether this new schedule of fees is mandatory or merely permissive, i.e., whether Registers must follow the new schedule, or whether they may continue to charge in accordance with the old schedule.

The word "shall" or the phrase "shall be entitled" has not always had a clear-cut interpretation as being either mandatory, in the sense of compulsion, or permissive, in the sense of a discretion. A great deal may depend on the particular legislative policy sought to be implemented by the statute. See *Words and Phrases*, Volume 39, "Shall—In Statutes", for examples of varying interpretations.

In this case, however, we direct your attention to Article 3, Section 45, of the Constitution of Maryland, which provides:

> "The General Assembly shall provide a simple and uniform system of charges in the offices of Clerks of Courts and Registers of Wills, in the Counties of this State and the City of Baltimore, and for the collection thereof; provided, the amount of compensation to any of the said officers in the various Counties and in the City of Baltimore shall be such as may be prescribed by law."

Certainly, there would be no uniformity of charges if one Register were to use one schedule and another Register a different schedule. We hold, accordingly, that the new schedule of charges for Registers of Wills is mandatory, and must be followed.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Assistant Attorney General.*

SHERIFF

SHERIFF—SHERIFF OF HOWARD COUNTY CANNOT ALSO ASSUME POSITION OF WARDEN OF JAIL—CAN KEEP PRISONERS—SALARY—EXPENSES—SALARY OF ASSISTANT WARDEN.

July 18, 1956.

Mr. W. Harvey Hill,
Sheriff of Howard County.

We have your recent letter in which you advise that the Warden of the Howard County Jail has recently resigned, and you make these inquiries:

1. Whether it is possible for you to assume the position of warden.

2. Whether it is possible for you to assume the duties of keeping the prisoners.

3. Whether, if you so assume the duties of keeping the prisoners, you would be entitled to the Warden's salary, or any part thereof, for taking on these additional duties.

4. If the answer to the last question is negative, can the County Commissioners allow you a sum of $1,000 for expenses for keeping the prisoners?

5. Can the County Commissioners raise the salary of the Assistant Warden?

As to question No. 1—we do not believe it is possible for you to assume the position of Warden. We direct your attention to Chapter 42 of the Acts of 1955, which provides:

> "The Sheriff of Howard County shall appoint a warden to the jail, and he shall be paid an annual salary by the County Commissioners of Two Thousand Dollars ($2,000.00) payable in monthly installments. The said warden so appointed shall hold office at the pleasure of the Sheriff and shall be removed at any time the Sheriff may elect or

> by the Circuit Court for Howard County upon indictment and conviction as now provided by law."

Thus, even were we inclined to think otherwise, Chapter 42 of the Acts of 1955 would preclude any other alternative, for therein is expressed clearly the legislative intention that the Sheriff should appoint a warden to the jail. In short, two different jobs held by two different persons are contemplated, and we believe it would violate the legislative intention, as fortified by canons of statutory construction, to say that the legislature contemplated that the Sheriff would appoint himself as warden of the jail.

Having thus determined that interpretation of the statute involved contemplates one job for one person, we do not find it necessary to engage in any lengthy discussion of Article 35 of the Declaration of Rights, which precludes any person holding more than one office of profit at any time. Parenthetically, we might state, however, that we doubt if a warden of a county jail under the Sheriff's supervision can be designated an "officer". Cf. *State Tax Comm. v. Harrington,* 126 Md. 162.

As to question No. 2—we believe it is not only possible, but your duty, in the absence of a Warden, to assume the responsibility of maintaining, safeguarding and keeping the prisoners. In 33 Opinions of the Attorney General, 219 (1948), this Department held that the Sheriff has control and custody of the prisoners in the Howard County jail.

As to question No. 3—we do not believe that you would be entitled to the Warden's salary, or any part thereof, for performing the additional duties. You are responsible for the control and keeping of the prisoners evolved by way of your general supervisory capacity with respect to the Howard County jail. However, as we mentioned in answering question No. 1, the post of Warden is considered to be a separate one, the compensation being a separate compensation, and we do not believe you are entitled to that compensation.

In question No. 4 you inquire whether the County Commissioners can grant you an allowance of $1,000 for expenses incurred in keeping the prisoners.

In our opinion, the County Commissioners should reimburse you for actual expenses incurred by you as Sheriff, and since under our previous opinion the duties of a Howard County Sheriff include the keeping of the prisoners, this would include your expenses in the keeping of the prisoners. It is necessary to elaborate on this question further, since an apparent conflict exists between Section 293G of Article 14 of the Public Local Laws of Maryland (Chapter 817 of the Acts of 1945) and Section 6(e) of Article 25 of the Annotated Code of Maryland (1951 Ed.), which is part of the Howard County Home Rule Act. It is a fundamental canon of statutory construction that in case of conflict, the later legislation prevails over the former, being considered the last expression of the legislative will. *Elgin v. Capitol Greyhound Lines,* 192 Md. 303. Hence, we believe Section 6(e) to be controlling. Section 6(e) provides that the County Commissioners of Howard County shall have power:

> "To fix and prescribe the salary or compensation of all appointed officers and employees of the County, and to prescribe and provide for the payment of the traveling and other expenses of the State's Attorney, Sheriff, Judges of the Orphans' Court and of all other elected and appointed officers and employees of the County incurred in the performance of their official duties."

You make reference to a $1,000 allowance. We do not believe the granting of an arbitrary allowance appropriate, in the absence of statute, as it could constitute a subterfuge to raise your pay, and hence would be prohibited under Article 3, Section 35 of the Constitution. See 32 Opinions of the Attorney General, 297. By far the better procedure is the submission of vouchers for actual expenses incurred for which you would be reimbursed in accordance with Section 6(e). Cf. *Bowman v. Harford Co.,* 166 Md. 296; 15

Opinions of the Attorney General, 276; 39 Opinions of the Attorney General, 128.

As to question No. 5—in our opinion, the County Commissioners can raise the salary of the Assistant Warden.

An Assistant Warden is not a public officer. See generally, Mechem on Public Officers. Hence, a raise in salary is not barred by Article 3, Section 35 of the Constitution.

Thus, since Article 25, Section 6(e) of the Code provides that the County Commissioners of Howard County can fix the salary of employees, they are permitted to raise the salary of the Assistant Warden.

C. FERDINAND SYBERT, *Attorney General.*

SOCIAL SECURITY

SOCIAL SECURITY—STATE EMPLOYEES—EDUCATION—CAFETERIA WORKERS IN CERTAIN COUNTY PUBLIC SCHOOLS ARE EMPLOYEES OF THE COUNTY BOARD OF EDUCATION FOR PURPOSES OF FEDERAL SOCIAL SECURITY.

February 17, 1956.

Dr. David W. Zimmerman,
Assistant State Superintendent,
State Department of Education.

You have advised us that the question of the eligibility for Social Security purposes of certain cafeteria workers in public school cafeterias in the Counties of the State has arisen on a number of occasions in the recent past, which has led to a need for clarification of an opinion of this office written in August of 1952 and reported in 37 Opinions of the Attorney General, 332.

Prior to the writing of the opinion heretofore referred to, questions as to cafeteria workers' eligibility for Social Security coverage under the provisions of Chapter 304 of the Acts of 1951 and the Federal Social Security Act had arisen, and the Attorney General in the opinion dealt at length with the problems posed. The opinion discussed the cafeteria workers in five categories, which may be briefly described as follows:

1. Those employed in cafeterias operated under a centralized system established and controlled by a County Board of Education.

2. Those employed in cafeterias as to which the County Board of Education exercised complete *financial* control, but only *general supervisory* control.

3. Those employed in cafeterias under the *financial* control of the County Board of Education, but not supervised or otherwise controlled as to operations by the County Board of Education.

4. Those employed in cafeterias operated as independent, self-sufficient units and under the supervision of individual school authorities or by local PTA's; without centralized financial control or State or County funds and with no control whatsoever in the County Board of Education; and

5. Those employed in cafeterias operated by concessionnaires.

The Attorney General held, as to categories 1 to 3, the workers were employees of the County Board of Education and hence eligible for Social Security coverage. As to categories 4 and 5, however, the Attorney General concluded there was no connection between the workers and the County Boards of Education, and hence the workers were ineligible for Social Security benefits. You advise us that all cafeterias of the type described in 5 have been eliminated from the public school system and that the Attorney General may have been misled by a failure to present the correct facts applicable to the category 4 situation. Indeed, you express the belief that there is not now, and was not, any cafeteria operating in the manner described in category 4 and you have asked that we consider the matter further. For simplicity, it may be well to consider the facts then presented and those now presented to determine whether the cafeteria units in question are such that their employees are employees of the County Board of Education for Social Security purposes:

Facts relied on by Attorney General

(a) The cafeteria is an independent, self-sufficient unit.

(b) The cafeterias are supervised by individual school authorities or PTA.

(c) Workers hired and paid by those in charge of cafeteria and no centralized payroll or account is administered whereby less profitable cafeterias may be aided by those more profitable.

(d) Each cafeteria is a separate and distinct financial unit, and no State or County funds are involved.

(e) No control over supervision, operation or financial status retained by County Board of Education.

Facts now presented

(a) State and County supervisory personnel are provided and the employees are subject to full control of operations and financial status by the County Board of Education.

(b) Cafeterias subject to control of County Board of Education.

(c) Workers hired and paid by local schools, but reports are required monthly to County Board and State Department of Education; cafeteria may not show a balance in excess of a month's receipts and County Board of Education may require that salaries be kept as low as possible to provide lunches as cheaply as possible to students, so that while not making the salary payments, or interchanging funds, control of salaries and profits is in the hands of the County Board of Education.

(d) The County Board of Education, out of State and local funds, supplies the space and equipment for the cafeteria; pays for the heat, light and operating costs of the cafeteria; pays supervisory personnel; and distributes and controls federal funds and commodities distributable to such cafeterias.

(e) Effective working control as to supervision, operation and financial status.

As will appear from this comparison, effective working supervision and control of the cafeteria workers exists in the County Board of Education. To our mind, the most important single aspect of the case is *not* whether or not a centralized payroll is maintained, but who has the *control* of the workers, or the right to control them. See Ferson, *Principles of Agency,* sec. 39, p. 49; Mechem's *Outlines of Agency,* Fourth Ed. (1952) sec. 13, p. 5.

The fact is, of course, that the County Board of Education furnishes the tools and equipment used for the job done, controls the doing of the job and thus directly supervises and controls the doing of the work which produces the income. That the County Board of Education chooses to restrain the particular cafeteria from producing income in excess of its operating needs, in order to provide lunches as cheaply as possible, in no way affects the situation. There is no magic in a centralized fund for salary payments as such, and where a County Board of Education authorizes income to be received by a principal or local representative and workers to be paid therefrom, under its control and supervision, the worker is no less an employee than if the money were taken in and paid out through a central account. The payment of salary made by the local representatives is, in our opinion, a payment of salary by an authorized agent of the County Board of Education under the circumstances.

In our opinion, these workers are entitled to be considered as employees of the County Board of Education and as such entitled to Social Security benefits. We are certain that had the facts now available been fully presented to the Attorney General at the time of the 1952 opinion, he would have so ruled. We further believe that, on the facts as to category 4 which were presented to the Attorney General at the time of his ruling, his conclusion was fully warranted. We would concur that such workers are ineligible for Social Security benefits if those same facts were now before us. It is a different set of facts, and not a different interpretation of the law, which leads us to our conclusion.

This opinion is in no way intended to deal with the eligibility of cafeteria workers in any category for retirement purposes.

C. FERDINAND SYBERT, *Attorney General.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

STATE BOARD OF EXAMINERS OF NURSES

State Board of Examiners of Nurses—Authorized to Set Standards of Curriculum, Entrance and Scholarship for Schools of Practical Nursing.

November 13, 1956.

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

We have your letter in which you ask our views on the promulgation of regulations for the administration and enforcement of the licensing of practical nurses under the provisions of Sections 286 to 292A of Article 43 of the Annotated Code of Maryland (1951 Ed. and 1956 Supp.).

You state that there has been a great increase in the number of schools of practical nursing and that there are presently twelve such schools in this State. Your Board has found it a proper function in the licensing of practical nurses to approve these schools in relation to the curriculum, entrance and scholarship of each of the schools.

Your question, briefly stated, is this: Does the Board of Examiners of Nurses have authority to approve schools of practical nursing in the administration of the licensing of practical nurses?

By the provisions of Chapter 89, Laws of 1955 (as now incorporated in Article 43, Section 292A), the Board is authorized " . . . to promulgate necessary regulations for the administration and enforcement . . ." of licensing of nurses, including practical nurses.

The Board is entrusted with certain duties and obligations in respect to the licensing of practical nurses by Article 43, Section 287. That Section is as follows:

> "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 qualifica-

> tions of all applicants for registration as licensed practical nurses; and each applicant shall furnish evidence satisfactory to said Board of Examiners that he or she is eighteen (18) years of age, is of good moral character, can read and write the English language and has received a certificate from an institution in which not less than a nine months' course of training with a systematic course of instruction is given to the satisfaction of said Board of Examiners."

The law, therefore, commits to the Board "in its sound discretion" the determination of the qualifications of all applicants, and further requires that each applicant shall have received a certificate from an institution with a systematic course of instruction of not less than nine months, which course is given to the satisfaction of the Board.

In connection with the exercise of discretion, we may add that the courts have held that discretion does not involve the exercise of unlimited authority, but such exercise is valid if it is not capricious, unreasonable or arbitrary. The discretion must be exercised to give effect to and carry out the provisions of the law, and not to nullify or destroy it.

In *Schneider v. Pullen,* 198 Md. 64, the Court of Appeals considered a provision of Section 14(a) of Chapter 1043 of the Acts of 1945 in respect to certification of private trade schools. The Court of Appeals there held that rules and regulations could be promulgated to regulate the conditions of entrance, scholarship, educational qualifications, standards and facilities to meet the purposes of the courses to be taught.

We are of the opinion that the authority vested by law in the Board of Examiners of Nurses authorizes the Board to set reasonable regulations for schools of practical nursing in regard to establishing proper minimum standards of curriculum, entrance and scholarship requirements for courses of instruction for practical nurses.

As you know, the final regulations promulgated by your Board must be approved by this office for legal form and

sufficiency, and also must, in accordance with Article 41, Section 9(a) of the Code, be filed with the offices of the Clerk of the Court of Appeals of Maryland, the Department of Legislative Reference and the Secretary of State.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

STATE EMPLOYEES—STATE EMPLOYEES RETIREMENT SYSTEM—CLERK OF THE COURT OF APPEALS IS "APPOINTED OFFICIAL" AND IS EXEMPT FROM COMPULSORY RETIREMENT AT AGE SEVENTY.

May 15, 1956.

Mr. Maurice Ogle, Clerk,
Court of Appeals of Maryland.

We have your letter of recent date requesting our opinion as to whether or not you, as the Clerk of the Court of Appeals of Maryland, must retire when you reach the age of seventy years.

Section 8(1)(b) of Article 73B, Annotated Code of Maryland (1951 Ed.), states:

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

An "elected or appointed official" is exempt from compulsory retirement at the age of seventy by this Section. Since your office is no longer an elective one, the question for determination is whether you are an "appointed official".

The office of Clerk of the Court of Appeals was changed from an elective to an appointive office by amendment to Section 17 of Article IV of the Constitution of Maryland in 1940. This Section now reads as follows:

> "There shall be a Clerk of the Court of Appeals, who, after the expiration of the current term of the present incumbent, shall be appointed by and shall hold his office at the pleasure of said Court of Appeals."

There is no doubt that you are an official or public officer. See 26 Opinions of the Attorney General, 340. It is therefore our opinion that you may serve at the pleasure of the Court in your present position as Clerk of the Court of Appeals after your seventieth birthday.

C. FERDINAND SYBERT, *Attorney General.*

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

STATE EMPLOYEES BUDGET—PROVISIONS IN BUDGET BILL FOR SALARY INCREASES FOR STATE EMPLOYEES ARE APPLICABLE TO ALL SUCH EMPLOYEES EXCEPT WHERE SALARY IS SPECIFICALLY FIXED BY STATUTE.

June 11, 1956.

Mr. Russell S. Davis,
Commissioner of Personnel.

We have your recent letter requesting our opinion in connection with a portion of the 1956 Budget Bill providing for salary increases for State employees. This Bill, Chapter 42 of the Acts of 1956, at page 69, reads, is part, as follows:

"Salary Increases for State Employees and Forty Hour Work Week

"General Fund Appropriation, for the purpose, on or after October 1, 1956, and prior to January 1, 1957, of supplementing the salaries of State employees by adding $260 to the existing salary scale up to and including scale No. 28; for payments required as a result of restudy and pay adjustments pursuant to the provisions of Section 25 of Article 64A of the Annotated Code of Maryland (1955 Supplement), title 'Merit System'; for the elimination of arbitrary salary differentials in State employment; for comparable increases consistent with such revised scales except where the salary of a position is specifically fixed by statute; and to provide for a five day forty hour work week; the appropriation to be allocated by budget amendment to the various State agencies as may be necessary to supplement the agency appropriation included in this Budget.

"Not in excess of $10,000 of this sum shall be available to the State Employees Standard Salary Board for the purpose of making such studies as may be required to effect allocation of the sum hereby appropriated .... $4,600,000"

You have listed certain State employees who are not subject to Standard Salary Board jurisdiction and you ask whether such individuals are eligible to receive a general salary increase under the Budget Bill. The Legislature clearly intended that employees not subject to Standard Salary Board jurisdiction should receive salary increases when it provided for "comparable increases consistent with such revised scales except where the salary of a position is specifically fixed by statute". The Legislature even provided an appropriation of not in excess of $10,000 in order that the Standard Salary Board would make the studies required to effect allocation of the sum appropriated for salary increases. In other words, the Board must determine the amount of the increases to be granted employees outside of its jurisdiction comparable to the increases granted employees under its control.

The only case in which a State employee will not receive an increase is where the salary of a position is "specifically fixed by statute". In our opinion a statute does not specifically fix a salary where it merely empowers the head of a particular State agency to fix the compensation of employees, such as, for example, in the case of employees of the Maryland Civil Defense Agency, whose compensation is fixed by the Director under Section 206 of Article 41 of the Code. In each instance, the determination must be made whether the salary of an employee is specifically fixed by statute in order for such employee to qualify for a salary increase under this Act.

The salaries of employees of the State Military Department are controlled by the provisions of Section 32 of Article 65 of the Code, and it is there provided that officers, warrant officers and enlisted men who are full-time employees of the Military Department shall be entitled to receive the same pay including longevity pay, subsistence and allowances as are authorized for persons of corresponding grades and length of service in the Regular Army. Although the amount of compensation itself is not named in the statute, a specific scale is provided for measuring the

compensation of each employee, namely, that received by corresponding persons in the Regular Army. We, therefore, conclude that salaries of employees of the Military Department have been specifically fixed by statute, and that such State employees do not qualify under the Budget Bill for salary increases.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

STATE RACING COMMISSION

STATE RACING COMMISSION—AGREEMENT BETWEEN RACING ASSOCIATION AND ITS EMPLOYEES—COMMISSION'S BROAD POWER TO REGULATE HORSE RACING MAY NOT BE BARTERED AWAY AND MUST BE EXERCISED WHEN AND AS THE PUBLIC INTEREST REQUIRES.

April 9, 1956.

Mr. J. William Graham, Secretary,
Maryland Racing Commission.

You have submitted to us a proposed new two-year contract between the Southern Maryland Agricultural Association, operator of Bowie Race Track, and the Independent Association of Race Track Employees, governing the terms of employment of the employees of the track for the years 1956 and 1957. You have asked us to comment on that contract and to advise you what steps the Commission should take in connection therewith.

A review of the contract indicates that a "union shop" is established at the Bowie Track, rates of pay are set, seniority among employees is recognized, the method of lay-off and promotion is defined, discharge and grievance procedures are established, strikes and lockouts are forbidden during the term of the contract, group insurance benefits are provided, and the entire agreement is made subject to the rules of the Racing Commission. It is also provided that the agreement is to be submitted to the Racing Commission for its "sanction". We have not covered all the phases of the contract, but only the important ones, in this list.

The matter which is of particular importance to the Commission is the provision which purports to require the Commission's "sanction" of the contract.

As you know, the Racing Commission is given broad powers to regulate and control horse racing within the

State. As Attorney General Armstrong pointed out in an opinion reported in 6 Opinions of the Attorney General, 475, at p. 478:

> "* * * The Racing Commission was created for the purpose of controlling and regulating horse racing within the State of Maryland. It is clothed with ample powers to exercise a very effective control of the various organizations which conduct horse racing, and it may adopt, promulgate and enforce such rules and regulations as may seem necessarily incident to proper regulation and control. The power of the Commission is limited, however, to regulation. The Associations themselves still have functions to perform, subject to the supervision and control of the Commission. These corporations must conduct their racing meets and otherwise carry on the racing business in which they are engaged, and the Commission has no right to invade the field of operation which is thus reserved to the associations themselves. * * *"

In this connection, the matter of employer-employee relations is of interest to the Commission only in so far as a control thereof is essential to effective control of the associations conducting racing. As you know, in the past, we have expressly said in informal advice to your Commission that *the Commission* had no power to create a seniority system as respects mutuel clerks, or to accede to a closed shop contract in the mutuel department of one of the racing associations.

Section 11 of Article 78B of the Code, which gives the Commission authority to make rules and regulations controlling racing operations, subjects to Commission approval: "All contracts and agreements for the payment of money, and all salaries, fees and compensation paid by any person or persons, association or corporation licensed * * *", and, in addition, the Commission is empowered "at any time (to) require the removal of any employee or official em-

ployed by any licensee hereunder." These quoted provisions of the Code are evidence of the broad powers conferred upon the Commission by the Legislature to effectuate complete regulation of racing in Maryland.

Accordingly, to the extent that a conflict develops with the Commission's statutory powers, it would seem improper for a licensee operating under Maryland's racing laws to be subject to an agreement which would require that the licensee hire at set rates or retain in its employ only members of a given union. The Commission must be free at all times to exercise the authority explicitly conferred by the Legislature to require dismissal of any employee, and to approve the pay given employees. A union shop contract would certainly tend to impede these basic powers of the Commission. In our opinion, the Legislature could not have intended that the Commission's powers would be circumscribed.

It is further our opinion that the attempt to require the Commission to examine and give its "sanction" to the contract is in contravention of the Commission's continuing power to control salaries, fees and compensation paid, which we believe requires freedom to act in the public interest in the future. The Commission should take no steps to indicate its approval or disapproval of the contract as a whole, but the licensees who enter into such contract should be advised that under the continuing power of the Commission under the provisions of Section 11 of Article 78B, the Commission will exercise its prerogatives under the applicable statutes at such times and in such manner as the public interest requires.

In summary, we believe the union shop provisions contravene the Commission's express statutory power to regulate compensation paid and to require the removal of employees. We further believe that, while the employer and employees may agree to a seniority system, this can in no way affect the Commission's statutory powers. It is also our opinion that the contract provision that the agreement

be submitted to the Commission for its "sanction" does not compel or require the Commission to so act, and that the licensee should be notified that no provision thereof which conflicts with the Commission's statutory powers will be permitted to interfere with a proper exercise of those powers.

Attorney General Armstrong, in the opinion heretofore cited, made the comment that "The Commission cannot barter away the discretionary powers with which it has been vested, and which it is supposed to exercise in the interest of the public * * *." We believe that any action by the Commission to sanction or approve, in whole or in part, the contract heretofore submitted might well constitute the bartering away in part of the powers of the Commission, which must at all times be exercised in the public interest.

C. FERDINAND SYBERT, *Attorney General.*

NORMAN P. RAMSEY, *Deputy Attorney General.*

TAXATION

TAXATION—INHERITANCE TAX—FORGIVENESS OR CANCELLATION OF INDEBTEDNESS DUE DECEDENT BY TESTAMENTARY RELEASE ORDINARILY SUBJECT TO TAX ON VALUE OF DEBT—IF INDEBTEDNESS BARRED BY STATUTE OF LIMITATIONS, NOT SUBJECT TO TAX UNDER FACTS GIVEN.

January 11, 1956.

Miss Ruth R. Startt,
Register of Wills for Talbot County.

Your recent letter states that a decedent, by will, had cancelled or forgiven any indebtedness due to said decedent by a nephew. The indebtedness arose out of a series of loans, and was evidenced by a number of notes. You further inform us that these notes are dated more than three years prior to decedent's death, that said notes are not under seal, that the notes, according to the facts you have gathered, were never acknowledged, nor was any payment made thereon. You understand that the signer of the notes is solvent. You wish to know if the value of these notes should be included in the decedent's estate for purposes of Maryland inheritance tax.

This office has held on many occasions that a testamentary cancellation or forgiveness of indebtedness due the decedent is equivalent to a bequest to the debtor of the amount of the debt, and thus the amount cancelled or forgiven should be, as a taxable transfer by testamentary release, included for the purpose of calculating Maryland inheritance tax. 13 Opinions of the Attorney General, 246; 17 Opinions of the Attorney General, 387; 22 Opinions of the Attorney General, 767; 24 Opinions of the Attorney General, 858; 30 Opinions of the Attorney General, 210; 31 Opinions of the Attorney General, 225. We have further held that in calculation of the executor's commission, the amount of the debt forgiven would be included. 30 Opinions of the Attorney General, 210.

CCH, Inheritance, Estate and Gift Tax Service, *All-State Treatise,* Section 1510 G, makes this statement:

> "The reasoning in such cases is that had the debt not been forgiven or released, the beneficiary would have been required to pay to the estate the amount of the debt. By being released from that obligation, by virtue of the will provision, the courts consider the legatee to be ahead in the amount equal to the sum forgiven . . .". Cf. Gleason and Otis, *Inheritance Taxation,* Page 297.

However, in the case you present before us, the notes, not being under seal, are subject to the three year provision of the Statute of Limitations. Article 57, Section 1, of the Annotated Code of Maryland (1951 Ed.). *Frank v. Baselaar,* 189 Md. 371, 56 A. 2d 43. We assume, from the fact that there was no acknowledgment of the debt, and no payment thereon, that there was no revival of the debt or extension of the Statute of Limitations.

Under these circumstances, where the debt is barred by the Statute of Limitations, nothing is deemed to have been passed by the will, and the debt is not included in the estate of the decedent for purposes of inheritance tax. *Philbrick v. Manning,* 57 F. Supp. 245 (1944) — It was there held that the Statute of Limitations, while not discharging a note, affords a valid defense, and a note barred by limitations is not an enforceable obligation. Hence, said the Court, if voluntary payment of the obligation is negated (as here, we are informed), ". . . the note represented nothing of value upon which to predicate the assessment of a tax." To the same effect, see *Est. of W. Walker,* 4 T.C. 390; *Stinger v. Commonwealth,* 26 Pa. 429 (1856).

On the facts given, therefore, no collateral inheritance tax is due on the forgiveness by will of the indebtedness.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—PROPERTY TAX—POWER OF MARYLAND COUNTY TO TAX IMPROVEMENTS IN POTOMAC RIVER TO VIRGINIA SHORE.

February 3, 1956.

Mr. Albert W. Ward, Secretary,
State Tax Commission.

You have asked the opinion of this office on the question of the power of Montgomery County to levy real property taxes against a proposed electric power project, including a dam across the Potomac River connecting Montgomery County with Virginia. You have advised that the Potomac River is navigable and therefore, of course, permission for the erection of the dam would have to be obtained from the United States Army Engineers.

The waters of Montgomery County extend to the low watermark on the Virginia side of the Potomac River. This boundary of the State was originally determined by the grant from the King of England to Lord Baltimore and has since been formalized in the Compact of 1785 with Virginia and by subsequent arbitration fixing the line more definitely. See *Barnes v. State,* 186 Md. 287. Under the provisions of Article 75, Section 163 of the Annotated Code of Maryland (1951 Ed.), the jurisdiction of any County bounded by waters adjoining neighboring States shall extend to the ultimate limits of the State at the place in question. Under these circumstances, therefore, it is quite clear that the jurisdiction of Montgomery County extends to the low watermark on the Virginia side of the Potomac River.

It is equally clear that a County has the power to tax a dam as well as the land flooded as a result of the dam, even though the project is located on navigable waters. In *Susquehanna Power Co. v. State Tax Comm.,* 159 Md. 334, the Court of Appeals held that an assessment levied by the County Commissioners of Harford County against the portion of the dam of the Susquehanna Power Company as well

as the lands behind the dam that were flooded and lying within the boundaries of the County were subject to real property tax. It is to be noted that in that case, the Court permitted the assessors to affix a value to the flooded lands based upon their use as a part of the power project, although that valuation was substantially more than the value of the same lands prior to the development of the power project. It is therefore our opinion that Montgomery County would have power to tax that portion of the dam and the lands beyond it located in Montgomery County. It is our further opinion that this power to tax would extend to the low watermark on the Virginia side of the Potomac River as the line between Maryland and Virginia has been fixed by arbitration.

It is to be noted that under the Compact of 1785, the citizens of the State of Virginia were given full property rights in the shores of the Potomac River adjoining their land and the privilege of erecting wharves and improvements not obstructing navigation of the River. It might be contended that this right reserved in the Compact of 1785 in some way might deprive Maryland of its power to tax improvements of land located within the waters of Maryland, when those improvements were made to shore properties on the Virginia side of the River. It is our opinion, however, that this provision does not in any way detract from Maryland's right to levy taxes against improvements located in the River beyond the low watermark. In this connection, it is important to note that Maryland has jurisdiction over crimes committed on the River at any point beyond the low watermark on the Virginia shore, and, therefore, Maryland has the obligation of policing any improvements that might extend from the Virginia shore into the River beyond low watermark. See *Barnes v. State, supra.*

C. FERDINAND SYBERT, *Attorney General.*

FRANK. T. GRAY, *Asst. Attorney General.*

TAXATION—RETAIL SALES TAX—USE TAX—TREATY MADE BY UNITED STATES IS SUPREME LAW OF THE LAND. NATO GRANTS AN EXEMPTION FROM TAXES TO ITS REPRESENTATIVES IN UNITED STATES AND MARYLAND MUST RECOGNIZE IT.

February 14, 1956.

Mr. Milton Mitchell, Chief,
Courtesies and Privileges Section,
Office of the Chief of Protocol,
Department of State, Washington, D. C.

You have asked us whether Rear-Admiral R. A. Currie, D.S.C., of the British Joint Services Mission, is entitled to an exemption from the Maryland Retail Sales and Use Taxes.

If a person is entitled to an exemption from taxes in the State of Maryland, the exemption must be found either in the laws of this State, or in a treaty to which the United States Government is a party. Article VI, Clause 2, of the United States Constitution reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Part III of Article 12 of the North Atlantic Treaty, to which the United States Government is a party, reads as follows:

> "Every person designated by a Member State as its principal permanent representative to the Organization in the territory of another Member State, and such members of his official staff resident in that territory as may be agreed between

the State which has designated them and the Organization and between the Organization and the State in which they will be resident, shall enjoy the immunities and privileges accorded to diplomatic representatives and their official staff of comparable rank."

Rule 72 of the Comptroller of the State of Maryland, reads as follows:

"Ambassadors, ministers and other properly accredited diplomatic representatives of foreign governments to the United States are exempt from the payment of the tax imposed by the law. The exemption does not apply to consular officers or to any officials of foreign governments other than those hereinbefore specified, unless such exemption is warranted by treaties or reciprocal agreements between such governments and the United States.

"However, if ambassadors, ministers or consular officers are engaged in a profession, business, trade, manufacture or commerce, they are subject to the tax in the same manner as other persons who are not ambassadors, ministers or consular officers. In such cases they are required to collect the tax on all sales of tangible personal property from the purchasers thereof, for and on account of the State of Maryland and to pay the tax to their vendors on all purchases of tangible personal property which are not purchases for resale.

"Ambassadors, ministers or consular officers who believe themselves entitled to exemption are required to make application therefor to the Comptroller, submitting with their application copies of the treaty or reciprocal agreement granting similar exemption to United States diplomatic representatives. If the application is approved the Comptroller will furnish the applicant with a let-

ter of exemption. The applicant shall exhibit such letter to his vendor or furnish such vendor with a copy thereof."

You have informed us in your letter that the Department of State of the United States Government has agreed with the North Atlantic Treaty Organization that Rear-Admiral Currie shall enjoy the immunities and privileges accorded diplomatic representatives of foreign governments in the United States and their official staff. Since the North Atlantic Treaty is the supreme law of the land and since it grants immunities and privileges to principal permanent representatives and members of their official staff of member States of the North Atlantic Treaty Organization, and since Rear-Admiral Currie is recognized by the United States Government as such a principal permanent representative, it is our opinion that he should be given a letter of exemption from the Retail Sales and Use Taxes by the Comptroller. Certainly Rule 72 of the Comptroller grants an exemption to properly accredited diplomatic representatives of foreign governments to the United States. Rear-Admiral Currie is to be treated the same as a diplomatic representative of a foreign government, in our opinion, and is exempt under the Treaty and under Rule 72 of the Comptroller from the payment of the tax.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

Taxation—Sales Tax Exemption—Trade Association of Dry Cleaning Industry Not Exempt, in Spite of Scientific and Educational Functions.

February 14, 1956.

Mr. Edward F. Engelbert,
Assistant Director,
Retail Sales Tax Division.

February 14, 1956.

Re: Exemption of National Institute of Cleaning and Dyeing.

You have asked our opinion concerning the exemption from the retail sales tax of purchases made by the National Institute of Cleaning and Dyeing. Section 322 (i) of Article 81, Annotated Code of Maryland (1955 Supp.), provides an exemption for sales to any person operating a non-profit scientific or educational institution or organization when such tangible personal property is purchased for use in carrying on the work of the institution or organization.

From the material furnished to our office it appears that the Institute maintains administrative headquarters of a trade association composed of persons in the clothing cleaning and dyeing business in all parts of the United States and parts of Canada. The constitution of the Institute refers to local organizations and to a national convention, and, presumably, the headquarters handles administrative matters in connection with the organization of and relations with these organizations and the conduct of the national convention. The headquarters also supplies a newspaper mat service to members of the association and carries forward such projects as public relations.

It is the opinion of this office that the headquarters' activities described in the preceding paragraph do not fall within the exemption provisions of Section 322 (i) referred to above. These activities are not religious, charitable, scientific, literary or educational.

The Institute also conducts extensive research programs both in the field of chemistry in connection with various

cleaning solvents and manners of handling them, and in the field of accounting and business management, in connection with problems of business operation normally encountered by members of the Institute. The results of this research activity are published regularly in technical bulletins distributed to members of the Institute. Presumably, these bulletins are distributed without charge to members, being covered by the members' dues. The laboratory facilities of the Institute are also available to members for an analysis service in connection with particular cleaning problems a member may have in connection with a particular garment. Members are entitled to three free analyses each year. Presumably, subsequent analyses must be paid for by the member.

It is the opinion of this office that, although the activities described in the preceding paragraph are scientific in nature, they are not "non-profit" within the meaning of Section 322 (i) and, therefore, the Institute is not entitled to an exemption on the basis of these activities. It is our opinion that profits accrue to members of the Institute through the service rendered to them as a result of the research activities of the laboratory. Valuable services rendered to individual members of the Institute may be said to constitute a part of the net earnings of the Institute which inure to the benefit of its members; "profits" are not restricted to money dividends alone. It has been repeatedly held that trade associations rendering services to members of the association, which services are valuable to them in the conduct of their business operations, are in fact distributing profits to their members. *General Contractors Ass'n. v. U. S.,* 202 F. 2d 633, 636; *Automotive Elec. Ass'n. v. Commissioner Internal Revenue,* 168 F. 2d 366; *Apartment Operations Ass'n. v. Commissioner Internal Revenue,* 136 F. 2d 435; *Underwriters Laboratories v. Commissioner Internal Revenue,* 135 F. 2d 371, cert. den. 320 U.S. 756; *Northwestern Municipal Ass'n. v. U. S.,* 99 F. 2d 460, 463; *Boston Chamber of Commerce v. Assessors,* 315 Mass. 712, 718, 54 N.E. 2d 199.

The Institute also conducts a school at its headquarters in which proper drycleaning and dyeing methods are taught. It appears that this school is attended primarily by members of the Institute and employees of members of the Institute. It also appears that veterans are permitted to attend upon payment of attendance fees. The members apparently pay for this school facility at the usual tuition rate charged to veteran students. It does not appear whether the school is operated entirely separately and distinctly from the laboratory functions and to what extent the tuition charges for schooling make the educational function of the Institute self-supporting.

It is our opinion, from facts presently available, that this school function of the Institute does not change its character within the meaning of Section 322 (i) referred to above. While the school activity is an educational function, we cannot say on the facts that have been furnished that it makes the Institute primarily an educational enterprise. The school could not be exempt under the provisions of the sales tax law unless it were independently set up insofar as its teaching and administrative staff were concerned, its funds accounted for separately, and unless it were fully open on an equal basis for admission to both members of the Institute and all non-members of the Institute who might apply at the school. Grounds for discrimination, always applicable to any school, would have to be on some other basis, such as proven interest in the business, ability, etc., rather than on membership or non-membership in the Institute. It appears that the school in this case is operated primarily for the benefit of members of the Institute; further, it appears that the school is not separately organized so that its operation, separate and distinct from the headquarters and research activities of the Institute, would permit a determination that there are no profits from the educational activity accruing to the members of the Institute through its other activities.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION—INCOME TAXES—CORPORATE DISTRIBUTIONS OF ASSETS BEARING UNREALIZED APPRECIATION CONSTITUTING "DIVIDENDS" TAXABLE TO STOCKHOLDER.

March 6, 1956.

Mr. Frank W. Forestell,
Income Tax Division,
Comptroller of the Treasury.

You have asked us to review for further clarification the opinion which was rendered by this office on August 7, 1953 (38 Opinions of the Attorney General, 308), concerning distributions of capital assets by corporations, and the income tax consequences to the stockholders resulting therefrom. At that time this office advised you, on the basis of facts supplied by you, that a corporation distributing a capital asset bearing unrealized appreciation does not realize profits when it distributes the asset to its sole stockholder. Consequently, even though the appreciated value of the asset would result in profits to the corporation if the asset were sold prior to distribution, the distribution of the asset itself does not ordinarily result in profit to the corporation. Hence, under the definition of "dividend" in Section 275(j) of Article 81 of the Annotated Code of Maryland, the distribution is not taxable to the shareholder, the corporation having no profits or earnings to distribute, but rather it constitutes a return of capital.

While a substantial argument might be made in theory that a distribution by a corporation is an economic event equivalent to a sale or exchange, by virtue of which the corporation divests itself of the asset, such has not been the consistent interpretation placed upon such an event by most taxing authorities dealing with this problem. The United States Treasury Department in its Regulation 111, Section 29.22 (a)-20, provides that, "no gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition". Such also has been the interpretation

given to *General Utilities and Operating Co. v. Helvering,* 296 U.S. 200 (1935). See Magill, *Taxable Income,* 63-64; Johnson, *Corporation and Stockholder—Dividends in Kind,* 1 Tax L. Rev. 86. In view of these authorities, it is our opinion that, in the absence of specific language indicating a contrary intent by the Legislature, corporate distribution of an asset does not result in "earnings" to the corporation of the assets' otherwise unrealized appreciation within the meaning of Section 275(j) of our act defining "dividends" in terms of distributions of "earnings". We thus reaffirm the previous opinion of this office referred to above.

It should be pointed out that this opinion applies only to the specific case referred to in the opinion. We submit a few examples, which are by no means intended to be an exhaustive list, of cases in which corporate distributions in kind would result in taxable dividends to the stockholder to the extent of unrealized appreciation of the asset distributed.

1. If a corporation having no earnings or profits declares a liquidation dividend in money, but distributes property to a stockholder at a valuation reflecting a substantial appreciation in value, the distribution would be considered as made in satisfaction of a monetary obligation to make payment of the dividend, thus resulting in realization of income by the corporation. The distribution would therefore constitute a dividend to the stockholder to the extent that the value of the asset exceeded the corporation's capital. See *Bacon-McMillan Veneer Co.,* 20 B.T.A. 556; *General Utilities and Operating Co. v. Helvering, supra.*

2. If a corporation has no earnings or profits, but does own a capital asset bearing substantial unrealized appreciation, the sale of the asset by the corporation would, of course, result in profits to the corporation, the distribution of which to a stockholder would result in a taxable dividend to the stockholder. 28 Opinions of the Attorney General, 254; 33 Opinions of the Attorney General, 394. If, in fact, the corporation negotiated with a prospective purchaser of the asset, and essentially arrived at an agreement as to

purchase, but actually distributed the asset to its stockholder, who, in turn, completed the transaction with the purchaser, the State might be justified in looking through the transaction and holding, that for tax purposes, the corporation had actually made the sale, realized the profits, and distributed them to the stockholder as a taxable dividend. *Commissioner v. Transport, Trading and Terminal Corp.*, 176 F. 2d 570 (C.A. 2d 1949), cert. den. 338 U.S. 955.

3. An altogether different situation is presented if a corporation has earnings or profits and distributes an asset in kind to its stockholders. It is the opinion of this office that, generally speaking, the determination of whether a distribution is a dividend, from earnings and profits, should be determined by examining the effect of the distribution upon the corporation. If, after the distribution, the corporation still has assets properly valued at the amount of its paid in capital, the distribution should be a dividend taxable to the shareholder. See *R. D. Merrill Co.*, 4 T.C. 955; Raum, *Dividends in Kind; Their Tax Aspects*, 63 Har. L. Rev. 593. Even though the asset distributed was part of the original capital of the corporation, it is a dividend to the stockholder, since all distributions are presumed to be from earnings and profits as such existed. 28 Opinions of the Attorney General, 254. Further, the dividend should be taxable to the shareholder at the full value of the asset distributed, taking into account any appreciation in value of the asset since acquisition by the corporation.

We are reluctant to discuss further any hypothetical cases involved in this field. Each case should properly be examined in the light of all of the circumstances surrounding the transactions involved and not considered in a factual vacuum. It is suggested that cases arising in this field be separately considered in the light of the principles discussed above in order to determine the tax consequences to the shareholder of distributions in kind made to him by a corporation.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION—PROPERTY TAXES—PERSONAL PROPERTY TAX ON ALCOHOLIC BEVERAGE INVENTORIES BY LOCAL SUBDIVISIONS NOT AFFECTED BY PROHIBITION AGAINST LOCAL EXCISE TAXES.

March 27, 1956.

Mr. Albert W. Ward, Secretary,
State Tax Commission.

You have asked us for an opinion concerning the effect of Chapter 8 of the Laws of Maryland, 1954, as codified in Article 2B, Sections 126, 126A and 126B, of the Annotated Code of Maryland (1955 Supp.), upon the taxation of alcoholic beverages as a stock-in-business under the ordinary tax on personal property provided for in Article 81 of the Code. Chapter 8 of the Laws of 1954, after providing for an increased gallonage tax by the State on alcoholic beverages, and the remission of a portion of the tax collected to the counties and to Baltimore City, provides in Section 126B that "no political subdivision in this State shall, after July 1, 1955, have the power or authority to impose any tax on distilled spirits, beer, wine or any other alcoholic beverage . . ." Unless prohibited by the provisions of this Section, alcoholic beverages constituting the inventory of a business on the date of finality, for purposes of personal property tax, are subject to taxation by the county, or Baltimore City, in which the business carries its inventory. Section 7, Article 81 of the Annotated Code of Maryland (1951 Ed.). It is our opinion that Chapter 8 does not remove the power of any political sub-division of the State to impose personal property taxes upon alcoholic beverage inventories under the provisions of Article 81, Section 7.

The purpose of Chapter 8 is to be ascertained by an examination of the Act as a whole, and its legislative history. Section 126B refers to the authority to impose "any tax on distilled spirits, etc.". This is intended by the Legislature to refer to a tax based on all alcoholic beverages, as such, that is, a gallonage or other unit tax on all alcoholic

beverages sold in Maryland. It is our opinion that this would not refer to a tax based on inventories which the taxpayer happened to have on hand on the date of finality for personal property taxes. Such taxes are not based generally on alcoholic beverages as such, but are simply designed to measure a rough average of the value of property generally retained in the business of the taxpayer at any given time.

This conclusion is strongly supported by the introductory passages of Chapter 8. The first "Whereas" clause of the Act calls attention to the power of three local subdivisions to levy *excise* taxes. This is followed in the fourth "Whereas" clause with a statement that it is the intent and desire of the General Assembly "to *restate,* as a general policy of this State, that no political subdivision shall have the power to tax alcoholic beverages . . ." (Emphasis supplied.) The imposition of personal property taxes by local subdivisions upon inventories of stock in trade, including alcoholic beverages, held on the date of finality has since 1841 been the established policy of the State. On the other hand, it has not until recently been the policy to permit subdivisions to impose excise taxes on alcoholic beverages. Therefore, when the Act refers to newly established local excise taxes as a reason for enacting the law, and then refers to the restating of a general policy against local taxation, it must refer to the reversion to the traditional policy of permitting personal property taxes, but denying the right to impose excise taxes.

It appears that Chapter 8 is generally in accordance with, and apparently was inspired by, the recommendations of the Maryland Tax Survey Commission of 1949, known as the "Case Commission", in its Second Interim Report. That Commission's recommendation was that "the imposition of local excise taxes upon alcoholic beverages is rigidly limited . . ." There is never any indication of a recommendation to change the long established policy with regard to imposition of personal property taxes upon inventories of alcoholic beverages. An examination of the Governor's veto message by which this Act was returned to the Legislature

clearly indicates that the Governor did not construe the Act as altering the policy with regard to personal property taxes. He stated that the purpose of the Bill was to eliminate local taxation in Baltimore City and Baltimore County, those being the two jurisdictions having excise taxes in effect at that time. Laws of Maryland, 1954, p. 298.

Under these circumstances, it is our opinion that this Act does not purport to alter the traditional policy of imposing personal property taxes upon inventories of alcoholic beverages.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION — INCOME TAXES — INCOME ACCUMULATED BY TRUSTEE TAXABLE TO TRUST EVEN THOUGH EVENTUALLY DISTRIBUTED TO CHARITY AS REMAINDERMAN.

April 25, 1956.

Mr. Frank W. Forestell,
State Income Tax Division.

You have asked our opinion as to the taxation under the Maryland income tax law of certain income accumulated by the trustees of a trust. The trust in question provides that certain specified annuities in dollar amounts should be paid to the named annuitants, who are individuals, for their lifetimes. The balance of the income of the trust, after payment of these annuities, is to be accumulated by the trustee and added to the corpus, to become a part thereof. Upon the death of the annuitants, the entire corpus is to be paid over to the Johns Hopkins Hospital, an organization exempt from Maryland income tax. The trustee has raised the question of the taxability of the accumulated income under Maryland income tax law.

It is our opinion that this accumulated income is taxable under Section 283, Article 81, of the Annotated Code of Maryland (1955 Supp.). This Section imposes a tax upon individuals, and "individuals" are defined in Section 275 to include fiduciaries and the estates they represent. Section 309 of Article 81 further provides that a fiduciary shall be liable for income tax only with respect to such portion of the income of the fiduciary estate as is accumulated and not "paid, distributed or credited to or for the benefit of a beneficiary thereof". It is our opinion that, in the case described, the accumulations of income to be added to corpus for ultimate distribution to the Johns Hopkins Hospital do not constitute paying, distributing or crediting the income to or for the benefit of a beneficiary. Such income is not immediately available, and, in fact, serves a purpose to the trust; such income benefits the annuitants by increasing the corpus and making more certain the ability of the

trust to pay the specified monetary annuities required as a first charge against income. It is clear that the Legislature intended the quoted part of Section 309 above to be applicable to all income that would not normally be received by, and taxable to, the beneficiary. Income which is accumulated by the trustee for ultimate distribution to a beneficiary, as remainderman, is not properly considered as paid, distributed or credited to the beneficiary so as to charge the beneficiary with liability for income tax thereon.

Federal income tax provisions providing for different treatment of accumulated income of trusts are not relevant here.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION—WITHHOLDING TAXES—EMPLOYER WITHHOLDING INCOME TAXES IN TRUST FOR STATE FOR SUMS WITHHELD—SECURITY FOR STATE IN EVENT OF BANKRUPTCY OR INSOLVENCY.

May 1, 1956.

Mr. Frank W. Forestell,
Income Tax Division,
Office of State Comptroller.

You have asked for our opinion concerning the rights of the State in endeavoring to collect from employers taxes which they are required to withhold from wages of their employees under provisions of the Maryland income tax law, as amended by Chapter 281 of the Laws of Maryland of 1955. You state that on several occasions, employers have either failed to remit taxes which they have apparently withheld, or they have remitted by checks which have been returned because of insufficient funds. In such case, the State has not been paid the taxes which the employers have supposedly withheld from the employees' wages.

Under the provisions of Section 308(h) of Article 81 of the Annotated Code of Maryland (1955 Supp.), "Any sum or sums withheld in accordance with the provisions of this section shall be deemed to be held by the employer in trust for the State of Maryland." This section is substantially similar to the provisions of the Federal tax laws, 26 U.S.C.A. Sec. 7501(a), providing "The amount of tax so collected or withheld shall be held to be a special fund in trust for the United States." Because of the similarity of these statutes, the experience under the Federal law is pertinent here.

It has been generally recognized that these provisions of statute call for the creation of a trust of the funds withheld, which funds are generally to be treated in the same manner as other trust funds. *Rivard v. Bijou Furniture Co.*, 67 R.I. 251, 21 A. 2d 563, 27 A. 2d 853 (1941); see *Hercules Service Parts Corp. v. United States,* 202 F. 2d 938

(C.A. 6th 1953). Accordingly, when funds have been set aside by the employer, those funds are properly considered a trust, and are held for the account of the State when they come into the hands of any receiver or trustee in bankruptcy. However, if those trust funds have been dissipated or have never been set aside, the trust cannot be relied upon by the State. As a practical matter, such cases generally result in receivership or bankruptcy, and unless the Comptroller's office can find the funds that have been set aside and can show that they have remained inviolate until the time of receivership or bankruptcy, the trust theory is of value only as to those funds that can be traced into other property. In order to trace assets, the Comptroller must be able to show that funds set aside from the payroll account for taxes have been used to purchase capital assets, or other property which is found in the hands of the insolvent employer, or has been used by the employer to provide other property found in his hands at the time of receivership or bankruptcy.

After receivership or bankruptcy, any trust that then exists, or that may thereafter be created by virtue of future operations and withholding by the court appointed receiver or trustee, should be fully protected by the court. The court here, being responsible for the operation, has a duty to protect the trust in favor of the State and will see that those funds are preserved. *Hercules Service Parts Corp. v. United States, supra.*

If, for the reasons stated above, the trust does not exist or cannot be relied upon as to all or part of the amount due by the employer, the State's claim is then placed upon the same priority as any other tax claim.

You have also inquired as to whether, under Section 308(h), providing that any employer who fails to withhold or pay the tax to the Comptroller "shall be held personally and individually liable" applies to officers of corporations who are employers. It is our opinion that this Section cannot be applied to officers of corporations to make them per-

sonally liable for taxes which the corporation should have withheld. The Act refers to employers and not to officers or agents of employers, and, therefore, is limited to the employer itself in the case of a corporation.

In cases where the employer is solvent, his liability is for the tax that should have been withheld, plus interest and penalties as assessed under provisions of Article 81, Section 314. If, prior to collection of the tax from the employer, however, the tax is paid in full by the employee, the employer would not be liable except for interest and penalties, since the tax he is required to submit has already been received by the Comptroller's office.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION — PROPERTY TAXES — CONSTITUTIONALITY OF LEGISLATIVE ENACTMENT TAXING REAL ESTATE USED FOR AGRICULTURE AT AGRICULTURAL VALUE, REGARDLESS OF MARKET VALUE.

May 1, 1956.

Mr. Albert W. Ward, Secretary,
State Tax Commission.

You have asked our opinion as to the constitutionality of Chapter 9 of the Laws of Maryland of 1956, pertaining to land assessments and providing that "lands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use, and shall not be assessed as if sub-divided or on any other basis". Article 15 of the Declaration of Rights of the Constitution of Maryland provides that all taxes levied by the counties and by the State "shall be uniform as to land within the taxing district". You point out that the method of assessment provided in Chapter 9 means that certain land used for agricultural purposes may be assessed at substantially less than its full market value, and have inquired as to whether this fact brings it in violation of Article 15 of the Declaration of Rights.

It is our opinion that this act is valid and not in conflict with the Declaration of Rights. We believe that although the act results in assessments being made of certain properties at less than full market value, the Legislature has provided an exemption to the taxpayer, using his land for agricultural purposes, to the extent that value for other uses may be attributable to his property. Exemptions have been clearly recognized as proper in the administration of real estate taxes, so long as the classification established by the Legislature is reasonable and can be supported upon some sound reasons of public policy. *Mayor and City Council of Baltimore v. Minister et al., of Star Methodist and Protestant Church*, 106 Md. 281. The Legislature, in granting exemptions, may classify property according to character, use, description and location. *Grossfield v. Baughman,*

148 Md. 330. We cannot say that the classification by the Legislature of agricultural use, as providing a basis for an exemption from property taxes to the extent that the land concerned may be more valuable for other use, is arbitrary and unreasonable. We, therefore, believe that this act does not contravene the Maryland Constitution.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—VESTED REMAINDERMAN SUBJECT TO DIVESTITURE MAY APPLY FOR ACCELERATION OF PAYMENT OF TAXES AT THE RATE APPLICABLE TO REMAINDERMAN'S CLASSIFICATION.

May 3, 1956.

Mrs. Ruth R. Startt,
Register of Wills for
Talbot County.

You write to us of an estate in which the will of a decedent recently has been probated containing the following language in a testamentary trust created therein:

> "Upon the death of my wife after my death, the principal of the Trust created by this Item of my Will shall be distributed free, clear, and discharged of all further trusts, to my said daughter, Sarah Graham Adkins, if she shall be then living; if she shall not then be living, the principal of said trust shall be distributed to and among my daughter's issue, my son, my son's issue, as shall survive her and in such proportions as my said daughter shall by her Last Will and Testament designate and appoint, and in default of appointment to my daughter's next of kin living at the death of my said wife."

You state that the remainderman wishes to accelerate the payment of inheritance taxes on this trust. This is expressly permitted under the terms of Article 81, Section 160, of the Annotated Code of Maryland (1951 Ed). You inquire, under that acceleration provision, whether the rate of inheritance taxation on this remainder should be the 1% lineal tax (Section 150), since the daughter is, of course, a lineal; or, since it is possible that the remainder may go to collaterals, if the daughter dies before that remainder vests in possession, whether the 7½% collateral tax (Section 149) should be imposed; or whether an intermediate

arrangement, depending on ultimate devolution, might be involved.

In our opinion, the instant remainder is a vested remainder, subject to divesting. Miller, *Construction of Wills,* Page 596; Gray, *Perpetuities,* Section 108; *Bouse v. Safe Deposit and Trust Co.,* 181 Md. 351, 29 A. (2d.) 906. The vested remainderman, being a lineal, has the right to pay on the rate applicable to her; in this case, the lineal rate of 1%, and the possibility that the estate might be divested does not affect this result. As 30 Opinions of the Attorney General, 154, pointed out in discussing a somewhat similar problem, "the parties in interest, by calculating the total tax payable if each of the procedures suggested should be followed, can decide which course produces the greatest credit and the least total tax."

The instant discussion, of course, does not undertake to pass on the question of the imposition of inheritance tax in the event the remainderman dies before acquiring possession.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—COMPUTATION OF VALUATION OF LIFE ESTATES, OTHER INTERESTS LESS THAN AN ABSOLUTE INTEREST, AND REMAINDERS.

May 7, 1956.

To: All Registers of Wills in Maryland.

On October 21, 1955, in a letter addressed to Mr. Harry D. Radcliff, Register of Wills for Frederick County, Maryland, and subsequently published in 40 Opinions of the Attorney General, 625, this office gave an opinion as to the method of computation of valuation of life estates, other interests less than an absolute interest, and remainders for purposes of the Maryland inheritance tax. In the course of that opinion, we pointed out that under then Section 159 of Article 81 of the Annotated Code of Maryland (1951 Ed.) the Federal Estate Tax Regulations effective on June 1, 1951, controlled such computation and that such regulations had been subsequently amended, but the amended regulations were inapplicable since Section 159 prescribed that the regulations in effect as of the effective date of the Act should control. We stated that the Legislative Council was considering remedial legislation to effectuate a greater uniformity with the Federal method of calculation.

Since that time, Section 159 has been amended by Chapter 102 of the Acts of 1956, and now reads, in part, as follows:

> "Whenever any life-estate, or interest for a term of years or other interest less than an absolute interest, in trust or otherwise, shall pass to a person, and a contingent or remainder or reversionary interest shall pass to another person, the Orphans' Court of the County or City in which administration is granted, or any other Court having jurisdiction over the administration or distribution of such property, shall determine, before any distribution thereof shall be authorized, the value of the life-estate, or interest for a term of years,

> or other interest less than an absolute interest, in accordance with *the applicable and effective regulations of the Federal Estate Tax under the Internal Revenue Code as promulgated by the United States Treasury Department, Bureau of Internal Revenue, as such regulations may be amended from time to time,* and shall assess the tax against said interest; * * *".

Section 160 has been unchanged and continues to read, in part, as follows:

> "Whenever a life-estate, or interest for a term of years, or other interest less than an absolute interest, shall be valued by the Orphans' Court, or other Court having jurisdiction, as provided in Section 159, the person entitled to the property after the termination of such estate, by way of contingent interest, remainder or reversion, may apply to the Orphans' Court, or other Court having jurisdiction, for the valuation of such contingent interest, remainder or reversion. *In making such valuation, the Court shall determine the value of the whole corpus and deduct therefrom the value of the preceding estate or estates,* to the end that the tax collected shall equal that which would have been payable, if an absolute interest in such property had passed. * * *". (Emphasis supplied.)

The newly amended Section 159 will be effective June 1, 1956.

This amendment will change considerably the method of inheritance tax calculation of life estates and other interests less than absolute interest, and, as a result thereof, we are setting forth herewith our suggestions of the method of computation to be used. Mr. M. H. LeVita, Actuary of the Insurance Department of Maryland, who has had considerable experience in this field, has assisted us greatly in these suggestions. The table used, reflecting the *present*

Federal regulations, is extracted from a pamphlet published by the United States Treasury Department, Internal Revenue Service, although the remainder calculations of the Federal Government continue to differ from those of the State of Maryland.

Effective June 1, 1956

SUGGESTED RULES FOR COMPUTING "LIFE INTEREST" AND "REMAINDER".

1. Multiply the AMOUNT OF THE ESTATE by 3½%. This gives the annual income.
2. Consult Table I (attached), and locate the factor opposite the age of "beneficiary" as of nearest birthday.
3. Multiply the annual income obtained in (1) by the factor obtained in (2). The result will be the LIFE INTEREST.
4. Deduct the LIFE INTEREST, computed in (3) from the AMOUNT OF THE ESTATE. The balance will be the value of the REMAINDER.

Example

(1). A Maryland resident dies bequeathing estate of $300,000. to his widow for life with Remainder to his brother. The age of the widow is 70.

Solution:

(1). Multiply $300,000. by 3½%. The annual income is $10,500.

(2). Table I, Factor for age 70 is 7.8200.

(3). Multiply $10,500. by 7.8200. The result is $82,110. which represents the LIFE INTEREST.

(4). From $300,000. subtract $82,110. The balance of $217,890. represents the REMAINDER.

Example

(2). A Maryland resident dies bequeathing estate of $450,000. to her widower for life with Remainder to her sister. The age of the widower is 45.

Solution:

(1). Multiply $450,000. by 3½%. The annual income is $15,750.

(2). Table I, Factor for age 45 is 16.4754.

(3). Multiply $15,750. by 16.4754. The result is $259,487.55 which represents the LIFE INTEREST.

(4). From $450,000. subtract $259,487.55. The balance of $190,512.45 represents the REMAINDER.

TABLE I

Age	*Complete Life Annuity*	*Age*	*Complete Life Annuity*	*Age*	*Complete Life Annuity*
0	23.9685	16	23.1665	32	20.0699
1	24.9035	17	23.0103	33	19.8288
2	24.8920	18	22.8511	34	19.5816
3	24.8246	19	22.6870	35	19.3285
4	24.7378	20	22.5179	36	19.0695
5	24.6392	21	22.3438	37	18.8044
6	24.5326	22	22.1646	38	18.5334
7	24.4188	23	21.9801	39	18.2566
8	24.2982	24	21.7902	40	17.9738
9	24.1713	25	21.5950	41	17.6853
10	24.0387	26	21.3942	42	17.3911
11	23.9008	27	21.1878	43	17.0913
12	23.7600	28	20.9759	44	16.7860
13	23.6161	29	20.7581	45	16.4754
14	23.4693	30	20.5345	46	16.1596
15	23.3194	31	20.3052	47	15.8388

TABLE I—(Continued)

Age	Complete Life Annuity	Age	Complete Life Annuity	Age	Complete Life Annuity
48	15.5133	68	8.5001	88	2.9648
49	15.1831	69	8.1578	89	2.7788
50	14.8486	70	7.8200	90	2.6019
51	14.5101	71	7.4871	91	2.4342
52	14.1678	72	7.1597	92	2.2754
53	13.8221	73	6.8382	93	2.1254
54	13.4734	74	6.5231	94	1.9839
55	13.1218	75	6.2148	95	1.8507
56	12.7679	76	5.9137	96	1.7256
57	12.4120	77	5.6201	97	1.6082
58	12.0546	78	5.3345	98	1.4982
59	11.6960	79	5.0572	99	1.3949
60	11.3369	80	4.7884	100	1.2973
61	10.9776	81	4.5283	101	1.2033
62	10.6186	82	4.2771	102	1.1078
63	10.2604	83	4.0351	103	.9973
64	9.9036	84	3.8023	104	.8318
65	9.5486	85	3.5789	105	.4831
66	9.1960	86	3.3648		
67	8.8464	87	3.1601		

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—INTANGIBLES OF A RESIDENT DECEDENT SITUATED OUTSIDE STATE ARE SUBJECT TO MARYLAND INHERITANCE TAX—VALUE OF SUCH INTANGIBLES MAY BE USED IN DETERMINING AMOUNT OF DOMICILIARY EXECUTOR'S COMMISSIONS—REASONABLE COMMISSIONS OF ANCILLARY AS WELL AS DOMICILIARY PERSONAL REPRESENTATIVE DEDUCTIBLE IN COMPUTING "CLEAR VALUE" OF ESTATE—SUGGESTED TREATMENT IF COMBINED COMMISSIONS EXCEED MAXIMUM ALLOWED DOMICILIARY PERSONAL REPRESENTATIVE.

May 8, 1956.

Mrs. Elizabeth Asay,
Register of Wills for
Montgomery County.

Re: Estate of Edward W. Donn, Jr.

We have your letter concerning the above entitled estate.

The basic facts which give rise to the point at issue are as follows:

The decedent, a Maryland resident, died leaving property, both real and personal, in both Maryland and the District of Columbia. Testamentary letters were obtained in Maryland, and ancillary letters testamentary were obtained in the District of Columbia, the necessity of such ancillary administration being indicated by such authorities as Mersch, *Probate Practice in the District of Columbia,* Vol. 2, Sections 1781-1788, and the case of *Cameron v. Riggs National Bank,* 53 F. Supp. 56. The executor was paid commissions in the District of Columbia in connection with the ancillary administration of $11,051.86. The executor has filed a first account in the Orphans' Court of Montgomery County, Maryland, and in this account claimed commissions of $5,803.76. Such claim for commission has not yet been acted on. The maximum commissions allowable to a domiciliary executor under the Maryland statute on

the facts given are $8,037.60. (Article 93, Section 5, Annotated Code of Maryland (1951 Ed.))

The executor, in its first account to the Orphans' Court of Montgomery County, has paid Maryland inheritance tax on what purports to be the net clear estate distributable to all legatees and devisees. However, in the interpretation of "net clear value", the executor has computed said net estate and, accordingly, the inheritance tax on such clear value, by including among deductions the commissions allowed by the District Court of the United States for the District of Columbia, to wit, $11,051.86, and the commissions claimed, although not yet allowed, in the Orphans' Court of Montgomery County of $5,803.76.

These facts, you state, give rise to the following questions:

> 1. "Where a resident of Montgomery County dies owning intangible personal property, stocks or bonds, which stocks or bonds are physically located in a safe deposit box in the District of Columbia, and ancillary administration in the District of Columbia is had; may the value of the intangible personal property be used to compute the amount of the executor's commissions in the ancillary administration, allowed under the Maryland law, in arriving at the net clear value of the ancillary estate transferred to the domiciliary executor?"

We have consistently held that the intangibles of a resident decedent situated outside of the State are subject to the Maryland inheritance tax. 32 Opinions of the Attorney General, 458, 499 (1947). In this respect, we have ruled almost squarely on the subject. 30 Opinions of the Attorney General, 238 (1945); 36 Opinions of the Attorney General, 280 (1951). The opinion in 30 Opinions of the Attorney General, 238, indicates that the value of the intangible personal property may be used in such computation.

> 2. "If the answer is in the affirmative, may the value of the intangible personal property turned over to the domiciliary executor for eventual dis-

tribution be used to determine the amount of the domiciliary executor's commission allowed under Maryland law?"

On this point, we stated in 30 Opinions of the Attorney General, 238, at 240:

> "The executors should charge themselves in Montgomery County with the full amount of the assets (intangible personal property). Commissions should be allowed on the basis of the gross estate so to be accounted for, * * *".

3. "In calculating 'clear value', it is permissible to deduct commissions paid to an ancillary personal representative?"

Sections 148 and 149 of Article 81 contemplate that inheritance taxes shall be imposed on "the clear value" of the property transferred. In *Bouse v. Hutzler,* 180 Md. 685, 26 A. 2d. 757 (1942), the Court said:

> "The expression 'clear value' means net value after the payment of all debts and expenses of administration."

This office has held on many occasions that reasonable commissions of a domiciliary executor or personal representative are deductible as an expense of administration involved in preserving the assets. Certainly, the work of an ancillary representative contemplates the preservation and maintenance of an estate. Therefore, although there is some authority indicating the contrary, we are of the opinion that commissions of an ancillary representative are deductible. Cf. 92 A.L.R. 537; *Clarke v. Weldon,* 204 Md. 26, 102 A. 2d. 560.

4. The affirmative answer to the third question gives rise to a fourth question. In this case, the total commissions claimed by personal representatives, ancillary and domiciliary exceed, if allowed, the total amount of commissions which would be allowable to a domiciliary representative alone.

> Under these circumstances you ask: "Is it permissible to deduct the entire amount of commissions, both ancillary and domiciliary, from the gross estate in calculating 'clear value' for purposes of Maryland inheritance tax, or is such deduction limited to the maximum amount of commissions allowed under Maryland law?"

As a preliminary matter in deciding this question, it should be pointed out that the ancillary representative and the domiciliary representative in the instant case are one and the same. Under such circumstances, 30 Opinions of the Attorney General, 238, suggests:

> "* * * 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."

An unpublished opinion of this office, dated January 27, 1948, makes a similar suggestion in these words:

> "Your letter of January 21, 1948, asks whether, in calculating the Maryland inheritance tax on an estate in which ancillary administration proceedings were had in the District of Columbia, it is proper to impose the tax on the amount of commissions paid to the ancillary administrator which, together with the domiciliary commissions, exceed the total of such allowances permitted by law. In my opinion, such procedure would be improper.
>
> "The Maryland inheritance tax is imposed on the clear value of all property received from the estate of a decedent. In calculating the clear value of the estate, it has uniformly been held that reasonable executors' commissions are deductible. I have found no opinion which would advance the theory that a certain portion of ancillary commissions would not be deductible merely because those commissions, plus domiciliary commissions, ex-

ceeded the total of such allowances permitted by law. Moreover, as a practical matter, it is my view that even if such a tax were imposed it would be uncollectible.

"It seems to me that if the Orphans' Court for Montgomery County feels (as perhaps it properly should feel in the instant case) that a certain amount of the estate is escaping tax, it could correct the situation by reducing the domiciliary administrator's commissions to such a point that when such commissions were added to those allowed in the District of Columbia they would amount to no more than permitted by law. This would be an equitable solution particularly in a case in which both the domiciliary and the ancillary administrator were one and the same person. If this is not the case, the Court can, of course, act in its discretion within the statutory limits."

Our ultimate conclusion, however, is that it is permissible to deduct the entire amount of commissions, both ancillary and domiciliary, even if such commissions exceed those which would be allowable to a domiciliary representative.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—RECORD TITLE OF AUTOMOBILE GOVERNS INHERITANCE TAX LIABILITY INSOFAR AS REGISTER OF WILLS IS CONCERNED—COURT OF COMPETENT JURISDICTION MAY CORRECT ERRORS OF RECORD TITLE—ORPHANS' COURTS ARE GENERALLY NOT COURTS OF COMPETENT JURISDICTION TO CORRECT ERRORS IN RECORD TITLE.

May 18, 1956.

Mrs. Elizabeth Asay,
Register of Wills for
Montgomery County.
Re: Estate of Roy D. Rife.

We have your letter concerning the above entitled estate. The contention is made therein that cars and trucks registered in the name of the decedent alone were actually owned by the decedent and his wife as tenants by the entireties; and in another case that an automobile registered in the name of the decedent actually was the property of a minor child. Thus, it is contended, under Article 81, Section 150, of the Annotated Code of Maryland (1951 Edition) that the cars and trucks involved would be exempt from inheritance taxation as property held by husband and wife as tenants by the entireties. Similarly, the property of the minor child, if such property designation is established, would not be part of the estate of the decedent.

Under these circumstances, you ask:

> "Does the Register of Wills have the power to look behind the title to an automobile in determining whether or not inheritance tax is due?"

So far as deeds of land are concerned, this office has had occasion to remark on several occasions that the Register of Wills does not have the power to look behind the record title in determining whether or not inheritance tax is due. We have stated consistently that the Register is not to go behind the record title but that, so far as the Register is

concerned, the inheritance taxability of real estate is to be controlled by the record title. Thus it was stated in 28 Opinions of the Attorney General, 300:

> ". . . you are not at liberty to look beyond the record title."

and in 27 Opinions of the Attorney General, 362:

> The Register's "obligation to collect a tax" . . . "is fixed by the record title."

See also 40 Opinions of the Attorney General, 448, 606, Cf. 13 Opinions of the Attorney General, 273; 16 Opinions of the Attorney General, 322.

A similar question on shares of stock was the subject of discussion in 32 Opinions of the Attorney General, 472. Therein we stated to the Register of Wills:

> ". . . you must be bound by the record title and must collect the tax on the full value of the stock unless a court of competent jurisdiction holds upon proper proof that the decedent was not the owner of all the stock . . .".

We are of the opinion that certificates of title of motor vehicles stand on the same basis, and that the Register of Wills cannot look beyond the record title.

It should be further noted that, in speaking of the necessity of one who claims a beneficial interest in contravention of the record title to obtain a court determination, the opinion in 28 Opinions of the Attorney General, 300, states, at page 301:

> "* * * The reasons for refusing claims of this nature by survivors are obvious and have been pointed out by this office in similar situations where the conclusion we have reached was likewise reached. Opinions of the Attorney General, vol. 27, p. 362, and 13 Opinions of Attorney General 273. The Legislature of 1941 carried the basis for these opinions over into the field of joint bank accounts

> by Chapter 790 of the Acts of 1941 wherein it was provided that the form of the account should be controlling notwithstanding a parol trust to a contrary effect. In the absence of court determination otherwise, it is our opinion that an unrecorded collateral instrument cannot be received to alter the effect of a recorded deed."

You point to our opinion in 40 Opinions of the Attorney General, 584, in which we were considering the question of existence *vel non* tenancy by the entirety in personalty, and ask if that opinion does not imply that a Register of Wills has the power to look behind the record title. We believe the opinion in that case to be distinguishable, for in that case there was an absence of any formal conveyance of record title. The livestock there involved was registered after acquisition with a livestock association in Vermont, but this, we feel, is not the equivalent of "record title".

We note that your letter makes reference to a petition to the Orphans' Court of Montgomery County by heirs of the decedent to correct the title to personal property. In our opinion, the Orphans' Court is not a court of competent jurisdiction to determine the title of real estate or, except under limited circumstances, the title to personal property. See 40 Opinions of the Attorney General, 569, 606.

Orphans' Courts, being special tribunals created by statute of special and limited jurisdiction, in the absence of express statutory power, are not courts of competent jurisdiction to ascertain the title of real estate or validity of conveyances affecting such title. *McComas v. Wiley,* 132 Md. 410.

The same lack of jurisdiction over title matters concerning personalty was expressed by the Court in *Talbot Packing Corp. v. Wheatley,* 172 Md. 369, 190 Atl. 833 (1937), as follows:

> "It has been consistently held, however, that the orphans' court has not jurisdiction to determine questions of title to personal property, except

under section 253, where a person interested in the estate charges the administrator with concealing or having in his hands property belonging to the estate which he has omitted to return in the inventory."

It is clear, therefore, that reformation in title by way of declaratory decree or otherwise is not available through the Orphans' Court, but must be sought in a court of general jurisdiction, such as the Circuit Court of Montgomery County.

On occasion, the question of record title has been put to us in a manner indicating that a deed to land was faulty and improper, and pointing out to us that such faulty deeds would raise problems in the record ownership. You may, therefore, find in our opinions referred to a faulty deed being "cured by court proceedings or subsequent conveyance". See, e. g., 27 Opinions of the Attorney General, 362. We consider those opinions as attempts to be helpful in such record ownership questions by pointing out that errors in record ownership may be cured in two ways, i.e., reformation of the erroneous deed by court proceeding, or reformation of the erroneous deed by all interested parties joining in a subsequent conveyance. In our opinion, the "subsequent conveyance" reference has no significance in the field of inheritance taxation. Were it to be given significance in that field, we could witness the State of Maryland being deprived of the source of revenue of inheritance taxation by the simple device of later agreements and conveyances between parties. If the "subsequent conveyance" allusion of previous opinions can be given the effect of nullifying the State's claim to inheritance taxes, we are constrained herewith to depart therefrom, since no legislative intention to vitiate inheritance taxes in such fashion may be found in the State's statutes. Such cases are distinguishable from "compromise agreements and settlements." See 40 Opinions of the Attorney General, 505.

Summarizing, it is our opinion that the Register of Wills does not have the power to go behind record title in the

instant facts to determine inheritance tax liability. If, however, an error in the record title is corrected by a court of competent jurisdiction, the decree or judgment of that court will be binding on you.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—INCOME TAXES—DISTRIBUTION OF "WINDFALL" RECEIPTS, OCCURRING ON IMPOSITION OF WITHHOLDING, AS TO TAXES "PAID TO THE COMPTROLLER DURING THE FISCAL YEAR" 1956.

July 27, 1956.

Mr. Frank W. Forestell,
Income Tax Division,
Office of State Comptroller.

You have asked our opinion concerning distribution of revenues collected by the Comptroller under the income tax law with reference to the income tax imposed upon individuals.

Article 81, Section 319 of the Annotated Code of Maryland (1956 Supp.) provides that certain percentages of the income tax collected shall be distributed to local authorities and the balance retained by the Comptroller as a part of the General Funds of the State. At the time that the Legislature enacted the withholding provisions of the income tax law (Chapter 281, Acts of 1955) a so-called "windfall" occurred by reason of the State receiving double collections from the income tax during the fiscal year ending June 30, 1956. The Legislature provided in the same Act that the distribution of income tax proceeds to the local authorities would be limited to $10,150,000 to Counties, cities and towns, with a provision for an additional $4,366,360 to Counties for capital improvements, rather than being based on the usual percentage of tax collected. This limitation is applied to distributions made from "income taxes paid to the Comptroller during the fiscal year ending on June 30, 1956". The balance of the collections received during that fiscal year were to be paid into the General Funds of the State. Sections 8 and 9 of Chapter 281, Laws of Maryland of 1955.

It is our opinion that the general effect of Sections 8 and 9 of Chapter 281 is to substitute a rigid dollar distribution to the local authorities in lieu of the percentages set out in

Section 319 of Article 81, but that for moneys received during fiscal years prior to and subsequent to that ending on June 30, 1956, the provisions of Section 319, as appearing in the Annotated Code, would control.

You have inquired specifically as to whether receipts by the Comptroller subsequent to June 30, 1956, on delinquent returns of taxpayers filed after that date, or on the basis of assessments made against taxpayers and paid after that date, should be subject to the limitations set forth in Chapter 281, because of the fact that the taxes were due and payable during the fiscal year ending June 30, 1956.

It is our opinion that such collections occurring after June 30, 1956, would be subject to division with the Counties on the percentage basis established in Section 319, since these funds were not "paid to the Comptroller during the fiscal year ending June 30, 1956". It must be assumed that the Legislature recognized that there are always delinquent tax collections in every year, including the fiscal year ending June 30, 1956, so that, during the year in which the Counties do not share on a percentage basis by virtue of Sections 8 and 9 of Chapter 281, there would have been collections which should have been paid to the State in the preceding fiscal year which, if paid on time, would have been divided with the Counties on a percentage basis under Section 319. Thus, delinquencies in 1955 payments are balanced by delinquencies in payments in prior years.

You have also raised the question as to how refunds which the Comptroller is required to make should be handled. You advise that on June 30, 1956, the Comptroller had on hand a number of income tax returns on which refunds were due, but as to which the refunds had not been paid, because of administrative requirements for processing these returns. Also, of course, the Comptroller will, in the course of receiving additional returns, have to make refunds by virtue of subsequent audits after June 30, 1956, as to the 1955 returns. You have suggested that the Comptroller establish a reserve as of June 30, 1956, for the amounts

estimated by the Comptroller to be necessary to pay the refunds on returns then in hand.

It is our opinion that such a reserve is in accordance with the provisions of law, and that this is a proper method of computing income tax receipts for the fiscal year ending June 30, 1956. Thus, although refunds may actually be made subsequent to June 30, 1956, such refunds should be made from the reserve established, and would not be charged against the payments to be made to the local subdivisions under the percentage distribution called for in Section 319. Since these payments are made from the reserve established, they would act to reduce the excess received by the General Funds of the State over and above the set dollar amounts required to be paid by Sections 8 and 9 of Chapter 281. This appears proper since these refunds were actually due and payable by the State on June 30, 1956, and were not paid only because of the administrative problem of processing the returns.

As to refunds made on returns received after June 30, 1956, however, regardless of the taxable year to which applicable, it is our opinion that such refunds should be charged against the percentage share of the local authorities as established in Section 319. Such refunds were not due and payable on June 30, 1956, and, therefore, would not be properly payable from the reserve established, as mentioned above. The same would apply to refunds determined to be due by virtue of subsequent audits only, and which were not due and payable on June 30, 1956, because not claimed in any income tax return then on file with the Comptroller.

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION — DIRECT INHERITANCE TAXES — IRREVOCABLE TRUSTS WITH DIRECT VESTED BENEFICIARIES WHERE TRANSFER AND DECEDENT'S DEATH BEFORE APRIL 4, 1936, ORDINARILY NOT TAXABLE; WHERE TRANSFER BEFORE, DECEDENT'S DEATH AFTER APRIL 4, 1936, ORDINARILY NOT TAXABLE; WHERE TRANSFER AFTER, DECEDENT'S DEATH AFTER APRIL 4, 1936, TAXABLE; POWER OF INVASION OF PRINCIPAL AS AFFECTING TAXABILITY.

August 16, 1956.

Mr. Leroy C. Shaughnessy,
Register of Wills for
Baltimore City.

Re: Estate of Sarah C. Lazenby.

You ask whether Maryland inheritance tax attaches to the passage of Maryland real estate under the following circumstances:

Under a trust indenture, executed December 7, 1935, and duly recorded, A created a trust of certain real property. Under the terms of the trust, which was irrevocable, A, the settlor, was to obtain the income for life and upon the death of the settlor the trust was to terminate and the distribution of any accumulated income and principal was to be made to the four children of the settlor, specifically named as B, C, D and E. The settlor died on January 18, 1956, and the question arises as to whether the assets of the trust are subject to the Maryland inheritance tax.

As a preliminary matter, it is necessary to keep in mind that there is here involved a mother-children relationship, or a direct inheritance tax, rather than a collateral inheritance tax. If the relationship here had been collateral, our opinion in 37 Opinions of the Attorney General, 375 (1952) would have been controlling. The consanguinity of direct relationship calls for different treatment, however.

The direct inheritance tax came into existence in Maryland by virtue of Chapter 90, Laws of 1935. That Act

placed an inheritance tax on direct descendents. In the case of *Downes v. Safe Deposit and Trust Co.*, 157 Md. 87 (1929) (a collateral inheritance tax), it had been ruled that for an interest in an *inter vivos* trust to be subject to inheritance tax at the grantor's death, it was necessary for the grantor to be "seized and possessed" thereof, and its transfer must have been such as to have taken effect in possession after the death of the grantor. See, however, the qualification of this opinion in *Darnall v. Connor*, 161 Md. 210 (1931), where the settlor not only retained life income, but power of testamentary disposition over remainder. See also 155 A.L.R. 850 at 867.

However, by Chapter 124 of the Acts of 1936 (presently codified as Section 150 of Article 81 of the Annotated Code of Maryland, 1951 Ed.), which was effective April 4, 1936, a tax, both as to collaterals and lineal, was imposed on transfers intended to take effect in possession (or enjoyment—Chapter 790, Laws of 1941) at or after the death of a decedent, "including property over which the decedent retained any dominion during his lifetime . . .". "The reservation of a beneficial interest in favor of the decedent or of a power of revocation, absolute or conditional, or of a power of appointment by will or otherwise, in or over any property passing subject to the tax imposed by this subtitle, shall be deemed to constitute dominion within the meaning of this Section". As a consequence of this 1936 amendment, the "seized and possessed" standard was considerably enlarged and as of this date it is the view of this office that the inheritance tax applies to property which was the subject of an *inter vivos* transfer where the decedent-grantor reserved a life estate, and should be taxed in the same manner as if the property had been owned outright by the decedent on the date of his death. 24 Opinions of the Attorney General, 831; 24 Opinions of the Attorney General, 894; 25 Opinions of the Attorney General, 655; 26 Opinions of the Attorney General, 404. But, we have also held that this is not true as to *inter vivos* transfers made prior to April 4, 1936 (32 Opinions of the Attorney General, 450), in view of the vested right language discussed in

Coolidge v. Long, 282 U.S. 582 (1931) and *Binney v. Long,* 299 U.S. 280 (1936). See also 22 Opinions of the Attorney General, 722; 23 Opinions of the Attorney General, 562; 30 Opinions of the Attorney General, 212.

Generally speaking, when an irrevocable trust is created, with an income or life estate retained by the decedent-settlor, the opinions of this office indicate that three major possible situations may occur, and, indeed, one authority makes precisely that classification. Commerce Clearing House, *Inheritance, Estate and Gift Tax Reports,* Maryland State Tax Section, Paragraphs 1560-80, *et seq.* Those three classifications are:

A. Transfer and Decedent's Death before April 4, 1936.

B. Transfer before, Decedent's Death after April 4, 1936.

C. Transfer after, Decedent's Death after April 4, 1936.

As to Classification A, no tax would apply in cases of this nature for the reason that, before Chapter 124 of the Acts of 1936, irrevocable *inter vivos* trusts, in accordance with *Downes v. Safe Deposit & Trust Co., supra,* were not considered to be transfers to take effect in possession at or after death.

As to Classification C, the tax would be applicable in accordance with the specific terms of the statute.

The instant case falls into the second or middle category, Classification B (Transfer before, Decedent's Death after April 4, 1936), the transfer taking place in 1935 and the death in 1956. Generally speaking, where the interests of the beneficiaries are vested, as here, such irrevocable trust transfers retaining a life income are not taxable. 22 Opinions of the Attorney General, 722; 23 Opinions of the Attorney General, 562, 571; 24 Opinions of the Attorney General, 829, 852; 25 Opinions of the Attorney General, 581; 26 Opinions of the Attorney General, 406, 414; 29 Opinions of the Attorney General, 211; 30 Opinions of the Attorney General, 157, 188. Cf. Prentice Hall, Vol. 2, *Inheritance and*

Transfer Taxes, Md. Section, Paragraph 122. Moreover, the Court of Appeals, in *Safe Deposit & Trust Co. v. Bouse,* 181 Md. 351, 29 A. 2d. 906 (1943), gave a broad interpretation as to what constitutes *vested* remaindermen for purposes of inheritance tax. See Critique in 8 Md. Law Review, 142. It might be noted parenthetically that after that decision, by Chapter 573 of the Acts of 1943, the application of inheritance tax statutes was limited to the estates of persons dying after the effective date of the taxing statutes. We held accordingly in 29 Opinions of the Attorney General, 220, and 30 Opinions of the Attorney General, 157, 188, 212, that contingent remainders created under testamentary trust established prior to enactment of the direct inheritance tax in 1935, but vesting thereafter and upon the death of the life tenant, are not taxable.

On the preceding discussion, the estate in question would not be taxable. There remains to be considered, however, still another matter which points up the fact that this classification being general in nature, is, like most generalizations, subject to qualification. That other matter is the fact that in the deed of trust it was provided that if the income did not equal $100.00 per month, the Trustees could invade the principal or corpus of the estate to make up the difference, and could further invade the principal for the settlor's comfort and welfare at said Trustees' discretion.

For, while the statement made is generally true, even as to trusts created before 1936, if the right of the settlor-decedent is enlarged beyond a mere life estate, so as to include additional rights such as the right to grant, convey or sell the property, such enlarged rights would be deemed to be "dominion", rendering the estate taxable, (21 Opinions of the Attorney General, 746; 23 Opinions of the Attorney General, 627), and this principle may also be true where other rights are reserved. In many cases those rights may be equated to a right of revocation, changing the character of the trust from irrevocable to revocable. See, for example, 22 Opinions of the Attorney General, 806; 23 Opinions of the Attorney General, 562, 627; 26 Opinions

of the Attorney General, 434. The power of invasion of the principal may well be such a right. Here, however, the right of invasion of the corpus is a limited right, in which the settlor retains no control over the ultimate devolution of the trust property (See 19 Opinions of the Attorney General, 511; 26 Opinions of the Attorney General, 406), and this office has previously held that a right of a trustee to invade the corpus for support and maintenance of a settlor would not render such an estate taxable. 29 Opinions of the Attorney General, 211. We believe that the last cited opinion governs the case before us and hold, accordingly, that since the remainder vested prior to April 4, 1936, the date of passage of the taxing act, the estate is not taxable upon the death of the settlor in 1956, despite the retention of a life estate by the settlor in the trust indenture.

NORMAN P. RAMSEY, *Deputy Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

TAXATION—RECORDATION TAX—CHATTEL MORTGAGE FROM RESIDENT MORTGAGOR NOT EXEMPT ALTHOUGH PROPERTY COVERED LOCATED OUTSIDE THE STATE.

September 26, 1956.

Mr. Joseph O'C. McCusker,
Chief Deputy State Comptroller.

You have asked our advice concerning refund of a recordation stamp tax paid on a certain chattel mortgage from the United Company of Carroll County, Maryland, to the Claimant, the C.I.T. Corporation. Although all of the chattels described in the chattel mortgage are located outside the State of Maryland, and the chattel mortgage so states, the chattel mortgage is recorded among the chattel records of Carroll County under the provisions of Article 21, Section 54 of the Annotated Code of Maryland, regarding recordation of such mortgages in the same manner as bills of sale are recorded. Under Section 53 of Article 21, bills of sale are to be recorded where the vendor or donor resides, and if the vendor or donor resides outside of the State, where the personal property conveyed is located.

The Clerk of the Circuit Court for Carroll County required and received the stamp tax, based upon the amount of the debt secured, before recording the chattel mortgage. The Claimant contends that under provisions of Section 273(d) of Article 81 of the Annotated Code of Maryland, the tax is not properly collectible upon this chattel mortgage. This sub-section provides as follows:

> "Upon deeds of trust or mortgages conveying property lying partly within and partly without the State, the tax shall apply only to such proportion of the debt secured as the value of the property within this State bears to the value of the whole property conveyed."

It is our opinion that this sub-section is not applicable to the chattel mortgage involved here and that, therefore, the

recordation tax is properly payable and was properly collected in this case. Section 273(a) imposes a tax upon every instrument of writing conveying title to real or personal property or creating liens or encumbrances upon real or personal property offered for record and recorded. This Section also provides that the term "instruments of writing" includes "deeds, mortgages, chattel mortgages, bills of sale, leases, deeds of trust, contracts and agreements". As appears from this language, the Legislature has used the word "mortgages" to refer to mortgages of interests in real property only, since it has separately mentioned "chattel mortgages". Thus, it is our opinion that as the word "mortgages" is used in sub-section (d), that word refers to mortgages of interests in real property and not to chattel mortgages.

On past occasions, this office has often ruled that an exception appearing in Section 273(a) for "purchase money mortgages" refers to mortgages of interests in land only and does not apply to chattel mortgages. 22 Opinions of the Attorney General, 741; 24 Opinions of the Attorney General, 981; 26 Opinions of the Attorney General, 476; 27 Opinions of the Attorney General, 431. It is pointed out in those previous opinions that the reference to "mortgages" does not include purchase money chattel mortgages, the latter being taxable.

This conclusion is also supported by a reference to subsection (c) of Section 273, a Section essentially parallel to sub-section (d), except that it refers to absolute conveyances rather than to conveyances for security purposes. Sub-section (c) refers only to "deeds", a term applicable to real property conveyances, and does not include a reference to bills of sale, the term applicable to conveyances of personalty. Further, the verb "lying" used in sub-sections (c) and (d) is generally applicable to real property, but not to personalty.

The general purpose of sub-sections (c) and (d) also indicates this result. These sub-sections provide proportionate exceptions for property lying partly within and

partly without the State. This appears clearly to have reference to transfers of real property rather than to chattels, since the Maryland recordation statutes do not purport to provide notice of transfers of real property located outside of the State. Thus the tax is made applicable only to that part of the transfer for which the Maryland recordation statute affords protection, that is, the portion of the property located inside the State. As to transfers of personalty, however, the recordation statutes purport to provide protection in the county in which the vendor, donor or chattel mortgagor resides, regardless of whether the personalty is physically located inside the State. Personalty, being mobile, is considered as having a situs at the place where the owner resides. Thus, since protection is afforded in this case, and not in the case of real property located outside of the State, it is appropriate that the tax should be imposed when the recordation occurs in Maryland by virtue of the chattel mortgagor's residence here, because, to that extent, protection is afforded by the Maryland recordation statutes. In this connection, it is significant that no reference is made in sub-sections (c) or (d) to property entirely outside the State, such a reference being appropriate only if chattel documents are included.

Under the well established law of this State, tax exemptions are to be strictly construed, and it is our opinion that the chattel mortgage involved here is not within the exemption of Section 273(d).

C. FERDINAND SYBERT, *Attorney General.*

FRANK T. GRAY, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—PROCEEDS OF LIFE INSURANCE POLICY ARE TAXABLE ONLY IF MADE PAYABLE TO DECEDENT'S ESTATE—TAX WAIVERS—NO PROVISION IS MADE FOR THE ISSUANCE OF WAIVERS OF INHERITANCE TAX IN MARYLAND.

October 10, 1956.

Mr. Joseph O'C. McCusker,
Chief Deputy State Comptroller.

This is to acknowledge receipt of your letter asking whether or not it is necessary for a life insurance company to obtain tax waivers from the State of Maryland when it has entered into supplementary contracts with the beneficiary of a life insurance policy, upon the death of the insured, wherein the beneficiary has elected to take a deposit, instalment or annuity type of settlement, rather than a lump sum settlement under the policy.

As we understand it, the beneficiary was entitled to full payment upon the insured's death, but elected instead to permit the insurance company to hold the proceeds of the policy upon certain trust arrangements. No tax is payable by a beneficiary who becomes entitled to the proceeds of a life insurance policy by reason of his designation as a beneficiary. Such a transaction is not covered by the Maryland statutes imposing inheritance or estate taxes since it is an inter vivos gift rather than a testamentary disposition. The proceeds of the life insurance policy are not assets of the decedent's estate unless they are made payable to his estate by the terms of the policy. 22 Opinions of the Attorney General, 749.

The further question may arise, upon the death of the beneficiary, who has elected to permit the insurance company to hold the proceeds of a life insurance policy upon certain trust conditions, whether the amount of the proceeds held by the insurance company and which pass at the beneficiary's death, is taxable. The property passing at the beneficiary's death is property over which the beneficiary

maintained dominion and control and is, therefore, subject to tax at his death. 26 Opinions of the Attorney General, 394.

Regardless of the source of property constituting an estate, whether it be from proceeds of a life insurance policy or otherwise, the State of Maryland does not issue tax waivers in the case of inheritance and estate taxes due the State of Maryland. There is no provision in our statutes for them and there has been no basis for their use established by usage or custom. Section 151 of Article 81 of the Annotated Code of Maryland (1951 Ed.) requires that any and all inheritance and estate taxes shall be paid by the executor, administrator or any other person making distribution of any property passing subject to such taxes, to the Register of Wills of the proper county or city for the use of the State of Maryland, before making any distribution to the persons entitled thereto, and charges the executor or administrator, or other person, with the payment thereof. The only way the insurance company distributing proceeds that are taxable as part of an estate, directly to the person entitled thereto, can protect itself is by paying the amount of tax due thereon to the Register of Wills in the County or city where the deceased was a resident, and obtaining a receipt from the Register showing the payment thereof. We want to make it clear, however, that an insurance company which pays the proceeds held by it to a duly appointed executor or administrator, whose duty it is to distribute the same to those entitled, does not have the responsibility to see that the inheritance or estate taxes are paid to the State. The duty of paying the taxes in such a case falls upon the executor or administrator.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—GIVING UP OF RIGHT TO SUPPORT BY WIFE IS SUFFICIENT CONSIDERATION TO EXEMPT WIFE'S INTEREST IN TRUST CREATED BY WILL OF HUSBAND FROM INHERITANCE TAX—METHOD OF COMPUTATION AND PAYMENT OF TAX WHERE SEVERAL LIFE ESTATES, SOME CONTINGENT, PRECEDE REMAINDERS.

November 19, 1956.

Mr. Leroy C. Shaughnessy,
Register of Wills of Baltimore City.

You inform us that on October 27, 1924, a testator entered into a marriage separation agreement with his first wife wherein he undertook, after his death, to pay her as long as she should live and remain unmarried, the sum of $66.66 per month. The testator and his said wife subsequently were divorced, and the decree did not award alimony and did not incorporate or adopt the agreement. The testator later remarried.

By a clause in his last will and testament, in order to secure the performance of the above-mentioned agreement, the testator created a trust in the principal amount of $30,000, and directed the trustee named therein to pay to the former wife the sum of $66.66 per month, and to pay any excess of the net income to his second wife, should she survive him, and if she failed to survive him, or should she die prior to the death of the first wife, then to pay any excess of the net income to his son and his stepson in equal portions. The excess of the net income payable to the second wife, who did survive the testator, is calculated to amount to $150.00 per year, based upon current income figures. The trust further provides that after the death or remarriage of the testator's former wife, his second wife, if then living, is to receive all of the net income from the trust until her death, at which time the trust is to terminate and the remainder is to be divided equally between the testator's son and stepson. The first wife, the second wife, the son and stepson have survived the testator.

You ask us what portion of the trust is presently subject to the inheritance tax of the State of Maryland.

There are five different interests in the trust estate which must be considered and which we will discuss in order, as follows:

1. The interest of the first wife in the monthly payments to be made to her from the trust estate during her life, or until she remarries.

2. The life estate of the second wife (the widow) in the *excess of the net income* of the trust estate.

3. The contingent life estate of the second wife in the *entire net income* of the trust estate.

4. The contingent life estate of the son and stepson in the excess of the net income of the trust estate.

5. The remainder interest of the son and stepson in the corpus of the trust estate.

1. The interest of the former wife in the trust estate is not subject to the State inheritance tax. The giving up of her right to any support from her husband other than that provided for by the agreement was full and adequate consideration for the interest which she received in the trust estate. In 25 Opinions of the Attorney General, 681, this office ruled that a transfer which would otherwise be subject to the inheritance tax statutes was not taxable, provided: (1) it was made in fulfillment of a binding contractual obligations; (2) the obligation is based on a consideration reasonably commensurate with the value of the property transferred; (3) the consideration was not executory, but is received or enjoyed by the decedent during his lifetime; and (4) the contract or agreement is clearly established and defined.

In this case, all four of the requirements of the rule have been clearly met and warrant the exemption of the interest of the former wife in the trust from the inheritance tax. It is true that this exemption is not expressly stated in the

statutes, but it has been implied because of the unfairness of taxing a transfer to one who before the death of the decedent paid an adequate price for the property transferred. 26 Opinions of the Attorney General, 445. The property transferred is not a benefit to the former wife because of the husband's death, but it is money paid because of an enforcible legal obligation entered into before the husband's death. It is actually a sale or exchange for which full value has been given to the decedent. See 40 Opinions of the Attorney General 484; 6 Opinions of the Attorney General, 523; 8 Opinions of the Attorney General, 318; 25 Opinions of the Attorney General, 678.

2. The value of the life estate of the second wife in the *excess of net income* which has already vested should be determined now and the tax paid thereon in accordance with Section 159 of Article 81 of the Code (1956 Supp.), which reads in part as follows:

> "Whenever any life-estate, or interest for a term of years or other interest less than an absolute interest, in trust or otherwise, shall pass to a person, and a contingent or remainder or reversionary interest shall pass to another person, the orphans' court of the county or city in which administration is granted, or any other court having jurisdiction over the administration or distribution of such property, shall determine, before any distribution thereof shall be authorized, the value of the life-estate, or interest for a term of years, or other interest less than an absolute interest, in accordance with the applicable and effective regulations of the federal estate tax under the Internal Revenue Code as promulgated by the United States Treasury Department, Bureau of Internal Revenue, as such regulations may be amended from time to time, and shall assess the tax against said interest; * * *. The tax so ascertained shall be paid within thirty days from the date of such determination. * * *"

Section 81.10 of the Federal Tax Regulations, 1956, provides formulas to be used to determine the value of each of the five different interests involved in the trust estate. Those formulas take into consideration the value of preceding estates in determining the value of the subsequent interests.

3. Section 160 of Article 81 of the Code (1951 Ed.) reads, in part, as follows:

> "Whenever a life-estate, or interest for a term of years, or other interest less than an absolute interest, shall be valued by the Orphans' Court, or other Court having jurisdiction, as provided in Section 159, the person entitled to the property after the termination of such estate, by way of contingent interest, remainder or reversion, may apply to the Orphans' Court, or other Court having jurisdiction, for the valuation of such contingent interest, remainder or reversion. In making such valuation, the Court shall determine the value of the whole corpus and deduct therefrom the value of the preceding estate or estates, to the end that the tax collected shall equal that which would have been payable, if an absolute interest in such property had passed. The tax so ascertained shall be paid within thirty days from its ascertainment. But if said person entitled to the property after the termination of the preceding estate shall fail to apply to the Orphans' Court within a reasonable time after the valuation of the preceding estate, or to pay the tax so assessed after application within thirty days from the date of such determination, then such person shall at the time when the same vests in possession at the termination of the preceding estate, pay a tax on the whole value thereof, without deduction of the tax or taxes previously paid. * * *"

The contingent life estate of the second wife in the *entire* net income of the trust estate (conditioned upon her sur-

viving the first wife) may, at her option be valued now and the tax paid thereon, or she may wait until the contingent life estate vests in her at the death of the first wife, and pay the tax thereon at that time. If she waits until her contingent life estate actually vests, she will not receive credit for the tax previously paid on her life estate in the excess of the net income, nor will she be entitled to take into account the annuity to the first wife in computing the value of said contingent life estate, but she must compute the value thereof using the Federal Formula just as though there had been no preceding interests in the trust estate. If she pays the tax on her contingent life estate now, she will be entitled to a credit for the tax paid on her previous life estate in the excess of the net income, and to use a method of computation which takes into account the preceding interest of the first wife and which thus reduces the value of the contingent life estate for tax purposes. The second wife's interest will be taxed at 1% under Section 148 of Article 81 since she is the widow of the testator.

4. The son and stepson may have their contingent life estate in the excess of the net income valued now and pay the tax thereon, with a credit for the tax paid by the second wife on her life estate in the excess of the net income, or they may elect to wait until they succeed to said contingent life interest in the excess of the net income (provided the death of the second wife should occur prior to that of the first wife) and then pay a tax on the full value of their life interest therein at the time it vests with no allowance for the tax previously paid by the second wife on her life estate therein. Under Section 148 of Article 81, the interest of the son is taxable at the rate of 1% since he is a lineal descendant. The stepson is a collateral legatee and his interest is taxable at the rate of 7½% under Section 149 of Article 81. 24 Opinions of the Attorney General, 840; 28 Opinions of the Attorney General, 284.

5. There are several options which the remaindermen (the son and stepson) have. They may obtain the benefits of Section 160, *supra,* by paying the tax now on the proportion of the trust estate remaining after deducting the

value of all preceding interests therein upon which the inheritance taxes are paid now. Since the inheritance tax would ordinarily have to be paid on the interest of the first wife (except that in this case there is no tax due because of the inter vivos contract) and on the interest of the second wife in the excess of the net income now, the remaindermen may pay the tax now on the proportion of the trust estate remaining after deducting the value of those interests, without any credit for the value of the contingent life estates. If the contingent life tenants, or either of them, elect to pay the tax on their contingent interests now, then the remaindermen may pay the tax now and receive an additional deduction for the value of the contingent interest or interests, upon which the tax is so paid, in computing the value of the remainder. The remaindermen may wait until the death of the first wife and pay the tax on their remainder interest at that time. If the contingent life estate of the second wife then vests in her, it will be taxable, if the tax has not previously been paid. The remaindermen would then be entitled to a credit for the life estate of the second wife at that time in computing the tax due on their remainder interest, but would not be entitled under Section 160 to a credit for the interest of the first wife. Another alternative would be to wait until the termination of all the prior interests in the trust estate and pay the tax at the time the remainder vests in possession. If they wait until that time, they must pay a tax on the whole value of the trust estate without deducting the value of any of the preceding interests. See 30 Opinions of the Attorney General, 154; 31 Opinions of the Attorney General, 228; and 32 Opinions of the Attorney General, 493.

We recommend that the parties in interest calculate the tax, using each of the procedures outlined, to determine which is the most advantageous for them. Each person in interest is responsible for the tax due on his interest in the trust estate.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—ONE-HALF OF VALUE OF GIFT OF PROPERTY OWNED BY HUSBAND AND WIFE IS TAXABLE ON DEATH OF HUSBAND WHERE GIFT WAS MADE IN CONTEMPLATION OF DEATH.

December 12, 1956.

Mr. Leroy C. Shaughnessy,
Register of Wills of Baltimore City.
Re: Estate of August Pullifrone.

You have asked our opinion concerning the proper inheritance tax payable on a conveyance of real estate made by a husband and wife shortly prior to the husband's death.

On December 7, 1949, a ground rent in Baltimore City was conveyed by a third party to the decedent and his wife. On December 31, 1955, decedent and his wife conveyed this property to the wife's son (the decedent's stepson). The husband died on February 7, 1956, and his estate is being administered through your office. You collected a collateral inheritance tax from the decedent's stepson on the ground that the latter conveyance was a gift made in contemplation of death. The attorney for the stepson is now protesting collection of this tax.

An inheritance tax is imposed by Section 150 of Article 81 of the Annotated Code of Maryland (1951 Ed.) on "all tangible or intangible property, real or personal, passing * * * by deed, gift, grant, bargain or sale, made in contemplation of death, * * *". This Section further provides as follows:

> "* * * Any transfer of a material part of his property, in the nature of a final disposition or distribution thereof, made by a decedent within two years prior to his death, except a bona fide sale for an adequate and full consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section. * * *".

It does not appear whether the husband and wife in the case at hand held the property as tenants by the entireties

or as joint tenants. In the absence of restricting or qualifying words, a conveyance to husband and wife creates a tenancy by the entireties. *Kolker v. Gorn,* 193 Md. 391 (1949). In any event, our opinion would be the same whether the decedent and his wife held the property as joint tenants or as tenants by the entireties.

In 33 Opinions of the Attorney General, 369 (1948), this office was asked to rule on the taxability of a transfer of certain real property held by a man and his wife as tenants by the entireties to their son and daughter-in-law, when the transfer was made thirty days prior to the date of the wife's death. In holding the transfer taxable, we said the following:

> "Since the transfer was made within thirty days from the death of the grantor-wife and because you have stated no motive associated with life which actuated the transfer, it will be assumed for the purposes of this opinion that the gift in question was made in contemplation of death. This being so, the tax would apply to one-half of the value of the property passing from the grantors to their son and daughter-in-law. * * *".

The conveyance in the present case was made within forty days of the death of one of the grantors and, therefore, if the transfer constitutes a final disposition of a material part of the decedent's estate, it must be presumed that such gift was made in contemplation of death within the meaning of the statute. We understand that you have determined that the transfer of decedent's interest in this property is a final disposition of a material part of this estate, and further that this presumption has not been overcome by any facts furnished by you; therefore, an inheritance tax in the amount of 7½% of one-half of the value of the ground rent is presently due, since the gift made by the decedent to his stepson consisted of his interest in the property.

The attorney for the stepson contends that no inheritance tax is now payable because title would have passed to the wife on the husband's death if no deed had been executed. Whatever the result might have been had no gift been made, the fact remains that an outright gift to the stepson was made of decedent's interest in the property, and that such gift has been determined by you to be in contemplation of death. In 24 Opinions of the Attorney General, 849 (1939), a husband shortly prior to death transferred a bank account into the name of himself and his wife as joint owners. Had such transfer not been a gift in contemplation of death, no inheritance tax on the account would have resulted, in view of the provisions of Section 150 exempting from taxation property owned by husband and wife either as joint tenants or as tenants by the entireties passing to the surviving spouse. However, this office held that if it were determined from the facts that a gift in contemplation of death had been made, the full value of the bank account was subject to inheritance tax, even though at the time of death the husband and wife were joint owners of the property. See also 27 Opinions of the Attorney General, 378 (1942).

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

TAXATION—RECORDATION TAX—CLERKS OF COURT MAY REFUSE TO RECORD INSTRUMENTS THAT DO NOT CONTAIN SUFFICIENT STAMPS TO COVER ENTIRE CONSIDERATION —DAMAGES AND CONSIDERATION DISTINGUISHED.

December 18, 1956.

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

We have your letter concerning payment of recordation taxes and documentary stamps on purchases of rights of way or easements by certain utility companies.

You state that you are informed and believe that these utility companies in making such right of way purchases are arbitrarily assigning the amount of $1.00 per rod as the consideration for the grant, and equally arbitrarily assigning the remainder of the payment given to damages to be caused by construction of the pipeline.

The utility companies on the other hand state that:

> "When we purchase a right of way from a landowner, one of the major elements of concern to such landowner is the amount of damages he will suffer because of the construction of our pipe line through his property. In settling the amount of such damages, we have the alternative either of agreeing upon the amount and paying such amount, in addition to the sum paid for the actual right of way, at the time we secure the right of way deed, which is prior to the construction of our pipe line; or, if agreeable to the landowner, we can wait until the pipe has actually been laid and then agree upon the amount of damages, or permit the amount to be determined by litigation. Of course, it is always desirable to have an amicable understanding with the various landowners across whose property our pipe line runs; and since the determination of

the amount of damages they will suffer, or have suffered, because of the construction of our pipe line at best is uncertain and incapable of exact mathematical computation, we endeavor to reach a figure that will permit the settlement of the amount of such damages without litigation. When we reach an agreement as to the amount of damages to be paid for construction of the pipe line, we take a separate receipt, which in effect is a receipt and release, for all damages done because of such construction. The sum paid for each right of way is correctly stated in the right of way deed and in a separate receipt taken from the landowner. The right of way deed does not state the amount paid for construction damages.

"Each receipt for damages taken by us in Montgomery County was a receipt in full for all damages which might arise from or be caused by constructing a pipe line, as proposed to be constructed and operated, over and through the particular tract of land."

In 22 Opinions of the Attorney General, 736 (1937) it was stated in reply to a question concerning recordation taxes on instruments reciting $1.00 to $10.00 consideration for rights of way for electric lines:

"In my opinion deeds of this character conveying easements in property are within the scope of the Act, and the stamps should be affixed upon the actual consideration paid, regardless of the recited consideration in the deeds. I would suggest that you obtain a statement from the person offering the deeds for record as to the amount of the actual consideration. The statute imposes a penalty for a false statement in this connection."

Article 81, Section 274 is to be applied to correct any

abuse in the stated consideration. It reads in part as follows:

> "*No instrument subject to the tax imposed by this subtitle, shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled.* * * *
>
> "It shall be unlawful for any person to record any instrument subject to the tax imposed by this sub-title, or to incur any additional debt secured by an instrument previously recorded, with respect to which additional debt a tax is required to be paid, without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail." (Emphasis supplied.)

85 C. J. S. *Taxation*, Sec. 1081, p. 683, states the problem as follows:

> "* * * The determination of the amount of the tax to be paid on an instrument may be left to the recording officer, and he may accept as prima facie correct recitals of the instrument and may act accordingly, in the absence of any fact or circumstance to the contrary, coming to his attention calculated to put on notice a reasonably prudent person; but, where the instrument is incomplete, he is within his rights in ascertaining the consideration paid, and, having ascertained this fact, it is his duty to govern himself by that information."

There is a distinction between consideration and damages in such a case as this. In *Philpot v. Gruninger*, 14 Wall (U. S.) 577, 20 L. Ed. 743, the Supreme Court said:

> "Nothing is consideration that is not regarded as such by both parties."

See also *Mitchell v. Holland,* 40 N. E. 2d 362, 365 (Ind.).

"Consideration" is that which is actually paid by the vendee to the vendor for the interest in the land which is actually conveyed to the vendee by the deed. *Central Trust Co. of N. Y. v. Columbus* 92 F. 919.

"Damages" are not part of the consideration paid for the property conveyed, but are paid to the property owner to restore the land retained by him to its former condition if possible, or are paid in lieu of restoring the land retained by the vendor to its former condition. Damages are paid because of injury to the land retained by the vendor and are not part of the consideration for the conveyance of the easement to the vendee. Undoubtedly, in some cases no damages result from use of the easement.

We are of the opinion that the consideration stated to you is not final and can be questioned by you at any time. In such cases where you believe from facts brought to your attention that the consideration recited is incorrect, you may require a statement of the consideration from the person submitting the document for recordation. If, in your estimate, the statement of consideration is erroneous, we are of the opinion that you should refuse to accept the document for recordation. The Legislature has placed the burden of collecting the tax on you, and it is your duty to see that the tax is paid. Section 274 very plainly states that no instrument subject to the tax shall be received for record by any clerk until a stamp is affixed and cancelled. This we interpret to mean a stamp or stamps sufficient to cover the full consideration.

If it is your belief that the consideration recited to you is incorrect, you should place the facts known to you before the State's Attorney for your jurisdiction, with a view to possible enforcement. It is unthinkable, however, in view of the provisions of Section 274, that the Legislature intended that you should be required to record an instrument bearing

a quantity of stamps which you have determined is insufficient, and that your only recourse should be to refer the matter to the State's Attorney for prosecution.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

TAXATION—IMPORTS—IRON ORE IMPORTED FROM FOREIGN SOURCES IS EXEMPT FROM STATE TAXATION SO LONG AS IT REMAINS IN A SEPARATE STOCKPILE IN ITS ORIGINAL FORM AND CONDITION.

December 19, 1956.

Mr. Albert W. Ward,
Secretary, State Tax Commission.

You have asked our opinion concerning the taxability as tangible personal property of certain iron ores imported from foreign sources by the Bethlehem Steel Company for use in the industrial operations it conducts at its Sparrows Point plant.

We understand that title to such ores passes to the Bethlehem Steel Company before the ores arrive in the United States, and that the Company itself acts as the importer. A specific shipload of ore is from one source only, and in most instances a ship unloads at the Sparrows Point Ore Wharf where the ore is placed in a stockpile containing only the ore received from a particular source. In other instances, we understand ships are unloaded at a Bethlehem terminal, whereupon the cargo of ore is transported to Sparrows Point in railroad cars and placed in one of several different stockpiles. We further understand that there is no intermingling of ores from the various sources until the ore is taken from the storage yard and actually enters into the manufacturing operation.

Bethlehem Steel Company now contends that under this state of facts such ores in its storage yard may not be taxed by the State of Maryland as tangible personal property because of Article I, Section 10, Clause 2, of the Constitution of the United States, which provides, in part, as follows:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports

> or exports except what may be absolutely necessary for executing its inspection laws; * * *."

Similar questions were considered by this office in 30 Opinions of the Attorney General, 220 (1945), and in 40 Opinions of the Attorney General, 599 (1955). In the former opinion, we considered the taxability of ilmenite, a black sandlike ore imported from India by the DuPont Company for use in a manufacturing process in its Baltimore plant. This material was transported by ship to a Baltimore terminal where it was transferred in freight cars to the DuPont plant. There the material was unloaded into an open storage bin containing only ilmenite, where it remained until withdrawn for manufacturing. In reaching the conclusion that so long as it remained in the bin in which placed upon its arrival from India, the ilmenite was an import which the State could not constitutionally tax, the Attorney General said the following at page 221:

> "It is, of course, undisputed that an import retains its immunity until it is sold or the original package in which it was contained is broken. The fact that an imported material may be of such character as not to be susceptible to packaging does not destroy the immunity as long as it is not sold or appropriated to the use for which it is designed by the importer. In other words, if the material imported remains in the condition in which it was brought in, the immunity continues to attach."

In the more recent 1955 Opinion, 40 Opinions of the Attorney General, 599, we concluded that newsprint imported from Canada by the A. S. Abell Company, which remained in its original package until used by the company in the course of its operation, was not subject to State taxation. In that Opinion we reviewed in detail the decision of the Supreme Court in *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 89 L. Ed. 1252 (1945), holding that bales of hemp and other fibres, imported by a manufacturer and stored in

a warehouse in Ohio pending their use, retained their character as imports and were entitled to constitutional immunity from State taxation.

We believe that there is little material difference in the facts of the present case from those of the two prior cases presented to this office. In the present instance, we are concerned with the taxability of foreign iron ores which are undoubtedly imports when they arrive at the Sparrows Point wharf. As the Supreme Court stated in *Hooven & Allison Co. v. Evatt,* the question which must be determined is whether the goods or materials have reached the point at which they have lost their character as imports when taxed by the State. In that case, the Supreme Court pointed out that it is a constitutional necessity that the immunity from taxation, "if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination when it can fairly be said that it has become a part of the mass of taxable property within a State * * *". 89 L Ed. 1264.

So long as ores from different foreign sources are kept in separate stockpiles in the same form and condition in which received, they would, in our opinion, retain their original characteristics as imports. However, if foreign ores are intermingled in a common stockpile with each other or with domestic ores, or if such ores are subjected while still in storage to processing in preparation for manufacture, we think that their immunity will have been lost since it may then fairly be said that they have become a part of the mass of taxable property within the State.

For these reasons, and subject to the conditions set forth herein, it is our conclusion that iron ores imported by the Bethlehem Steel Company from foreign sources are imports which the State may not tax so long as they remain in their original form and condition in a separate stockpile composed of like ore from the same source. A similar result was recently reach by the Ohio Board of Tax Appeals with

respect to iron ore imported by another company and stored at a plant in Youngstown, Ohio. *Youngstown Sheet and Tube Co. v. Bowers,* reported in *Assessors' News Letter,* July, 1956.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—(1) JOINT TENANCY CREATED SIX WEEKS BEFORE DEATH IS TAXABLE—QUESTION OF GIFT IN CONTEMPLATION OF DEATH NOT INVOLVED. (2) CONVEYANCES TO HUSBAND, WIFE AND THIRD PARTY AS JOINT TENANTS GIVES EACH A ONE-THIRD INTEREST—TAXABILITY CONTROLLED BY RECORD TITLE.

December 19, 1956.

Mrs. Elizabeth Asay,
Register of Wills for
Montgomery County.

In a recent letter you inquired as to the inheritance tax due on two different estates which are being administered through your office.

I.

In the first case, we understand that X and Y were sisters and owned property as joint tenants with right of survivorship. The property had originally been owned by X, but by deed dated July 14, 1956, was conveyed to X and Y as joint tenants. Y died on August 31, 1956, and you ask what inheritance tax is due.

Clearly, under Section 150 of Article 81 of the Annotated Code of Maryland (1951 Ed.) this is property in which Y, the decedent, prior to her death had an interest as a joint tenant, and the interest passing to X is determined by dividing the value of the property by the number of joint tenants, namely, two. An inheritance tax of 7½% is, therefore, due on one-half the value of the property passing to X at the death of Y.

The mere fact that Y's interest in the property was created only six weeks before her death does not alter the result in this instance, since the gift was complete when the deed was recorded in July, 1956. The attorney for the estate suggests that if X now died, the property might well be subject to tax on the grounds that a gift in contempla-

tion of death had been made, and that if such tax resulted, the property would be subject to "double taxation".

In the absence of necessary additional facts, we cannot now determine what inheritance tax would result if X were to die at sometime in the future, a hypothetical event which has not occurred. To decide whether a transaction was made in contemplation of death, in the event that such question were to arise, you would then have to determine, first, whether there was a transfer of a material part of the decedent's property; second, whether it was in the nature of a final disposition or distribution; third, whether it was made within two years prior to death; and fourth, whether it was a bona fide sale made for an adequate and full consideration in money or money's worth. 27 Opinions of the Attorney General, 408 (1942) ; 31 Opinions of the Attorney General, 229 (1946), 40 Opinions of the Attorney General, 458, 569, (1955). Even if you did find, on the death of X at some time in the future, that X's gift to Y of an interest in the property did constitute a taxable transfer in contemplation of death, such determination would not affect the completeness of the gift nor amount to double taxation. The fact that an inheritance tax on the same property may be paid twice because of two different deaths is not inequitable nor contrary to Maryland law.

II.

Secondly, you inquire as to the taxability of real estate conveyed to "A and B, his wife, and C as joint tenants", where A and B die within a month of each other and C is their son. In 35 Opinions of the Attorney General, 198 (1950), the Attorney General ruled that the conveyance of real estate in the form set forth in your letter constitutes a joint tenancy with each of the three parties having a one-third interest. In that opinion, the Attorney General relied on the case of *Kolker v. Gorn,* 193 Md. 391 (1949), which held that at common law in the absence of qualifying words, a conveyance to a husband and wife and a third party created a tenancy by the entireties in the husband and wife

of one-half of the property, and a tenancy in common in the third party as to the other half. However, the court further held that the use of the words "joint tenants" rebutted the common law presumption and showed a contrary intent to create a joint tenancy in the three parties.

A Register of Wills, as the collector of State inheritance taxes, may not look beyond the record title of real estate, and any correction to the record title must be made by proceedings in a court of competent jurisdiction or by subsequent conveyance. 27 Opinions of the Attorney General, 362 (1942); 28 Opinions of the Attorney General, 300 (1943); 40 Opinions of the Attorney General, 606 (1955) Therefore, you may not consider the assertions of the attorney for the estate that A and B paid half of the purchase price and C paid the other half, and that, therefore, C owned a one-half interest in the property at the time of the original conveyance.

If A dies first in the case presented, one-half of his interest passes to his wife, B, and the other half passes to his son, C. Under Section 150 of Article 81 of the Code, the one-sixth interest passing to the wife is not subject to inheritance tax, but the one-sixth interest passing to the son is. On the death of B, the son, C, must pay an additional inheritance tax on one-half of the value of the entire property which passes to him on his mother's death.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

TRIAL MAGISTRATES

TRIAL MAGISTRATES—CRIMINAL JURISDICTION—NO INDICTMENT NECESSARY WHERE LOTTERY CASE COMMENCED BY WARRANT BEFORE MAGISTRATE GOES UP FOR TRIAL TO CIRCUIT COURT ON APPEAL OR REQUEST FOR JURY TRIAL.

February 23, 1956.

Mr. Harry E. Dyer, Jr.,
State's Attorney for Harford County.

We have your recent letter requesting an opinion concerning the proper procedure in bringing to trial a recent lottery case which, we understand, arises under Section 429 of Article 27 of the Annotated Code of Maryland (1951 Ed.). You state that this prosecution was commenced by warrant and came before a Trial Magistrate; that the State then prayed a jury trial under Section 13(a) of Article 52 of the Code (1955 Supp.); and that, in accordance with this Section, the case is now awaiting trial in the Circuit Court for Harford County. You ask whether you now may proceed with trial on the warrant, or whether, before the accused may be tried before the Court, the matter must be presented to the Grand Jury of the County for indictment. We understand that in your County the Grand Jury does not meet again until May, and that although you have never deemed it necessary in cases of this kind to obtain an indictment, question has arisen as to the effect of Section 679 of Article 27, relating to the waiver of indictment by an accused, on the procedure heretofore followed.

The criminal jurisdiction of Trial Magistrates is set forth in Section 13(a) and (b) of Article 52 of the Code (1951 Ed. and 1955 Supp.), the relevant portions of which are as follows:

> "(a) *Jurisdiction and general powers.* The several trial magistrates of the State of Maryland (except in the city of Baltimore) are hereby vested

with, and shall have hereafter jurisdiction to hear, try and determine all cases involving the charge of any offense, crime or misdemeanor, not punishable by confinement in the penitentiary, as provided in the particular penal statute defining said offense and not as provided in Section 794 of Article 27 of the Annotated Code of Maryland (1951 Edition), or involving a felonious intent, which may be committed within their respective counties; * * * and the said trial magistrates shall have power to issue all process, and to do all acts which may be necessary for the exercise of their said jurisdiction, and may pronounce judgment and sentence in all such cases coming before them, in the same manner, and to the same extent as the circuit courts for said counties could, if such cases had been tried before said courts; provided, however, that the accused, when brought before any such trial magistrate, or being informed by him of his right to trial by jury, freely elects to be tried before such trial magistrate, and provided, further, that a jury trial be not prayed in such case on the part of the State by the State's attorney."

"(b) If after a trial before the Trial Magistrate either party shall feel aggrieved by his judgment there shall be a right of appeal within ten days to the Circuit Court for the county in which the alleged offense is charged to have been committed, and all cases where a jury trial is prayed by the State, or the accused elects to be tried by jury, or appeals from the judgment of the Trial Magistrate, the Trial Magistrate shall take from the accused his recognizance with sufficient surety conditioned for his personal appearance to answer said charge at the then session (if there be a session) of the Circuit Court of their respective counties, or the next session of said Court, if it be not then in session; * * *. The Clerk of the Court shall place such case on the trial docket of said Court,

or in appeal cases on the appeal docket of said Court and issue subpoenas for the witnesses named by the Trial Magistrate only upon the written order of the State's Attorney, and the case shall be then tried in said Court on the information *or warrant.* * * *

"In the trial of all charges of any offense, crime, or misdemeanor, except motor vehicle cases, and in the conduct of all prosecutions or proceedings for the recovery of any fine or penalty, as described in the preceding paragraph of this section, the proceedings and the method of trial, the right to demand a jury trial and the right to appeal shall be such as are prescribed by said paragraph, and such paragraph shall be deemed applicable in all its terms to each and every such offense, crime, misdemeanor, prosecution or proceeding, except motor vehicle cases, whether now or subsequently defined, *unless the statute defining them declares, by specific reference, that this section shall not apply.*" (Emphasis added.)

Under Section 13(a) and (b), the criminal jurisdiction of Trial Magistrates extends to all cases involving the charge of any offense, crime or misdemeanor not punishable by confinement in the penitentiary and not involving a felonious intent. The determination as to whether a criminal offense is of the type to bring it within such jurisdiction must be made from the particular penal statute defining the offense and not as provided in Section 794 of Article 27, which, in general, authorizes a court, in its discretion, to sentence a person who has been convicted of a crime punishable by imprisonment to imprisonment in jail, or in the Maryland House of Correction, or in the Maryland Penitentiary. Section 13(b) removes any further doubt as to the type of offense which may properly be tried by a Trial Magistrate by stating that Section 13(a) shall be deemed applicable to every such offense except motor vehicle cases,

unless the statute defining the offense specifically declares that such Section shall not apply.

Prior to the trial of a case within the jurisdiction of a Trial Magistrate, there is no requirement in Section 13 of Article 52, or elsewhere, that an indictment must be handed down by the Grand Jury of the County before the case can go to trial. The rights of the accused are protected by the provisions which permit him first to elect a jury trial before any proceedings at all before the Magistrate, or, secondly, to appeal to the Circuit Court from an adverse decision, requesting a jury trial if desired. In either instance, the matter is then tried before the Circuit Court of the County. The State is likewise given the right to elect a jury trial at the outset and to appeal from an adverse decision of the Trial Magistrate, and we understand that in the present case the State has requested a jury trial before any proceedings have been had before the Trial Magistrate. Under Section 13(b), the case, either on request for a jury trial or on appeal, stands for trial before the Circuit Court on the information or warrant. *Leek v. Warden,* 205 Md. 641 (1954).

The present prosecution, we understand, is based on Section 429 of Article 27, which provides as follows:

> "429. If any person shall bring into this State any lottery ticket, policy, certificate or anything by which the vendor or other person promises or guarantees that any particular number, character, ticket or certificate shall in any event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property or evidence of debt, or if any person shall have in his possession in this State any book, list, slip or record of the numbers drawn in any lottery, whether in this State or elsewhere, or any book, list, slip or record of any lottery ticket, or anything in the nature thereof mentioned in this section, or of any money received or to be received from, or for the sale of any such lottery ticket or

thing in the nature thereof as aforesaid he shall be liable to indictment, and upon conviction shall in the discretion of the court be fined any sum not exceeding One Thousand Dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; provided, however, that this section shall not apply to any person who may have possession of any of the articles herein mentioned, for the purpose of procuring or furnishing evidence of violations of any of the provisions of law relating to lotteries."

A careful reading of this statute indicates that a prosecution under it is one of the type of cases over which the Trial Magistrate has jurisdiction. The offense is not one punishable by confinement in the penitentiary, nor one involving a felonious intent. Furthermore, there is nothing in this Section specifically declaring that Section 13(a) does not apply. The words "liable to indictment" in Section 429 do not confer exclusive jurisdiction on the courts in a case arising under this Section and thus deny such jurisdiction to the Trial Magistrate. In 34 Opinions of the Attorney General, 283 (1949), we concluded that the intent of Section 13 of Article 52 was to make uniform throughout the State, except in Baltimore City, the method of trial in all cases of a criminal nature subject to the jurisdiction of Trial Magistrates, except motor vehicle cases, unless the statute defining them declared by specific reference that said Section was not to apply. Accordingly, we held that it was clear that Trial Magistrates had jurisdiction to try cases arising under Section 429 of Article 27 (formerly Section 411).

There is nothing in Section 679 of Article 27 which alters our conclusions in this regard. This Section provides, in part, as follows:

"679. Whenever in any County of the State any person is charged with the commission of a misdemeanor or felony, such accused person, before indictment by the grand jury, shall have the right to file a Petition and Suggestion, signed by him in

proper person, with the Clerk of the Circuit Court of said County, setting forth that there is a criminal charge pending against him, that it is a misdemeanor or felony as the case may be under the law of the State of Maryland, or a political subdivision thereof, and that he wishes to waive his right to an indictment by the grand jury and that he seeks an immediate trial by the petit jury, or the Court sitting as a jury, without regard to terms of Court, upon a criminal information filed by the State's Attorney of said County setting forth the charge or charges against him; which petition and suggestion may be signed by the person accused in his proper person or by counsel.

"In the event the said accused person shall have elected a jury trial or shall have taken an appeal from a conviction before a Trial Magistrate under the provisions of Section 13 of Article 52 of this Code, the said Petition and Suggestion shall set forth said facts and shall ask for an immediate trial by the petit jury, or the Court sitting as a jury, without regard to terms of Court.

* * *

"Provided, however, that nothing in this section shall change or affect the jurisdiction of Trial Magistrates, or Police Justices, to hear, try, and determine cases in which they now have original or concurrent jurisdiction, and the existing criminal procedure shall remain unchanged except as herein specifically set forth.

"And provided further that nothing in this section shall prevent the grand jury of any of the Counties from considering and taking action by way of presentment and indictment or otherwise, in any case in which it may so proceed under existing law, if the said grand jury deems it desirable to proceed by way of presentment and indictment

> instead of by way of Information, at any time before trial upon said Information. The provisions of this section shall not apply to Baltimore City or Baltimore County." (Emphasis added.)

We do not believe that this statute can be construed as providing that an accused is entitled to indictment by the Grand Jury in every type of offense. In *Heath v. State,* 198 Md. 455 (1951), the Court of Appeals construed this Section as follows, at page 462:

> "Unquestionably the purpose of the statute, * * * was to enable an accused person to obtain a speedy trial, without waiting (sometimes in jail in default of bond) for action by grand juries which, in most of the counties of the state, meet only twice a year unless specially recalled, and without waiting for the convening of the court and jury at the beginning of each term. It was designed to confer a benefit upon the accused, whereby he could force the State to prosecute its case forthwith."

Where the State has asked for a jury trial and proposes to proceed with the case at once, there is no necessity for an accused to invoke this statute in order to secure a speedy trial. The second paragraph of Section 679 clearly indicates that the Legislature had in mind that certain types of criminal prosecutions are commenced by a warrant bringing the case before a Trial Magistrate, and that in such instances there is no indictment nor any necessity for waiving same if the accused wants a speedy trial. In addition, there is a provision in this Section clearly stating that nothing therein shall change or affect the jurisdiction of Trial Magistrates to determine cases in which they now have original or concurrent jurisdiction, and that existing criminal procedure shall remain unchanged except as therein specifically set forth. The statute further goes on to say that nothing therein shall prevent the Grand Jury from acting by way of presentment and indictment in any case in which it may so proceed under existing law.

It is true, of course, that a lottery case under Section 429 may likewise be commenced by way of presentment and indictment by the Grand Jury of the county, whereupon, of course, the matter goes on for trial before the Circuit Court. In other words, your case is one of the class of cases with respect to which the Trial Magistrates have concurrent jurisdiction, and the State's Attorney may elect the tribunal before which the offense is to be tried. 26 Opinions of the Attorney General, 491, 492 (1941); cf. 25 Opinions of the Attorney General, 177 (1940).

However, the mere fact that the State's Attorney *may* proceed by way of indictment at the outset does not mean that in cases which have been originally brought before the Trial Magistrate there *must* be an indictment if the matter eventually goes before the Circuit Court on appeal or on an original demand for jury trial. The Legislature has clearly provided for two different means of commencing prosecutions of the nature involved here, either one of which is perfectly valid. The contention that in every criminal case an accused is entitled to presentment and indictment was answered in *State v. Glenn,* 54 Md. 572 (1880), when the Court, in upholding the constitutionality of a statute conferring jurisdiction on Magistrates to try certain types of cases, said the following at page 606:

> "* * * If all cases of a penal or criminal nature, where conviction may involve as a consequence, either directly or alternatively, the imprisonment of the party, must be tried upon indictment and by jury, how is the police power in the hands of the various municipal corporations to be enforced? * * *"

Accordingly, it is our opinion that the procedure which you have followed in the present case is entirely proper under the applicable statutes hereinabove quoted. Assuming that the case was properly commenced on warrant before the Trial Magistrate, it is not necessary that, when either party requests a jury trial, the matter must be presented to

the Grand Jury for indictment before the Circuit Court for Harford County can try the case. The Defendant should be tried upon the original warrant, unless, of course, the Grand Jury were to intervene with an indictment.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

TRIAL MAGISTRATES—JUSTICE OF THE PEACE—ANY JUSTICE MAY ENTER JUDGMENT IN A CIVIL CASE PREVIOUSLY DOCKETED BEFORE ANOTHER JUSTICE WHO NO LONGER HOLDS OFFICE—JUSTICE MUST ENTER JUDGMENT WITHIN TWO YEARS AFTER FILING.

May 29, 1956.

Judge Fanny B. Murphy,
People's Court for Wicomico County.

We have your recent letter in which you ask whether or not you, as a Trial Magistrate, may enter judgment in a suit on an open account which was filed and docketed by another Magistrate who is no longer in office. You inform us that a suit on an open account was docketed by the former Magistrate, that the defendant did not appear in the case, and the plaintiff is entitled to judgment. The last entry in the former Magistrate's docket shows the return date for the summons issued for the defendant and nothing further. You do not inform us whether the defendant was returned summonsed, but we presume he must have been since you state in your letter that the plaintiff was entitled to a judgment since the defendant was in default.

Sections 26 and 27 of Article 52 of the Annotated Code of Maryland (1951 Ed.) require any justice of the Peace, when he shall vacate his office by resignation, removal from office, or the expiration of his official term, or his administrator in the case of death, or any other person in whose hands the Magistrate's docket may then be, to deliver his docket together with all the notes, bonds, accounts and papers in his possession appertaining to judgments, or whereupon suits have been entered, to the Clerk of the Circuit Court for the County in which such Justice resides, or to the Clerk of the Baltimore City Court in case such Justice resides within the City of Baltimore, within 30 days after such resignation, removal from office, expiration of term, or death.

Section 39 of Article 52 of the Annotated Code of Maryland (1951 Ed.) provides that, where any Justice of the Peace shall cease to act from any cause, any Justice of the Peace in and for the same County may receive returns of writs or process, issue any writs or process, and do any and all other acts in relation thereto, just as such former Justice might have done had he remained in office, to the end that no pending suit or action shall abate because a Justice of the Peace shall cease to act upon the filing by either party to the suit of a copy of the docket entries of such suit taken from the docket of such former Justice, certified by the Clerk of the Circuit Court with whom the docket is filed, and provided the Justice then sitting gives at least ten days' notice to all other parties to the suit or action, that Justice may proceed to a final determination the same as though the suit were originally brought before him. This, of course, must be done within two years from the date of the original filing of the suit or action before the former Justice, since Section 37a of Article 52 of the Annotated Code of Maryland (1955 Supp.) reads as follows:

> "All civil cases filed before any justice of the peace or trial magistrate shall be marked 'dismissed without prejudice' unless tried within two years from the date of the filing thereof, provided that at any time during such two-year period the plaintiff may secure from such justice of the peace or trial magistrate an extension of said two-year period for good cause shown."

The proceedings and a final judgment rendered by you will be legal, provided you comply with Section 39, *supra,* and provided you follow the regular procedure in actions on open accounts in Magistrate's Court from the point of the last entry on the former Magistrate's docket.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

TRIAL MAGISTRATE—CRIMINAL LAW—LAW OF ARREST—MOTOR VEHICLES—PRIVATELY OWNED COMMERCIAL PARKING LOTS, USED GENERALLY BY THE PUBLIC, ARE PUBLIC PLACES WITHIN THE MEANING OF THE CRIMINAL AND MOTOR VEHICLE LAWS OF THE STATE OF MARYLAND.

June 6, 1956.

Mr. Harry J. Flemming, Chief Clerk,
Trial Magistrate for Prince George's County.

We have your recent letter requesting our opinion in connection with the enforcement of motor vehicle laws on a privately owned parking lot. The lot is in front of commercial buildings and is used generally by the public. It is our understanding that you are making this request for Judge Small, and we ask that, in the future, you specify that the request is made on behalf of the Trial Magistrate, since he is the proper officer to seek our advice on such matters.

This subject has been fully covered in an earlier opinion of this office, reported in 39 Opinions of the Attorney General, 227, so we will not discuss it further here except for the specific case you ask about.

You ask specifically whether or not a party may be convicted of leaving the key in the ignition of an unattended motor vehicle while the same is parked on such a privately owned, but publicly used, commercial parking lot. It matters not whether the lot is privately or publicly owned. Section 212 of Article 66½ of the Annotated Code of Maryland (1951 Ed.) reads as follows:

> "(Unattended Motor Vehicle.) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and

turning the front wheels to the curb or side of of the highway."

Regardless of where the motor vehicle is located, whether it be on private or public property, the statute makes it a crime to leave the key in the ignition if the vehicle is unattended. Unless the statute specifically makes the happening of the act in a public place an essential element of the crime, it matters not whether the act occurs on private or public property.

You also ask about other crimes, such as fighting, drunkenness and disorderly conduct, committed on such privately owned commercial parking lots. At common law, if the acts constituting those crimes were not committed in a public place, then there was no crime committed. One of the essential elements of those crimes was that they be committed in a public place. The laws of Maryland now make those acts a crime whether committed in a public place or on private property. See Article 27, Sections 142 through 146, inclusive. The question still might arise, when a party is charged under the common law or under a statute making the acts a crime when committed in a public place, whether or not such parking lots constitute a public place. The great weight of authority in this country holds that any place which, for the time being, is used by the public, is a public place within the meaning of the criminal laws. *Campbell v. State,* 17 Ala. 369; *State v. Fritz,* N. C., 45 S. E. 957; *Whittingham v. Hopkins,* 69 N. J. Law; 189, 54 Atl. 250. Hochheimer's Criminal Law, 1911 Edition, Section 50. An event that takes place on private property is considered to have taken place in a public place if it is so situated that it can be seen by any considerable number of people if they happen to look. *Hackney v. Commonwealth of Virginia,* 45 S. E. 2d 241; *People v. Ripke,* 115 N. Y. Supp. 2d. 590. We are of the opinion that if the offenses to which you refer take place on a privately owned but publicly used commercial parking lot, which is in constant use by the public, it is a public place within the meaning of the criminal laws of this State.

You also ask about the authority of a police officer to make an arrest on such privately owned but publicly used commercial parking lots. If the crime is committed in the presence of the police officer and is a misdemeanor, and the crimes that you have asked about are all misdemeanors, then he may make an arrest on said parking lot without a warrant. If the crime is a misdemeanor and is not committed in the presence of the officer, then he may not make an arrest without a warrant.

If the officer observed the leaving of a key in the ignition of an unattended motor vehicle on such a parking lot by a person, he could certainly make an arrest, since the crime is a misdemeanor and is committed in his presence. If the crime committed is a felony, however, the officer may make an arrest without a warrant whether committed in or out of his presence, based upon reasonable cause to believe that a felony has occurred and that the person arrested committed such felony.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Assistant Attorney General.*

TRIAL MAGISTRATE—COSTS & FINE MUST BE PAID IN FULL BEFORE COMMITMENT OR THE DEFENDANT MUST BE COMMITTED TO JAIL FOR THE FULL TIME SPECIFIED BY STATUTE—MAY LATER BE RELEASED UPON PAYMENT OF FULL AMOUNT LESS ONE DOLLAR PER DAY CREDIT FOR EACH DAY OF CONFINEMENT.

June 12, 1956.

Mr. Harry J. Flemming, Chief Clerk,
Trial Magistrate for Prince George's County.

You have asked whether or not a person, who has been found guilty of a crime and ordered to pay a fine in the amount of $100.00 and court costs in the amount of $3.50, may pay the $3.50 costs prior to his commitment to jail and thereby reduce the commitment to jail from 60 days to 30 days under Section 4 of Article 38 of the Annotated Code of Maryland (1951 Ed.). It is our understanding that you are making this request for Judge Small, and we ask that, in the future, you specify that the request is made on behalf of the Trial Magistrate, since he is the proper officer to seek our advice on such matters.

Section 1 of Article 38 of the Annotated Code of Maryland (1951 Ed.) provides that, whenever any fine or penalty is imposed by statute for a crime, anyone found guilty in the Circuit Courts of the State shall be sentenced to the fine or penalty provided, and the cost of prosecution; and, in default of payment thereof, he shall be committed to jail until discharged by due course of law. The "due course" of law is provided for by Section 4 of Article 38, which reads as follows:

> "Any person who shall or may hereafter be committed to jail on any charge, including contempt of court, by the Judgment of any court or by any Justice of the Peace of this State, for non-payment of any fine and costs, shall be confined one day for each dollar of fine and costs but in no event shall be confined more than thirty days

for fine and costs amounting to One Hundred Dollars, nor more than sixty days for fine and costs exceeding One Hundred Dollars but not more than Five Hundred Dollars, nor more than ninety days for fine and costs exceeding Five Hundred Dollars."

Section 13 of Article 52 vests in the Trial Magistrates in Maryland jurisdiction to hear, try and determine all criminal cases and all matters relating to collections of fines and penalties which take place in their respective counties, as long as they do not involve confinement in the penitentiary and do not involve felonious intent; to do all acts necessary to exercise the jurisdiction so granted; and to pronounce judgment and sentence in the same manner as the Circuit Courts may. This Section makes Section 1 of Article 38 apply to give Trial Magistrates the power to commit to jail for default in payment of fine and costs. Section 93 of Article 52 of the Annotated Code of Maryland (1951 Ed.), reads in part as follows:

* * *

> "*In cases of commitment to jail in default of payment of fine, the Trial Magistrate shall have the power, upon suitable written order to the sheriff or other custodian, to release the prisoners at any time after commitment upon payment of the fine and costs imposed, provided however, that a credit of One Dollar for each day of imprisonment actually served shall be deducted from the payments herein specified.* * * *". (Emphasis supplied.)

The judgment, as well as the statutes, contemplates the payment of the full sum of the fine and costs. The full $103.50 must be paid or the person found guilty must be committed to jail for sixty days, in accordance with the terms of Section 4 of Article 38. The statute is mandatory that the Defendant be sent to jail unless he pays the full amount of the fine and costs. Nothing short of actual pay-

ment of the full amount of fine and costs prior to commitment to jail will reduce the amount of time the Defendant is to spend in jail. The duration of the imprisonment fixed by the statute in the event of default of payment is for the whole term imposed and not for part of it, and the prisoner may not elect to pay a portion of the fine and costs and satisfy the remaining portion by his imprisonment for a lesser period of time than that fixed by the statute. He may not pay a portion of the fine and costs and thereby reduce the time that he is to serve for non-payment. *Galles v. Wilcox*, Iowa, 27 N. W. 816.

You ask further whether or not, after commitment to jail for a sixty day term, a Defendant may pay $3.50 costs and reduce his term for non-payment of fine and costs to thirty days, under Section 4 of Article 38. He may not pay part of the fine and costs and reduce the duration of commitment either before or after commitment to jail. As we said before, the law contemplates payment in full and makes no allowance for partial payment of either costs or fines. Section 93 of Article 52, *supra*, does permit the release of a prisoner upon payment of the balance of the fine and costs, after crediting that person with payment on the fine and costs at the rate of One Dollar per day for each day spent in jail. Once the Defendant is committed to jail in the case you mention, the duration of his commitment must remain at sixty days, but he is entitled to be released upon the payment of the full amount of the fine and costs, reduced by the amount of One Dollar per day for each day spent in jail. If he fails to pay the fine and costs, he must be discharged upon the completion of the service of the sixty days in jail.

C. FERDINAND SYBERT, *Attorney General.*

STEDMAN PRESCOTT, JR., *Assistant Attorney General.*

TRIAL MAGISTRATES—JUSTICE OF THE PEACE—LIMITATIONS ON THE COMPLETION OF A SUIT BEFORE A TRIAL MAGISTRATE APPLY ONLY TO SUITS COMMENCED AFTER THE EFFECTIVE DATE OF THE STATUTE—LIMITATIONS ARE MANDATORY, BUT MAY BE EXTENDED FOR "GOOD CAUSE" SHOWN.

July 27, 1956.

Judge William G. Kemp,
Trial Magistrate for Cecil County.

We have your recent letter in which you ask whether or not civil suits filed before any Justice of the Peace or Trial Magistrate, prior to June 1, 1955, the effective date of Article 52, Section 37A of the Annotated Code of Maryland (1956 Supp.), are subject to being marked "dismissed without prejudice", if they have not been tried within two years from the date of the filing thereof.

Section 37A of Article 52 reads as follows:

> "All civil cases filed before any justice of the peace or trial magistrate shall be marked 'dismissed without prejudice' unless tried within two years from the date of the filing thereof, provided that at any time during such two-year period the plaintiff may secure from such justice of the peace or trial magistrate an extension of said two-year period for good cause shown."

In order to encourage promptness in enforcing and disposing of civil claims by litigants once they are filed before a Justice of the Peace, or Trial Magistrate, the Legislature placed a reasonable time limit within which such actions once commenced must be completed. It amounts to a bar to further proceeding with the particular remedy after the two year period has expired unless for good cause shown the Justice of the Peace or Trial Magistrate with whom the case is filed decides to extend the time for trial. This provision was intended to prevent inconvenience from delay,

such as loss of evidence, vouchers, obscurity of facts due to lapse of time and memory, death and removal. The Legislature cannot constitutionally cut off all further remedy and deprive a person of his right of action by a new statute limiting the right to pursue an existing suit, so as to preclude any opportunity to obtain a judgment. It is well established that a new limitation on existing rights or causes of action must allow a reasonable time for pursuing that right. The Legislature can, at its pleasure, change a remedy, but it cannot do so if it amounts to the denial of all remedies, or even to such an extent that it would leave any essential part of the right practically unavailable. See *Slover v. Union Bank. Trustee,* 1 L.R.A., N.S. 528.

It is a basic rule of statutory construction that the Legislature intended an Act to be prospective rather than retrospective unless that Act specifically states therein that it is to be retrospective. Since, in this case, the Legislature has failed to specifically mention suits which have been filed prior to its effective date, we believe that it must have intended the Act to have a prospective rather than a retrospective effect, and that any suits filed before its passage are not affected by its operation, inasmuch as no time was given for the completion of such suits. See Crawford, *Statutory Construction,* Section 277; *Williams v. Johnson,* 30 Md. 500 at 507; *Hemsley v. Hollingsworth,* 119 Md. 431 at 442.

You also ask whether or not compliance with the Act by the Justice of the Peace or the Trial Magistrate before whom a civil suit is filed is mandatory or merely directory. It is our opinion that it is mandatory that the Justice of the Peace or the Trial Magistrate with whom such a civil suit is filed dismiss it without prejudice, unless it is tried within two years from the date of filing, unless for good cause shown he has determined that the time for trial should be extended. Where a statute is in language that amounts to a command, it is considered to be mandatory. Ordinarily, the word "shall" is mandatory and it is always presumed that the Legislature intended to use the words in an Act in

their usual and natural meaning, unless there is something in the Act to show otherwise. *State v. Knowles,* 90 Md. 646 at 655; Crawford, *Statutory Construction,* Section 262. What constitutes "good cause" is a question exclusively within the discretion of the Trial Magistrate to whom the application to extend the time for trial is made, but should be based upon a showing of some meritorious reason or cause for failure to conclude the matter earlier. "Good cause" is such a state of facts that would be considered by a man of ordinary prudence as a reasonable excuse for the litigant's failure to complete the pending case within the two years specified, and certainly the applicant for an extension of time should be free from neglect himself. *Kendall v. Briley,* 86 N.C. 58; *Dennis v. McCausland* (Tex.) 69 S. W. 2d 506. It is our opinion that the limitations included in the Act do not apply to actions filed prior to June 1, 1955, and that compliance with the Act is mandatory as to any civil actions filed subsequent to June 1, 1955.

NORMAN P. RAMSEY, *Deputy Attorney General.*

STEDMAN PRESCOTT, JR., *Asst. Attorney General.*

UNIVERSITY OF MARYLAND

UNIVERSITY OF MARYLAND—CONSTITUTIONAL LAW—UNIVERSITY REGULATIONS REQUIRING COMPULSORY MILITARY TRAINING BY STUDENTS DO NOT VIOLATE CONSTITUTIONAL RIGHTS OF ONE WHO OBJECTS THERETO ON GROUNDS OF CONSCIENTIOUS RELIGIOUS OBJECTIONS.

March 21, 1956.

Dr. Wilson H. Elkins, President,
University of Maryland.

Pursuant to your request we have reviewed the file and correspondence pertaining to one of your students.

The basic question involved concerns the authority of the University to require male students to take elementary military training for two years in conjunction with their course of study at the University, as a condition of attendance and graduation. The problem arises as a result of the student's refusal to complete his Air Force ROTC course on the ground of conscientious religious objections. He has taken three semesters of military training, but has notified you that he will not take the other semester required by the rules and regulations of the University, as authorized under Section 241 of Article 77 of the Annotated Code of Maryland (1951 Ed. as amended).

Two of the leading cases in this field are *University of Maryland v. Coale,* 165 Md. 224, 167 Atl. 54 (1933) and *Hamilton v. University of California,* 293 U.S. 245, 79 L. Ed. 343 (1934). The *Coale* case appeal to the Supreme Court was dismissed on the ground that no substantial federal question had been raised.

The *Coale* case held that the University of Maryland may suspend a student by reason of his refusal to take the regular prescribed course in military training, although such refusal is based on a conscientious religious opposition to war and preparation for war.

The *Hamilton* case cites the *Coale* case with approval and at 293 U.S. 265 states:

> "Plainly there is no ground for the contention that the regents' order, requiring able-bodied male students under the age of twenty-four as a condition of their enrollment to take the prescribed instruction in military science and tactics, transgresses any constitutional right asserted by these appellants."

55 Am. Jur. *Universities and Colleges*, at Sec. 21, summarizes the discussion as follows:

> "It is within the power of a state, under the control and regulation of a land-grant college maintained by it pursuant to Federal and state statutes, providing for military training in such college, to impose as a condition of attendance thereat that able-bodied male students shall take a compulsory course in military instruction as a part of their regular studies. The requirement of compulsory military training by students in a land-grant college, under state statutory and college regulations, does not deprive students in such a college of any of the rights guaranteed by the Federal Constitution, and is not a violation of religious beliefs or of conscientious scruples or objections to war, nor repugnant to or in violation of an international treaty to which the United States is a party renouncing war as a national policy and agreeing to the settlement of all disputes or conflicts between the parties thereto by pacific means."

See also 14 C.J.S. *Colleges and Universities*, Sec. 26.

The *Coale* case and the *Hamilton* case are so squarely in point to the question raised that there would seem to be little merit to a prolonged discussion here. It suffices to recognize that the governing body of the University, in accordance with authority granted to it by the General Assembly, enunciated rules and regulations requiring, with

certain enumerated exceptions, courses in military training as a part of the curriculum; that the catalogues of the University indicated this requirement with some particularity; that the student, in the exercise of a free choice of selection of a college, elected to attend the University of Maryland, subject to its rules and regulations. As both the *Coale* and *Hamilton* cases point out, the taking of a military training course during the first two years of college attendance do not in any way attach a student to the armed forces of the United States. And, as the *Hamilton* case points out, the student in any event, "has not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future". 293 U.S. 265-266. Such cases, therefore, differ from the questions raised by conscientious objectors in the case of Selective Draft Laws.

Under the circumstances set out, we are of the opinion that the University may, as in the *Coale* case, suspend the student from the University, subject to reinstatement upon the giving of proper assurances that the student will abide by the regulations; or, as in the *Hamilton* case, suspend the student, with leave to apply for re-admission at any time, conditioned upon the student's ability and willingness to comply with all applicable regulations of the University governing the matriculation and attendance of students.

C. FERDINAND SYBERT, *Attorney General.*

DAVID KAUFFMAN, *Asst. Attorney General.*

VOLUNTEER FIREMEN—WHEN BENEFITS ARE PAYABLE FOR INJURIES INCURRED WHILE NOT FIGHTING A FIRE OR GOING TO OR FROM A FIRE.

December 19, 1956.

Mr. Vincent A. Simmel, Secretary,
Board of Trustees,
Maryland State Firemen's Association.

We have your letter requesting an opinion interpreting Article 88A, Section 38 of the Annotated Code of Maryland (1951 Ed.) on three questions. The first poses under what conditions firemen injured or disabled while working at dances, carnivals or other fund-raising activities for the benefit of the fire company are covered by the Act. The second question presented asks whether firemen injured while participating in hose training or practice competition would be covered by the Act. The third question is whether the Act is broad enough to cover members of ambulance crews or rescue squads injured while responding to sick or accident calls not relating to fires.

The Act reads as follows:

> "Whenever any volunteer fireman in good standing of an incorporated volunteer fire company in the State of Maryland, shall be temporarily or permanently disabled as a direct result from active participation in fighting a fire or while going to or from a fire, or performing any other duties necessary to the operation or maintenance of the fire company, the said fireman shall lay his case before the Board of Trustees of the Maryland State Firemen's Association, supported in all cases by the recommendation of the fire company of which he is a member, and the Board of Trustees aforesaid shall proceed to consider the same, and if the facts are found as above stated, the name of the fireman shall be placed on a list to be

> kept by the Secretary of the Maryland State Firemen's Association, to be known as 'Disabled Firemen's List,' and every person so placed on said list shall be entitled to receive a pension from the Maryland Firemen's Association in a sum, the amount of which shall be decided upon by the Board of Trustees of the Maryland State Firemen's Association and to be paid out of its treasury at such times and in such instalments and in such amounts as the said Board of Trustees of the Maryland State Firemen's Association may decide, during the period he is so disabled or so long as said pensioner is without other means of comfortable support."

The statute was first enacted by Chapter 510 of the Laws of 1916 and was intended to pension permanently disabled volunteer firemen, their widows and dependent children who were ". . . disabled as a direct result from active participation in fighting a fire or while going to or from a fire . . .". Chapter 260 of the Acts of 1935 extended the benefits to those who were temporarily disabled and gave a broad discretion to the Maryland Firemen's Association as to the sum to be awarded. However, the requirements as to participating in a fire remained the same under the amendment effected by the 1935 Act. The latest amendment was enacted by Chapter 391 of the Laws of 1947 which in addition allowed relief to those volunteer firemen who were disabled, ". . . performing any other duties necessary to the operation or maintenance of the fire company . . .".

It is not possible for this office to define the exact conditions which must prevail in order for a volunteer fireman to obtain a pension. The statute requires that the volunteer in order to qualify must be actively participating in firefighting, going to or from fires, or participating in such "other duties necessary to the operation or maintenance of the fire company". The circumstances of each application for pension must stand on its own facts. To define what the "other duties necessary" include without specific facts would, we feel, unnecessarily limit the application of this

remedial statute and might possibly foreclose a claim which is meritorious by reason of not being able to foresee certain possible situations which may arise. In 38 Opinions of the Attorney General, 340, our predecessor held that a member of a volunteer fire company who was struck by a hit and run driver while returning home from a company dance was not entitled to an award. We believe this ruling was intended to apply to that fact situation and that it should not be construed to mean that all activities of a volunteer fireman at a company dance or carnival would be outside the scope of "other duties necessary to the operation or maintenance of the fire company". As we have indicated, we believe any further comment on this point should only be made when particular facts are known and before us.

Regarding the second question, various types of competition arising out of training and practice of fire fighting techniques are essential to the proper operation of a volunteer fire company. The success of any service organization such as a volunteer fire company is dependent upon the degree of training, practice and experience of its members. Whether these training and practice exercises take place at the premises of the fire company or at a gathering of various fire companies makes no substantial difference and we are of the opinion that the Legislature recognized these duties as "necessary to the operation or maintenance of the fire company", and we are therefore of the opinion that if a member in good standing of an incorporated volunteer fire company is either injured or disabled during such exercises, the Board of Trustees could award a pension under the provisions of the statute.

The final question as to whether ambulance crews and rescue squads responding to sick or accident calls not related to fires are covered by the Act, demands a close scrutiny of the Act. The Act from its inception has required that firemen be disabled "as a direct result from active participation in fighting a fire or while going to or from a fire". The 1947 amendment broadens the scope to include those duties "necessary to the operation and maintenance

of the *fire* company". Further, the Act as amended, has always, by its express terms only applied to "volunteer firemen". Nowhere has the Legislature indicated that the benefits shall accrue from the performance of duties not connected with fire fighting. In fact, nowhere in the Code of Public General Laws has the Legislature established, recognized or regulated ambulance crews or rescue squads operated by volunteer companies.

The Legislature at the 1955 Session, in local legislation, recognized the limitation of the pension acts to volunteer firemen and in two instances extended the provisions. Chapter 330 of the Laws of 1955 extended pensions to widows and children of members of "volunteer fire *or ambulance* company" (added words in italics) of Baltimore County. Chapter 381 of said laws authorized the County Commissioners of Prince George's County to impose a levy of taxes to provide disability benefits and death pensions of a member of the "volunteer fire departments and rescue squads of Prince George's County".

Members of the ambulance crews and rescue squads undoubtedly perform an invaluable service to the rural residents of our State and deserve the highest commendation for their skill and loyalty. However, we are compelled to interpret the words of the Act in accordance with their plain and natural meaning without resorting to a forced, strained or distorted construction. In 22 Opinions of the Attorney General, 833, we held that the Legislature had confined the grant of benefits to those who were disabled in fighting fires and not while on other humanitarian missions. Cf. 22 Opinions of the Attorney General, 832. We are still of the opinion that members of the ambulance crews or rescue squads injured in duties other than related to fires are not presently covered by this Act.

The limitations of the Act may, of course, be remedied by appropriate action of the Legislature, if it so desires.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

WATER POLLUTION

WATER POLLUTION CONTROL COMMISSION—POWER TO CONTROL POLLUTION OCCURRING IN STREAM FLOWING THROUGH PRIVATE PROPERTY.

January 3, 1956.

Mr. Paul W. McKee, Director,
Water Pollution Control Commission.

We have your letter of November 28, 1955, requesting our advice in connection with the possible pollution of a stream by an industry discharging waste water into the stream. You state that although the stream rises several miles above the industry's property, for a distance of approximately one mile land on both sides of the stream is owned by the industry. Further down stream, where the stream leaves the industry's property, the effect of any discharge is lessened. You ask whether the Commission may lawfully require the discharge on the industry's property to satisfy your effluent requirements.

Section 34 of Article 66C of the Annotated Code of Maryland (1951 Ed.) defines "pollution" as "the discharge or deposit into *any* of the waters of the State of any liquid or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life* * *".

The same Section defines the term "waters of the State" to include both surface and underground waters within the boundaries of the State, including all ponds, lakes, rivers and streams.

It is apparent from these definitions that a stream which flows through private land may be considered to be "waters of the State" and that the pollution of a stream, even though such pollution occurs on private property at a point where land on both sides of the stream is held by a private owner,

is subject to regulation under the statute by the Water Pollution Control Commission. The situation involved here does not concern a pond, lake or stream wholly on one individual's private property and we will, therefore, express no opinion as to the Commission's rights to regulate the pollution of such a body of water, although the statute may well be broad enough to apply in such a situation.

Our conclusions in this regard are supported by Section 38 of Article 66C, which provides, in part, as follows:

> "The Commission or any agent authorized by the Commission to represent the Commission shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters of the State * * *".

Section 39 makes it unlawful for any person to discharge or permit the discharge into any of the waters of the State any waste or polluting substance. Accordingly, an industry discharge into a stream flowing through the industry's property may amount to pollution within the terms of the statute, and the Commission is empowered to make such inspection and investigation on such property as may be necessary to determine whether such pollution may be occurring.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

WATER POLLUTION CONTROL—OVERLAPPING JURISDICTION OF WATER POLLUTION CONTROL COMMISSION AND STATE BOARD OF HEALTH—BOTH ARE OFFICIAL AGENCIES OF STATE AUTHORIZED TO CARRY OUT PROVISIONS OF FEDERAL WATER POLLUTION CONTROL ACT.

October 16, 1956.

Mr. Robert M. Brown, Chief,
Bureau of Environmental Hygiene,
State Department of Health.

You have recently requested our advice concerning the responsibility of the State Board of Health to join with the Water Pollution Control Commission in administering a State water pollution control program under Public Law 660 (84th Congress), which amended the Federal Water Pollution Control Act (33 U.S.C.A. 466-466(j)). Section 5(a) of this enactment provides for an appropriation for the fiscal year ending June 30, 1957, and for succeeding fiscal years for grants to states "to assist them in meeting the cost of establishing and maintaining adequate measures for the prevention and control of water pollution". Section 6(a) authorizes grants to a state "for the construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage or other waste into any waters, and for the purpose of reports, plans and specifications in connection therewith".

By letter dated August 28, 1956, to the Acting Secretary of the Department of Health, Education and Welfare, the Governor designated the Water Pollution Control Commission as the official State agency authorized to carry out the provisions of Public Law 660. You state that although there is little doubt that the Commission is the proper agency to administer grants to States under Section 5(a), the Board of Health has traditionally been the State agency primarily responsible for preventing water pollution arising as a result of improper sewage treatment, and you inquire as to the Board's part in administering funds available under aforesaid Section 6(a).

Prior to 1947, the State Board of Health had sole responsibility for programs designed to prevent water pollution affecting the health of the people of this State, whether such pollution resulted from the discharge of industrial waste or from untreated or inadequately treated sewage. However, by Chapter 697 of the Acts of 1947 (codified as Sections 34-45 of Article 66C of the Code), the Legislature created the Water Pollution Control Commission with wide powers to prevent pollution in the waters of the State. Section 34 defines "pollution" as—

> "the discharge or deposit into any of the waters of the State of any liquid or solid substance or substances which may create a nuisance therein or render such waters unclean or noxious so as to be detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life, or unsuitable with reasonable treatment, for use as present or possible future source of public water supply or unsuitable for commercial, industrial, agricultural, recreational or other reasonable uses. * * *".

Section 43 provides that nothing in the Water Pollution Control Law should be construed "to alter, change, modify or restrict the jurisdiction of the State Board of Health of Maryland as set forth in Article 43 and the amendments thereto of the Annotated Code of Public General Laws of Maryland".

Section 366 of Article 43 defines the powers of the State Board of Health, with respect to the supervision and control over the waters of the State, as follows:

> "The State Board of Health shall have general supervision and control over the waters of the State, in so far as their sanitary and physical condition affect the public health or comfort; and it may make and enforce rules and regulations, and order works to be executed, to correct and prevent their pollution. It shall investigate all sources

> of water and ice supply, and all points of sewage discharge. It shall examine all existing public water supplies, sewerage systems and refuse disposal plants, and shall have power to compel their operation in a manner which shall protect the public health and comfort, or to order their alteration, extension or replacement by other structures when deemed necessary. After April 16, 1914, it shall pass upon the design and construction of all public water supplies, sewerage systems and refuse disposal plants which shall be built within the State."

It is clear that the responsibility of the State Board of Health relates solely to water pollution conditions which adversely affect the public health or comfort, and does not extend to conditions detrimental to the propagation, cultivation or conservation of animals, fish or aquatic life. On the other hand, even though the water pollution control law, when codified, was placed in Article 66C relating to natural resources generally, it is equally clear from Section 34 of Article 66C that the Commission's jurisdiction likewise extends to water pollution conditions affecting the health or comfort of the public. It is in this latter area that there is an overlapping jurisdiction with respect to which both the State Board of Health and the Water Pollution Control Commission may, under existing law, exercise control. Had the Legislature not included Section 43 of Article 66C in Chapter 697 of the Acts of 1947, it might well have been said that the intention was to remove from the jurisdiction of the State Board of Health all the water pollution control functions that it had traditionally exercised and to transfer same to the newly created Water Pollution Control Commission. However, the above Section clearly indicates a legislative intention that the two State agencies should have coordinate responsibility in areas where the public health and comfort are affected by water pollution.

At the conference recently held in this office, at which you and Mr. Paul W. McKee, Director of the Water Pollu-

tion Control Commission, were present, you stated that the two agencies had some time ago agreed upon a manner of operation in this area of overlapping jurisdiction. We understand that it was decided that the Water Pollution Control Commission would have primary responsibility with respect to water pollution resulting from the discharge of industrial waste, and that the State Board of Health would have primary responsibility with respect to water pollution resulting from untreated or inadequately treated sewage. You and Mr. McKee further stated that although this practice has not been the subject of express legislation, the budgets of each agency have consistently reflected the fact that personnel of the State Health Department have concerned themselves primarily with sewage pollution, while personnel of the Water Pollution Control Commission have been concerned with problems of industrial waste pollution. Each year these budgets have been approved by the Legislature, thus giving legislative sanction to this administrative practice.

In view of the statutory provisions providing for overlapping jurisdiction of the two agencies in certain areas, and in view of the long-standing administrative practice referred to hereinabove, it is our opinion that both the Water Pollution Control Commission and the State Board of Health are the official agencies of the State of Maryland authorized to carry out the provisions of Public Law 660. In other words, the over-all program contemplated by Federal authorities will be undertaken in the State of Maryland as a joint effort on the part of these two agencies. In particular, it would appear that the Water Pollution Control Commission is the proper agency under Section 5(a) of Public Law 660 to receive and administer the grants provided for thereunder, in view of the fact that such grants are to be used for establishing and maintaining adequate measures for the prevention and control of water pollution in general. Similarly, the State Board of Health would appear to be the proper agency to receive and administer grants under Section 6(a), since such grants are for the

construction of necessary treatment works to prevent the discharge of untreated or inadequately treated sewage into waters of the State. In both instances, however, your two agencies will, of course, continue to cooperate with each other to further this joint program.

We are sending two extra copies of this letter to the Governor so that he may transmit one copy to the Acting Secretary of the Department of Health, Education and Welfare. The latter should be advised that the State Board of Health has, under Maryland law, concurrent responsibility with the Water Pollution Control Commission for enforcing State laws relating to the abatement of water pollution.

NORMAN P. RAMSEY, *Deputy Attorney General.*

ALEXANDER HARVEY, II, *Assistant Attorney General.*

WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION — DEPOSITIONS — PARTIES TO PROCEEDINGS BEFORE THE COMMISSION MAY TAKE DEPOSITIONS IN SIMILAR MANNER AS IN CIVIL ACTIONS IN COURTS OF RECORD THROUGHOUT THE STATE.

February, 17, 1956.

Mr. Melvin L. Fine, Chairman,
State Industrial Accident Commission.

You have requested our opinion in connection with the proper interpretation of Section 7 (a) of Article 101 of the Annotated Code of Maryland (1951 Ed.), in so far as that Section permits parties to take depositions in a manner similar to that provided for in the General Rules of Practice and Procedure of the Court of Appeals of Maryland now effective in the courts of record of this State. We understand it has been contended in a recent case that depositions in proceedings before the Commission may be taken solely by a member of the Commission, the Secretary thereof, or a special examiner or inspector, and not by counsel out of the presence of such an official representing the Commission. You have asked whether, in our opinion, the right to take depositions in such proceedings is as broad as in civil actions in courts of record throughout the State.

Section 7 (a) of Article 101 provides as follows:

> "Each member of the Commission, the Secretary thereof, and any special examiner or inspector shall for the purpose contemplated by this Article, have power to issue subpoenas, compel the attendance of witnesses, administer oaths, certify to official acts, take depositions within or without the State of Maryland as now provided by law, compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony. *Upon request of any party to proceedings before the Commission, the Commission shall*

> *issue subpoenas to compel the attendance of witnesses and compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony at hearings before the Commission and at depositions to be taken by such party. Any such party shall have the right to take depositions within or without the State of Maryland as provided by law."*

The underlined portion of the above statute was added to existing law by Chapter 579 of the Acts of 1951. The title to such Act provided that this amendment dealt with "the right of parties to proceedings before the State Industrial Accident Commission to compel the attendance of witnesses and production of records and to take depositions."

The General Rules of Practice and Procedure relating to the taking of depositions are limited in their applicability to civil actions both in law and equity in courts of record throughout the State. Part Two, I, Rule 13; II, Rule 8. Therefore, the right of a party to take depositions in proceedings before the Commission must arise, if at all, under the above Section 7 (a), which is the only Section of Article 101 dealing specifically with this question.

In our opinion, this Section, and particularly the last two sentences thereof added by the 1951 amendment, gives a party the right to take depositions in proceedings before the Commission in a manner similar to the practice in civil actions in law or equity before courts of record. Accordingly, such depositions may be taken after due notice in the offices of counsel for a party before such person and in such manner as provided by the General Rules of Practice and Procedure, and it is not necessary that a member of the Commission, Secretary thereof, special examiner or inspector conduct the deposition proceedings. The words "any such party" in the last sentence of Section 7 (a) refer to "any party to proceedings before the Commission" in the sentence immediately preceding. The word "party" in both

instances refers to a litigant with an adversary interest in the outcome, such as the claimant, employer, or insurer.

Our conclusion in this regard is supported by the language used in the title to Chapter 579 of the Acts of 1951, quoted above, which clearly indicates that the purpose of the amendment was to permit parties both to compel the attendance of witnesses and the production of records, and to take depositions. The first sentence of Section 7 (a), which was unchanged by the 1951 amendment, does, it is true, deal solely with the taking of depositions by a member of the Commission, the Secretary thereof, and any special examiner or inspector. If the final sentence were likewise construed to mean that depositions in proceedings before the Commission may be taken only by such officials of the Commission, its presence in the Section would be redundant and entirely unnecessary.

Whereas the first sentence of Section 7 (a) authorizes a member of the Commission, the Secretary thereof, etc. to take depositions, the second and third sentences both refer to the taking of depositions by a party. The result of the 1951 amendment, which added the second and third sentences, is clearly to permit depositions to be taken in proceedings before the Commission in either of two ways: by a member or other official on behalf of the Commission, or by a party to the proceedings. There is nothing in the related Sections, 7 (b), 7 (c) and 8 which in any way alters this interpretation of Section 7 (a).

In summary then, it is our conclusion that, as a result of the 1951 amendment to Section 7 (a) of Article 101 of the Code, parties to proceedings before the Commission have rights with respect to the taking of depositions similar to those they would enjoy if they were involved in civil actions in courts of record throughout the State.

C. FERDINAND SYBERT, *Attorney General.*

ALEXANDER HARVEY, II, *Asst. Attorney General.*

WORKMEN'S COMPENSATION — EMPLOYMENT BY A VOLUNTEER FIRE DEPARTMENT NOT SUBJECT TO COMPULSORY COVERAGE UNDER ARTICLE 101 OF THE CODE.

April 3, 1956.

Mr. Melvin L. Fine, Chairman,
State Industrial Accident Commission.

You have requested an opinion from us in connection with an inquiry contained in a letter from an official of an incorporated volunteer fire department in Prince George's County, asking whether employees of his organization are subject to coverage under the Maryland Workmen's Compensation Laws. From this letter which you have enclosed, it appears that the volunteer fire department in question has recently hired two paid firemen. The question which is posed is whether this type of employment constitutes an extra-hazardous employment, so that compensation is payable under Article 101 of the Annotated Code of Maryland (1951 Ed.), entitled "Workmen's Compensation", for injuries sustained by, or death of an employee in the course of such employment.

Employment by a volunteer fire department is not specifically listed as an extra-hazardous employment in sub-sections (1) to (45b) of Section 20 of Article 101. Nor do we believe that such employment can be construed to be a type of extra-hazardous employment not specifically enumerated but subject to coverage under sub-section (46). In *Mayor & City Council of Baltimore v. Smith,* 168 Md. 458 (1935), the Court of Appeals held that sub-section (46) did not make the Act applicable to employments other than those of the same general nature as the ones enumerated in the preceding sub-sections, and that such employments for the most part involved manual or industrial work in an industrial enterprise.

The word "employment", as used in Article 101, is defined by Section 68 (4) as follows:

> " 'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain."

Under this definition, it is our opinion that employment by a volunteer fire department is not a type of employment subject to compulsory coverage under Article 101. Obviously a volunteer fire department is not a trade, business or occupation carried on for pecuniary gain, but its principal purpose is to save inhabitants of the community from loss due to fire. In the case of *Krug v. New York,* 196 App. Div. 226, 186 N. Y. Supp. 727 (1921), the court, in deciding that a fireman of the City of New York was not an employee, within the meaning of a Workmen's Compensation Act which defined "employment" as including only employment in a trade, business or occupation carried on by the employer for a pecuniary gain, held that the City was not carrying on the fire extinguishing business for its own gain, but for the benefit of its inhabitants. In *Rooney v. Omaha,* 105 Nebr. 447, 181 N. W. 143 (1920), it was held that a policeman in the regular service of the Omaha Police Department was not employed for "gain or profit", as those terms were used in a Workman's Compensation Act, and was, therefore, not within the operation of the Act.

Our conclusion is further supported by Section 33 of Article 101. Sub-section (a) of that Section provides that all members of all volunteer fire companies in Kent County, while going to or returning from or fighting a fire, or while engaged as a member of any first-aid or rescue squad, shall be deemed workmen for wages and engaged in extrahazardous employment within the meaning of Article 101. If members of volunteer fire companies in the various Counties throughout the State could be construed to be subject to mandatory coverage under Article 101, it would have been entirely unnecessary to enact a special section applying to Kent County. It may, therefore, be assumed that the Legislature has interpreted Article 101 as not applying to members of volunteer fire departments throughout the State. See *Humphreys v. Walls,* 169 Md. 292, 299 (1935).

If it is desired to have this volunteer fire department made subject to mandatory coverage under Article 101, application should be made to the Legislature for passage of an act similar to Section 33, in order to provide such coverage for Prince George's County. In the absence of such a special statute as applies to Kent County, it is our opinion that members or employees of volunteer fire departments throughout the State are not mandatorily subject to the provisions of Article 101 as employees engaged in extra-hazardous employment.

Of course, nothing we have said herein concerning the applicability of Article 101 to volunteer firemen is in any way intended to limit or otherwise affect the right of volunteer firemen or their widows or children, under Sections 38-42 of Article 88A of the Code, to receive benefits from the Maryland State Firemen's Association. Under those Sections, a volunteer fireman in good standing of an incorporated volunteer fire company in the State, is entitled to receive certain benefits from the Board of Trustees of the Maryland State Firemen's Association in the case of temporary or permanent disablement or death by accident resulting from active participation in fighting a fire, or while going to or from a fire.

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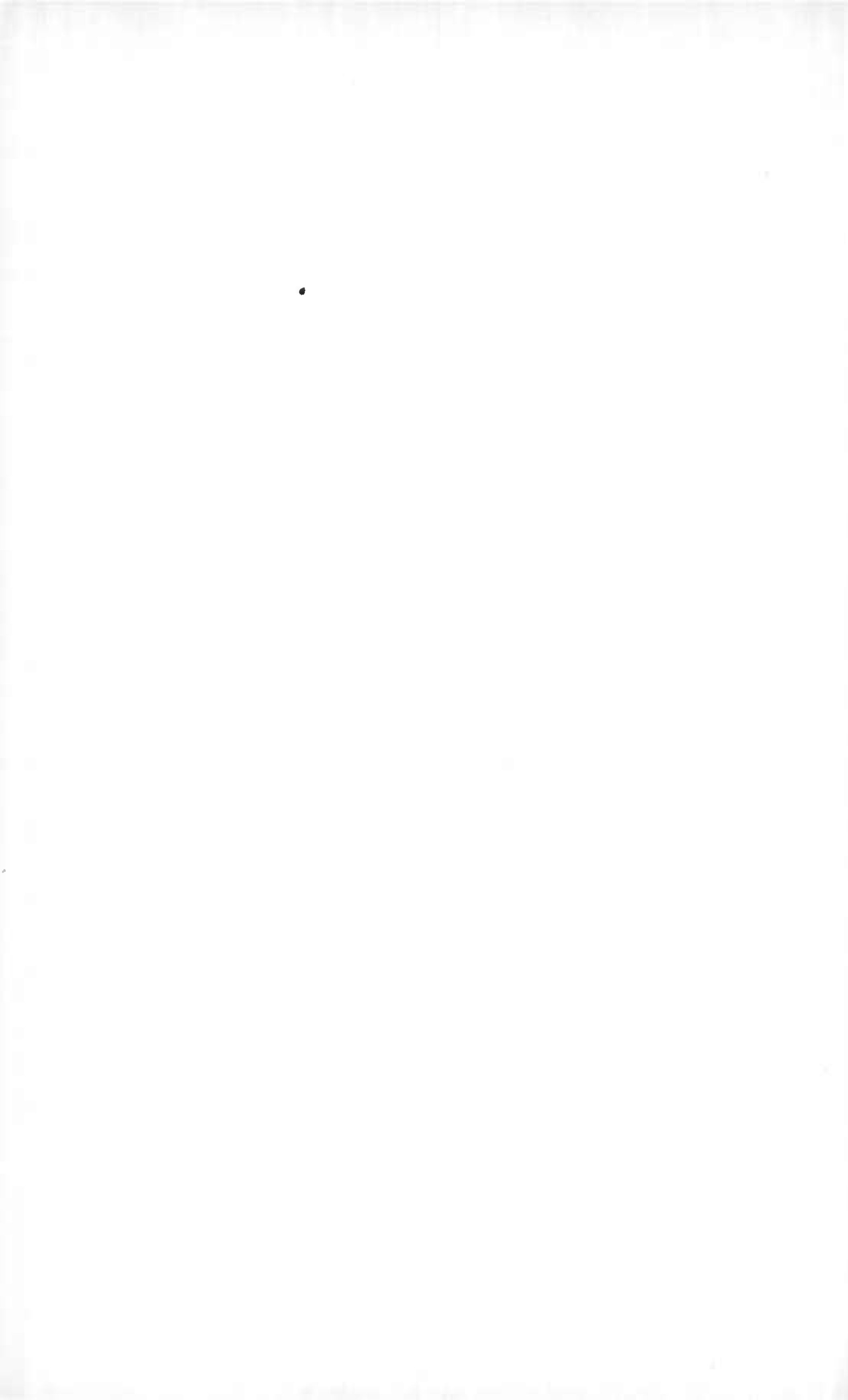

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