COMPLIMENTS OF

C. FERDINAND SYBERT

ATTORNEY GENERAL

ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1958

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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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

STATE LAW DEPARTMENT

C. Ferdinand Sybert	Attorney General
Stedman Prescott, Jr.	Deputy Attorney General
Clayton A. Dietrich	Assistant Attorney General
Joseph S. Kaufman	Assistant Attorney General
[1]E. Clinton Bamberger, Jr.	Assistant Attorney General
Charles B. Reeves, Jr.	Assistant Attorney General
[2]Mrs. Shirley B. Jones	Assistant Attorney General
James H. Norris, Jr.	Special Assistant Attorney General
[3]Theodore C. Waters, Jr. [4]John Martin Jones, Jr.	Special Assistant Attorney General for the Comptroller of the Treasury
Joseph D. Buscher	Special Assistant Attorney General for the State Roads Commission
LeRoy W. Preston	Special Assistant Attorney General in Charge of Subversive Activities Control
J. Howard Holzer	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
[5]Eli Baer	Special Assistant Attorney General for the Department of Motor Vehicles
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
Mrs. Mary G. Kress	Stenographer-Secretary State Law Department
Miss Agnes T. Conroy	Law Stenographer

[1]Resigned December 9, 1958.
[2]Appointed December 10, 1958.
[3]Resigned December 23, 1958.
[4]Appointed December 24, 1958.
[5]Appointed January 23, 1958.

Offices: 1201 Mathieson Building,
Baltimore 2, Md.

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Annual Report For 1958

January 1, 1959.

Hon. J. Millard Tawes,
Governor of Maryland,
Annapolis, Md.

DEAR GOVERNOR TAWES:

I am submitting herewith my report covering the business and proceedings of the State Law Department for the year 1958. This is in compliance with Article 32A, Section 10 of the Annotated Code of Maryland (1957 Ed.).

A detailed financial statement for the fiscal year beginning July 1, 1957 and ending June 30, 1958 is herewith submitted. Included also are individual reports of my Assistants assigned to the State Roads Commission, the Employment Security Board, the Department of Motor Vehicles, the State Accident Fund and the Office of Subversive Activities Control. The written opinions of the Department rendered during the year follow this Report.

During the year the Department participated in one hundred and sixty-nine cases in which the State was a party. We appeared in the Supreme Court of the United States, the United States Court of Appeals and the United States District Court for the District of Maryland; the Court of Appeals of Maryland, the Circuit Courts throughout the State, as well as the Courts of Baltimore City, the Orphans' Court of Baltimore City and the People's Court of Baltimore City. These cases do not include those tried by my Assistants assigned to other Departments.

During the year members of my staff prepared for the Court of Appeals memoranda of law in one hundred and twenty-three (123) applications for leave to appeal from denied writs of habeas corpus. A bill was introduced in the General Assembly last year establishing a post conviction procedure to consolidate the various writs available to a person convicted of a crime and incarcerated under sentence

of death or imprisonment; however, the bill at that time failed of passage. At the 1958 session of the General Assembly, the bill was reintroduced and, after hearings, the General Assembly passed the Uniform Post Conviction Procedure Act, which also abolished the right of appeal in habeas corpus cases.

We represented the State in thirty-three (33) criminal cases in the Court of Appeals and thirteen (13) civil cases. The total number of cases tried in the Court of Appeals during 1958 exceeded by fifteen cases the number tried in 1957.

The subjects covered in both criminal and civil cases varied and included possession of narcotic drugs, robbery with deadly weapon, kidnapping, receiving stolen goods, criminal trespass, murder in the first degree, grand larceny, carrying a concealed deadly weapon, rape, employment of a minor to work where alcoholic beverages were sold, incest, sex perversion, assault with intent to murder, unauthorized use of an automobile, breaking and entering, forgery and bastardy; also appeals from commitments to Patuxent Institution for delinquents, sales and use taxes refunds, admission of conscientious objector to University of Maryland exempt from requirement to take basic military training, testamentary law, appeals from tax assessments, election laws and exemption for taxes on certain real estate.

We represented the State in cases involving petitions for writs of certiorari, mandamus, replevin, attachment, injunction, declaratory judgments and cases involving constitutional law, personal property taxes, real estate taxes, gross receipts taxes, sales and use taxes, inheritance taxes, condemnation of lands, hearings before the Personnel Commissioner of charges preferred against State employees, sanity hearings, elections, hearings of charges before the Police Commissioner of Baltimore City and rights of redemption.

All bonds submitted to the Department by public officials required by law to be bonded, as well as State employees handling State revenues, were approved as to form and

legal sufficiency before acceptance by the State. An estimated number of fifteen hundred were approved during the year.

All leases, contracts and contract bonds submitted to the Department of Public Improvements and the Department of Budget and Procurement for work and materials were approved by this Department as to form and legal sufficiency, as well as all deeds submitted by the Board of Public Works and all similar documents in which the State had an interest, before being accepted by the State. All rules and regulations proposed by the Departments and Officials authorized by law to promulgate such rules and regulations were examined by us as to legality before being filed with the State Departments designated by statute.

Legal matters pertaining to continuing as well as new projects of the State, such as Patapsco State Park, received our attention.

The General Assembly convened on February 5, 1958 and adjourned on March 5, 1958. After the closing of the thirty-day session, a Special Session of the General Assembly was called by the Governor to remove any doubt as to the constitutionality of certain bills passed at the regular thirty-day session.

The Annapolis office, during the two sessions, was in charge of Robert S. Bourbon of Montgomery County; however, I was in daily attendance at the session, together with one or more of my regular staff, to advise and consult with members of the General Assembly relative to legislation, and departments and officials of the State government having an interest in proposed legislation.

In the thirty-day session there were three hundred and twenty-three (323) bills introduced. 100 became law and 6 were vetoed. At your request, we examined all bills passed as to legality before they were signed by you.

The Convention of the National Association of Attorneys General was held in Chicago on June 8th to 11th, 1958. At this meeting, as Chairman of the Committee on Juvenile Delinquency, I was required to present a very extensive report of this Committee. Mr. Stedman Prescott, Jr., Deputy

Attorney General, and Mr. E. Clinton Bamberger, Jr., Assistant Attorney General, accompanied me to this Convention.

It was necessary for me to decline the invitation of Honorable John J. Parker to attend the Judicial Conference of the Fourth Circuit held at Hot Springs, Virginia, from June 30th to July 2nd, because of previous official commitments.

The following changes in the personnel of the Department occurred during the year: On January 23, 1958, I appointed Mr. Eli Baer as Special Assistant Attorney General for the Department of Motor Vehicles; on December 9, 1958, Mr. E. Clinton Bamberger, Jr., resigned as an Assistant Attorney General to resume the private practice of law and in his place on December 10th I appointed Mrs. Shirley B. Jones. On December 23, 1958, Mr. Theodore C. Waters, Jr., resigned as Special Assistant Attorney General for the Comptroller of the Treasury to resume the private practice of law, and on December 24th I appointed Mr. John Martin Jones, Jr., in his place.

The enforcement of the Blue Sky Law continues to consume a great deal of time. The law is in need of complete revision and it is our intention to submit our recommendations to the Legislative Council for its consideration with the hope that a really effective law will be submitted and passed at the 1959 Session of the General Assembly.

We have continued the policy of conferring and meeting with the members of the State agencies. The legal business of the State has increased to such an extent that each year greater demands are being made upon my staff, and we are devoting our fullest energies to insuring that the interests of the State and justice will prevail.

With kindest regards, I am

Very truly yours,

C. FERDINAND SYBERT,
Attorney General.

Summary of Litigation for 1958
Cases Disposed of in the Supreme Court of the United States

Tyrone Topp vs. Ferling, Superintendent of Maryland Reformatory for Males. No. 449, Misc. 1957. This was a petition for a writ of habeas corpus. The Supreme Court of the United States requested that the State of Maryland respond to the petition and a brief in opposition was filed. The Court denied said petition on May 19, 1958, without requiring argument. Mr. Norris represented the Superintendent of the Maryland Reformatory for Males.

C. Boyd Corsa, et al., Plaintiffs-Appellants vs. John P. Tawes, et al., Defendants-Appellees, and Edwin Allison, et al., Intervening Plaintiffs-Appellants. No. 416, October Term, 1957. This case involved the constitutionality of State laws prohibiting the use of purse nets by anyone for catching any type of fish in Maryland waters. The plaintiffs, commercial fishermen for menhaden, asked for an injunction against enforcement of the law against them. A three-judge United States District Court denied the relief prayed. The court found it unnecessary to consider another State law prohibiting the use of nets of any description for the catching of fish in Maryland waters by other than residents of Maryland. Plaintiffs appealed to the Supreme Court. The Supreme Court affirmed the judgment of the District Court on the State's Motion to Affirm. Messrs. Harvey, Digges and Reeves represented the State.

William Cheeks vs. State of Maryland. No. 230 Misc., October Term, 1957. This was a petition for writ of habeas corpus which was filed in the Supreme Court of the United States. That Court requested the State of Maryland to respond to the petition for writ of habeas corpus, and also to cover any certiorari grounds which Cheeks may have raised in his petition. A brief in opposition was filed with the Supreme Court and the Court denied the motion for leave to file a petition for writ of habeas corpus and, treat-

ing the papers submitted as a petition for certiorari, denied certiorari. Mr. Norris represented the State of Maryland.

Comptroller of the Treasury of the State of Maryland vs. the Glenn L. Martin Company. No. 129. The Martin Company (formerly The Glenn L. Martin Co.) paid certain sales and use taxes under protest to the Comptroller of the Treasury. Martin duly filed claims for refund. Hearings on these claims were held by the Comptroller on December 9, 1954, and January 13, 1955. The Comptroller denied the refunds and Martin duly appealed to the Circuit Court for Baltimore County. Martin and the Comptroller stipulated that the amount of any refund due Martin would be $311,539.28. Martin's appeal was heard by the Circuit Court for Baltimore County on March 22, 1957. That court reversed the decision of the Comptroller and ordered refund of the taxes paid.

The Comptroller appealed to the Court of Appeals of Maryland. That Court on March 31, 1958, affirmed the decision of the lower court and held (1) that under its decision in *Aerial Products v. Comptroller,* 210 Md. 627, decided subsequently to the decision of the Comptroller but before the hearing in the lower court, Martin would not be taxable under the sales and use tax acts as in force prior to January, 1957, and (2) that the retroactive application of Chapter 3 of the Acts of 1957 violated Article 23 of the Maryland Declaration of Rights and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

From the judgment of the Court of Appeals, the Comptroller filed his petition for writ of certiorari to the Supreme Court of the United States to review the decision of the Court of Appeals of Maryland. The Supreme Court of the United States denied certiorari without opinion.

Mr. Dietrich represented the Comptroller in the Circuit Court for Baltimore County, and Mr. Reeves represented the Comptroller in the Court of Appeals of Maryland and in the Supreme Court of the United States.

Cases Pending in the Supreme Court of the United States

Commonwealth of Virginia vs. State of Maryland. No. 12 Original, October Term, 1957.

Aaron D. Frank vs. State of Maryland. No. 278, October Term, 1958.

Kenneth George Hanauer and Jack A. Crabill vs. Wilson H. Elkins, President of the University of Maryland, et al. No. 580, October Term, 1958.

Robert H. Reddick vs. State of Maryland. No. 924, October Term, 1958.

Loren L. Landman, et al., vs. Robert Miedzinski, Sheriff of St. Mary's County, et al. No. 589, October Term, 1958.

Cases Disposed of in the United States Court of Appeals for the Fourth Circuit

John Wilber Davis vs. Vernon L. Pepersack, Warden, Maryland Penitentiary. This was an appeal from the orders of the U. S. District Court for the District of Maryland, dated October 4, 1957, and November 18, 1957, the first order dismissing the writ of habeas corpus after a hearing, and the second, denying a writ of habeas corpus. *Davis v. Pepersack,* 155 F. Supp. 550. Judge Roszel C. Thomsen of the District Court certified that there was probable cause for the Appellant's appeal from the order of November 18, 1957, but only insofar as it relates to the question whether he was sentenced under the wrong statute and whether he was accorded procedural due process by the Maryland courts in connection with the consideration of that question. However, no certification for probable cause has been filed as to any of the other points which he raised in either petition. The orders of the U. S. District Court for the District of Maryland were affirmed in part and dismissed in part. Mr. Norris represented the Warden of the Maryland Penitentiary.

Benjamin F. Plater, Jr. vs. Warden, Maryland House of Correction. No. 7679, November Term, 1958. This was an

appeal allowed *in forma pauperis* from an Order of the United States District Court for the District of Maryland, denying the Appellant's petition for a writ of habeas corpus. On December 5, 1958, the appeal was dismissed. Mr. Norris represented the Warden of the Maryland House of Correction.

John E. Kirby vs. Warden, Maryland Penitentiary. No. 7737. This was an appeal which was allowed *in forma pauperis* from an Order of the United States District Court for the District of Maryland (Roszel C. Thomsen, Chief Judge) denying the Appellant's petition for a writ of habeas corpus. The order of the District Court was affirmed November 13, 1958.

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

In the matter of Harry H. Meisel. In the United States District Court for the District of Maryland, in Bankruptcy, No. 10594. This was an appeal on behalf of the Comptroller from the decision of the referee in bankruptcy according priority to the claim of the Federal Government for unpaid income taxes over the Comptroller's claim for unpaid sales and use taxes. It was conceded that under applicable lien law the Government would prevail; but it was urged that the provisions of Section 67(c) of the Bankruptcy Act operated to alter priority in view of the fact that the Comptroller had reduced the debtor's assets to possession through execution. The District Court (Thomsen, C.J.) affirmed the referee's decision and no further appeal was taken. Mr. Waters represented the Comptroller.

William Cheeks vs. Warden, Maryland House of Correction. Civil No. 10368. This was a petition for habeas corpus filed in the United States District Court for the District of Maryland. Judge Thomsen denied such petition, stating that the petitioner had failed to exhaust his remedies in the State court. Mr. Norris represented the Warden of the Maryland House of Correction.

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

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

In the matter of American Business Research, Incorporated, Bankrupt.

In the matter of Carl J. Rieman, ind. and t/a the Carl J. Rieman Company, Bankrupt.

United States of America vs. George Briscoe, John P. Mannion, Director of the Employees Retirement System of the State of Maryland, et al. Civil No. 10111.

Criminal Cases Tried in the Court of Appeals

William Edward Beard vs. State of Maryland. No. 5, September Term, 1957. This was an appeal which was granted by Judge Benjamin Michaelson after a hearing pursuant to the opinion of this Court in *Beard v. Warden,* 211 Md. 658. The Appellant appealed from the judgment and sentence of the Criminal Court of Baltimore wherein he was tried and convicted as a third offender under Section 369 of Article 27 of the Annotated Code of Maryland (1951 Ed.). He was sentenced to fifteen years in the Maryland Penitentiary. The Court appointed counsel to represent the Appellant and the State printed the transcript of testimony as an appendix to its brief at the request of the Appellant's court-appointed counsel. The judgment and sentence of the lower court were reversed and the case remanded for the entry of a judgment and sentence in accordance with the opinion. On November 27, 1957, a motion for reargument was filed and the case was heard on January 20, 1958. On April 21, 1957, the judgment and sentence of the lower court were affirmed. Judges Horney and Prescott filed a dissenting opinion. Mr. Norris represented the State.

William Oscar McCoy vs. State of Maryland. No. 80, September Term, 1957. This was an appeal from a judg-

ment entered against the Appellant in the Criminal Court of Baltimore on August 28, 1956, Appellant having been found guilty by the trial judge sitting as a jury as a second offender of having narcotic drugs in his possession and control on the date of July 19, 1956. Appellant was sentenced to ten years in the Maryland Penitentiary. The case was heard on November 14, 1957. On December 18, 1957, an order of Court was filed setting re-argument of the case for January 20, 1958. On April 21, 1958, the judgment and sentence of the lower court were affirmed with costs. Mr. Prescott represented the State.

Morris Ruckle and Curtis Edward Midgett, alias Thomas Olin Ballance vs. State of Maryland. No. 81, September Term, 1957. The Appellants together with John R. Davis were tried before a jury in the Criminal Court of Baltimore under separate indictments for robbery with a deadly weapon and a joint indictment for kidnapping. The jury returned a verdict of guilty on the first count of the robbery indictment and guilty on the kidnapping indictment, whereupon the Appellants, Ruckle and Midgett, were sentenced to twenty years for robbery and fifteen years for kidnapping, to be served consecutively, or a total of thirty-five years as to each. From this verdict and judgment this appeal was taken to the Court of Appeals. The Court appointed counsel to represent them; however, it was understood that Ruckle did not wish counsel. After the record was printed, Ruckle dismissed his appeal. The judgments and sentences of the lower court were reversed and a new trial awarded. Mr. Norris represented the State.

Enoch Thomas vs. State of Maryland. No. 141, September Term, 1957. This was an appeal from a conviction of receiving stolen goods by a jury in the Circuit Court for Dorchester County. Prior to sentencing, the Court overruled a motion for a new trial and a motion to arrest judgment. The Court entered judgment and sentenced the Appellant to be confined in the House of Correction for a term of two years. The judgment of the lower court was affirmed with costs. Mr. Kaufman represented the State.

William Krauss and Edward Schmidt vs. State of Maryland. No. 192, September Term, 1957. This Court issued a writ of certiorari to review a judgment of the Circuit Court for Anne Arundel County finding the Appellants guilty of criminal trespass upon appeal from a conviction of the same crime before a magistrate of Anne Arundel County. Another individual who participated in the commission of the acts for which the Appellants were convicted was acquitted in a trial before another magistrate of the same county. The judgment and sentence of the lower court were reversed, with costs to be paid by the County Commissioners of Anne Arundel County. Mr. Bamberger represented the State.

Albert C. Johns vs. State of Maryland. No. 194, September Term, 1957. This was an appeal from an order of the Criminal Court of Baltimore, dated September 13, 1957, denying the issuance of a writ of error *coram nobis* and denying the motion to strike out the judgment and sentence. The appellant was found guilty by a three-judge court (Ulman, Leser and Sayler, J.J.) of murder in the first degree without capital punishment on December 15, 1937, and was sentenced on February 9, 1938, to confinement in the Maryland Penitentiary for the term of his natural life after a motion for a new trial had been denied. The order of the lower court was affirmed with costs. Mr. Norris represented the State.

John Lee Jewell and William J. Rawlings vs. State of Maryland. No. 203, September Term, 1957. This appeal involved a violation of Article 27, Section 405, of the Annotated Code of Maryland (1957 Supp.) which establishes as a felony larceny of goods of the value in excess of $100.00. The appellants were tried under a criminal information charging larceny and receiving stolen goods, and the appellant William J. Rawlings was tried under a criminal information charging grand larceny. They elected trial without a jury and Judge Charles C. Marbury, after hearing the evidence, found the appellants guilty of larceny. The appellants John Lee Jewell and Frank Lee Jewell were given

suspended sentences, and the appellant Rawlings was sentenced to twelve months in the Maryland House of Correction. In a per curiam opinion rendered March 24, 1958, the Court affirmed with costs the judgment and sentences as to each. Mr. Kaufman represented the State.

David Neal Moquin vs. State of Maryland. No. 210, September Term, 1957. A petition addressed to the People's Court Judge for Juvenile Causes of Montgomery County alleged that the appellant, who was then sixteen years of age, was a delinquent child because he had set homes afire, had burgled a home and had assaulted a young man. After a psychiatric examination and evaluation of the appellant and the reception of testimony substantiating the facts alleged in the petition, the Judge for Juvenile Causes found that the appellant was a delinquent child, retained jurisdiction over him and committed him to the Psychiatric Institute of the University of Maryland for diagnosis and treatment, from which the appellant eloped. The Judge for Juvenile Causes rescinded his previous order of commitment to the Institute, waived jurisdiction of the appellant and ordered that he be held for trial in the Circuit Court for Montgomery County. The appellant was tried by the Circuit Court, without a jury, and convicted of arson and attempted arson of a dwelling house, burglary and assault with intent to murder. There were three appeals in one record from those convictions. The appellant contended that he was placed twice in jeopardy for the same acts and that the Circuit Court did not have jurisdiction to try him because the Judge for Juvenile Causes could not waive exclusive jurisdiction after a hearing and a finding that the appellant was a delinquent child. The judgment of the lower court was affirmed with costs. Mr. Bamberger represented the State.

Carl Daniel Kier vs. State of Maryland. No. 218, September Term, 1957. The appellant was found guilty of murder in the first degree of Mrs. Myrtle Agnes Bopst by the Circuit Court for Baltimore County before Judges Michael Paul Smith and Lester L. Barrett, sitting without

a jury. Appellant was sentenced to death by administration of lethal gas. From that judgment he appealed. This Court, in an opinion written by Judge Henderson, reversed the judgment and remanded the case for a new trial. *Kier v. State,* 213 Md. 556. The case was removed to the Circuit Court for Frederick County. At the conclusion of the second trial before Chief Judge Patrick M. Schnauffer and Associate Judge Thomas M. Anderson, sitting without a jury, appellant was again found guilty of murder in the first degree. He was sentenced to death by administration of lethal gas. From that judgment he appealed. The judgment of the lower court was affirmed with costs. Mr. Reeves represented the State.

Theodore Mitchell Gray vs. State of Maryland. No. 222, September Term, 1957. This was an appeal from a conviction in the Circuit Court for Prince George's County for carrying a deadly weapon concealed upon the person. The appellant's contention in this court was that the Circuit Court erred when it allowed the State to amend the warrant just prior to the commencement of the trial. That was the only error which appellant charged to the trial judge. The judgment and sentence of the lower court were affirmed, with costs to be paid by appellant. Mr. Bamberger represented the State.

Gus Merchant vs. State of Maryland. No. 225, September Term, 1957. The appellant was tried in the Circuit Court for Anne Arundel County by Judges Benjamin Michaelson and Matthew S. Evans, sitting without a jury. He was charged with the rape of Mrs. Margaret Bruce. He was convicted and sentenced to death by the administration of a lethal gas. From that judgment, he appealed. The judgment of the lower court was affirmed. Mr. Reeves represented the State.

Jane R. Molinari, et al. for and on behalf of Cadillac Liquor Stores, Inc. vs. State of Maryland. No. 228, September Term, 1957. Appellants were indicted by the Grand Jury of Allegany County, charging them with employing a

minor to do work about their place of business where alcoholic beverages were sold. A motion to dismiss was overruled by the court and appellants were found guilty on both counts of the indictment. Thereupon, the sentence of the court was that appellants be fined the sum of $500.00 and costs. This appeal was from that judgment and sentence. The judgment and sentence of the lower court were affirmed as to the first count and reversed as to the second count, with the costs to be paid one-half by appellants and one-half by the County Commissioners. Mr. Prescott and Mr. Norris represented the State.

Elmer J. Carder vs. State of Maryland. No. 264, September Term, 1957. This was an appeal from the denial of a writ of *coram nobis* by the Honorable Morgan C. Harris, Judge of the Circuit Court for Allegany County, on October 26, 1957. Appellant pleaded guilty to the first count of an indictment charging larceny and receiving stolen goods on April 16, 1953. He was sentenced by Judge George Henderson, Circuit Court for Allegany County, to eighteen months in the Maryland House of Correction. On May 14, 1953, he pleaded guilty to a charge of jail-breaking and was sentenced by Judge Henderson to four years in the Maryland Penitentiary. Sentence was suspended and appellant was paroled for ten years. On June 13, 1956, a petition was filed alleging that appellant had violated his parole, and a hearing for this violation was held on February 5, 1957. Appellant pleaded not guilty but was found guilty by the trial judge. Parole was stricken out and appellant was to serve the four year sentence in the Maryland Penitentiary from December 28, 1956, from which sentence this appeal was taken. In a per curiam opinion filed June 13, 1958, the order of the lower court was affirmed with costs. Mr. Norris represented the State.

Oden C. Lusby vs. State of Maryland. No. 265, September Term, 1957. Appellant was indicted, tried and convicted by a jury under Chief Judge John B. Gray, Jr., in the Circuit Court for Prince George's County, of incest with his minor daughter. Appellant moved for a directed verdict

at the close of the State's case, which motion was overruled. Appellant offered no testimony on his own behalf, and the case was submitted to the jury. After the verdict, motions for new trial and judgment N.O.V. were overruled. The judgment and sentence of the lower court were affirmed. Mr. Kaufman represented the State.

Charles H. Moulden vs. State of Maryland. No. 269, September Term, 1957. This was an appeal from an order of the Circuit Court for Montgomery County overruling a motion to correct sentence. The motion prayed the Circuit Court to correct sentences imposed by that court on January 30, 1956. The sentences were imposed after an appeal from the People's Court for Montgomery County by the appellant. The execution of said sentences was suspended on certain conditions, but said suspension was stricken out on May 2, 1957, and appellant was committed to the Sheriff. The order of the lower court was affirmed with costs. Mr. Norris represented the State.

Joseph Saldiveri vs. State of Maryland. No. 287, September Term, 1957. This case involved an appeal from the judgment and sentence by the Circuit Court for Charles County, sitting as a two-judge Criminal Court without a jury under the first count of an indictment charging the appellant with having violated Section 627 of Article 27 of the Annotated Code of Maryland (1951 Ed.) by having unlawfully committed a certain unnatural and perverted sexual practice upon the prosecuting witness, Sherrill Russell. The judgment and sentence of the lower court were affirmed with costs. Mr. Prescott represented the State.

Robert Douglas Bruce vs. State of Maryland. No. 11, September Term, 1958. The appellant was found guilty of manslaughter by a jury upon an indictment charging him with the murder of Noland Willey in Wicomico County, Maryland, Judge Rex A. Taylor sitting. He was sentenced to be confined in the Maryland State Reformatory for Males for an indeterminate period of time, not to exceed six years. From the judgment of the trial court, he entered

an appeal to this Court. The judgment and sentence of the lower court were reversed and a new trial awarded. Mr. Prescott represented the State.

Richard Floyd Myers vs. State of Maryland. No. 12, September Term, 1958. This was an appeal from the denial of a writ of error *coram nobis* by the Honorable Emory H. Niles, Chief Judge of the Supreme Bench of Baltimore City, on October 3, 1957. Appellant was indicted on a charge of burglary in 1956. He pleaded not guilty before the late Judge Deeley K. Nice and was found guilty on August 13, 1956, and sentenced to the Maryland Penitentiary for a term of five years from July 17, 1956. From that sentence this appeal was taken. A per curiam opinion was filed October 24, 1958, affirming order of the lower court. Mr. Norris represented the State.

Nathaniel Shields vs. State of Maryland. No. 13, September Term, 1958. This was an appeal from a denial of the writ of error *coram nobis* by the Honorable Joseph L. Carter, Judge of the Supreme Bench of Baltimore City, on December 17, 1957. Appellant was tried under an indictment charging him in the first count with assault with intent to murder and in the second count with simple assault. He was found guilty under the second count of the indictment and on February 22, 1956, he was sentenced to a term of five years in the Maryland House of Correction, from which sentence this appeal was taken. A per curiam opinion was filed October 24, 1958, affirming the decision of the lower court. Mr. Norris represented the State.

Augustine Marshall Hill vs. State of Maryland. No. 19, September Term, 1958. Appellant pleaded guilty in the Criminal Court of Baltimore and was sentenced as a second offender under the narcotics law to ten years in the Maryland Penitentiary. He was not represented by counsel. The appeal was from that judgment and sentence. The judgment and sentence of the lower court were reversed and the case remanded for a new trial. Mr. Prescott represented the State.

Jesse Casper Judy vs. State of Maryland. No. 29, September Term, 1958. This was an appeal from the judgment and sentence of the Criminal Court of Baltimore entered upon a jury verdict of guilty on an indictment charging violation of Section 488 of Article 27 (Annotated Code of Maryland) dealing with robbery with a deadly weapon. The sentence was twenty years in the Maryland State Penitentiary. The judgment of the lower court was affirmed. Mr. Dietrich represented the State.

Henry M. Wolfe vs. State of Maryland. No. 30, September Term, 1958. This was an appeal by Henry M. Wolfe from the judgment of the Criminal Court of Baltimore City (Warnken, J.) entered on October 3, 1957, following a jury's verdict of guilty under an indictment for forgery and attempting to obtain money under false pretenses, sentencing him to a term of two years in the Maryland State Penitentiary. The judgment of the lower court was reversed and the case remanded for a new trial. Mr. Prescott represented the State.

William Bryant vs. State of Maryland. No. 38, September Term, 1958. This was an appeal from a conviction for unauthorized use of an automobile upon indictment in the Criminal Court of Baltimore. Appellant pleaded guilty to the charge of unauthorized use, and was sentenced to four years in the House of Correction. From this judgment, the appeal was taken. Under a per curiam opinion filed November 13, 1958, the judgment and sentence of the lower court were reversed and the case remanded for a new trial. Mr. Waters represented the State.

Charles William Stansbury vs. State of Maryland. No. 43, September Term, 1958. Appellant was indicted along with James Donald Fitzgerald and Marvin Rich for the murder of Ralph Sliger, which occurred on January 16, 1958, in Baltimore City. Appellant pleaded not guilty and his case was tried separately before Judges Michael J. Manley and Joseph L. Carter without a jury. He was found

guilty of murder in the first degree and was sentenced to suffer death by the administration of lethal gas. From this judgment this appeal in forma pauperis was taken. The judgment of the lower court was affirmed. Mr. Kaufman represented the State.

John Felkner and Dewey S. Bafford vs. State of Maryland. No. 52, September Term, 1958. These were two appeals in one record from the Criminal Court of Baltimore. The cases were tried before the judge sitting without a jury. Appellants were convicted for breaking and entering the warehouse of Daily Motor Express, Inc., Baltimore, on November 22, 1957, and of carrying away a typewriter and a book of blank checks of the company. Felkner was also convicted generally of forging and uttering checks and obtaining money under false pretenses. Felkner was sentenced to three years in the House of Correction and two sentences of confinement for six months each, to be served consecutively. Bafford was sentenced to the House of Correction for three years. From these convictions, this appeal was taken. The judgments against Felkner on the forging, uttering and false pretense cases affirmed; judgments against Felkner and Bafford in the burglary cases reversed and cases remanded for new trials. Mr. Bamberger represented the State.

William H. Jackson vs. State of Maryland. No. 53, September Term, 1958. This was an appeal from the denial of the writ of error *coram nobis* by the Honorable Joseph L. Carter, Judge of the Supreme Bench of Baltimore City, on March 14, 1958. Appellant was indicted on a charge of forgery in 1956 and pleaded not guilty. He was found guilty by a jury and sentenced to three years in the House of Correction. He appealed on March 18, 1957, to this Court, where he was furnished with his transcript at State expense. Judgment was affirmed on October 28, 1957. (*Jackson v. State,* 214 Md. 454, 135 A. 2d 638). The order of Judge Carter denying the petition for writ of error *coram nobis* was affirmed. Mr. Norris represented the State.

Calvin C. Carr vs. State of Maryland. No. 55, September Term, 1958. This was an appeal from the sustention of Appellee's exceptions and a denial of Appellant's motion to strike out the verdict, judgment and sentence of the Criminal Court of Baltimore. Appellant was tried in 1955 and convicted by the Criminal Court of Baltimore under an information charging bastardy. The Defendant's motion for new trial was denied, and he failed to perfect an appeal to this Court. As the result of the Appellant producing an affidavit dated March 22, 1956, which was purportedly made by the prosecuting witness at the 1955 trial, the Appellant was tried under an indictment for obstructing justice and acquitted by a jury in the Criminal Court of Baltimore on May 8, 1956. The Appellant on January 18, 1958, filed a motion, in the case of the original conviction of bastardy, seeking to strike out the verdict, judgment and sentence. The State excepted to the motion, and Judge James K. Cullen, sitting as the Criminal Court of Baltimore, sustained the State's exceptions and denied the Appellant's motion on April 1, 1958. The transcript of testimony in the original trial before Judge Moser in 1955 was contained in the record at the time in 1958 when Judge Cullen acted upon the exceptions and the motion. The 1955 testimony is presently contained in the record in this Court. Judge Moser's opinion and verdict is included in the Appellee's Appendix. After Judge Cullen's ruling, a stipulation as to the respective arguments of the parties was filed in the case. The order of the lower court was affirmed with costs. Mr. Dietrich represented the State.

Leonard Melvin Shockley and Harold Edward Shockley vs. State of Maryland. No. 56, September Term, 1958. On January 15, 1958, the Appellants, Harold Edward Shockley, age 23, and Leonard Melvin Shockley, age 17, were living with their parents over a chicken feeding house on the McCormick farm at Omar near Frankford, Delaware. That night, Harold Shockley told his sister, Addie Virginia Ayres, that he and Leonard were going down to Snow Hill the following morning and asked if she would like to go along. On the morning of the 16th, they left Omar at 8

o'clock A.M. in a 1951 blue Chevrolet, which had been loaned to Harold Shockley by a dealer to whom he had returned another car which his mother had bought because that other car had developed engine trouble. Leonard was driving the car and they first proceeded to the home of Annie Martin in Snow Hill where the sister, Addie Virginia Ayres, and her baby were let out to make a visit. Leonard was armed with a knife or dagger which he always carried strapped to his belt. After letting the sister out, the two men spent the morning visiting some of the stores and some of the people they knew in Snow Hill.

At approximately 1 P.M., they decided to go to Box Iron in Worcester County, Maryland. When they arrived at Box Iron, they passed a store operated by Mrs. Sarah Hearne, which was located on the front of the Hearne's home premises. The store occupied a building which was approximately 25 x 14 feet in size. They stopped and backed up to the store and Mrs. Hearne came from her home to wait upon them at approximately 1:20 P.M. She returned to the kitchen of the home some twenty minutes later with her throat cut 3 inches across and 2½ inches deep, a 1½ inch stab wound in the left shoulder, and a deep stab wound near her left shoulder blade near the spinal vertebra. She fell dead in the kitchen as a result of the wounds. She was wearing pedal pushers at the time she had gone to the store and when she was found in the kitchen they had been pulled down about 4 inches from her waist, were torn down one side, and the crotch had been entirely torn out of her underpants.

While the two Shockleys were in the store, Clarence W. Bishop, who lived nearby, went to the store. He noticed Harold Shockley's blue Chevrolet automobile in front of the store, which he later identified at the home of the Shockleys in Omar, Delaware, at approximately 11 P.M. that same evening. Bishop opened the door of the store and had just stepped inside when he heard a noise which sounded to him like someone wrestling behind the meat counter. He looked in that direction and saw Harold Shockley standing behind the counter in a space approximately 2 feet wide

between the meat counter and the shelves of the store. Bishop did not remain in the store but ran to seek aid from one of the neighbors in order to help Mrs. Hearne. When he and the neighbor returned, the Shockleys had fled the scene in their car. That night in Omar, Bishop also identified Harold Shockley as the person he had seen behind the counter in the store at the time the crime was committed and also identified him at the trial of the case. Bishop had known the Shockleys for some years.

The Shockleys, when they left the store, did not go back to the Martin home to pick up their sister and her child, but took a circuitous route described at the trial as a back route to their home in Omar. On the way, each of the Appellants discarded the outer pair of pants which he was wearing, each having worn two pairs on that date. Harold's gray colored outer pants, which the evidence showed he was wearing at the time he left his sister, were found by Gilbert Hess about two miles from the scene of the crime covered with human blood of the same type as that of Mrs. Hearne, and they were introduced into evidence as State's Exhibit No. 30. The shirt Harold was wearing that day was found 1½ miles from the scene and was found to contain human blood and was introduced into evidence as State's Exhibit No. 27. Also, the jacket and the right boot that Harold was wearing that day were examined and found to contain human blood stains and were introduced into evidence as State's Exhibits Nos. 23 and 34, respectively. The police officers also found a handkerchief on the side of the road along the escape route, the same being found to contain blood. The police, when they arrived on the scene, inspected the store. They found blood all over the entire store. They inspected the cash register and found a 50 cent flag was showing on the register at the time when the 90 cent key on the same was jammed as though someone who did not know what they were doing had attempted to open it. The register was of the type which opened upon mechanically turning a hand crank.

The police located the Shockleys at their parents' home in Delaware through descriptions of them and their car

received from witnesses, and both upon being taken to police headquarters in Georgetown, Delaware, gave statements to the police. Harold, in his statement, claimed that Leonard had entered the store and gotten into a fight with Mrs. Hearne, and that only upon hearing Leonard scrambling around in the store did he enter. He claims he saw Leonard holding Mrs. Hearne down, with her pedal pushers down around the lower part of her legs, and attempted to pull him off her, and that it was at that time that Leonard cut her throat with a dagger or knife, and that they both immediately left the store, returning to their home by a circuitous back route well off the main highways. Just before leaving the scene, he had seen the victim walk out on the porch with the blood running down from her throat.

Leonard's confession was to the effect that he and his brother went to the store, planning to rob it, and that he had grabbed the woman at the urging of Harold and that they had both attacked her in attempting the robbery, admitting, however, that he was the one who had stabbed her and actually cut her throat. In a statement to the psychiatrist he said that he had attempted to rob the cash register, but could not open it.

The Appellants were indicted jointly on a charge of murder in the first degree, and after trial by a three-judge court, they were found guilty. Leonard was sentenced to death and Harold was sentenced to life imprisonment. From that judgment, the Appellants appealed to this Court. The judgment of the lower court was affirmed. Mr. Prescott represented the State.

Louis A. Jefferson vs. State of Maryland. No. 64, September Term, 1958. The appellee moved to dismiss this appeal and as grounds therefore respectfully represented that: (1) This was an appeal from a verdict of the Circuit Court for Anne Arundel County, sitting as a Juvenile Court, finding the appellant guilty of a wilful act contributing to, encouraging or tending to cause a condition bringing a child within the jurisdiction of the Juvenile Court. The jurisdiction of the Circuit Court is conferred by Sec-

tion 53 of Article 26 of the Annotated Code of Maryland (1957 Edition) and by the appellant's waiver of a trial by a jury. (2) The Circuit Court found from the evidence that the appellant, an adult male, had contributed to the delinquency of a minor by committing acts of sexual perversion with a fourteen year old boy. (3) Stenographic notes or other transcript of hearings before the Circuit Court for Anne Arundel County, sitting as a Juvenile Court, are not required unless ordered by the judge. Article 26, Section 60, Code. Neither the judge, nor the State, nor the appellant ordered a transcript of the hearing of this case. No transcript of the hearing was available for consideration by this Court. (4) An "Agreed Statement of Facts" was printed at pages 3 to 13 of appellant's brief. This was presented as a recapitulation or narrative summary of the testimony of the hearing before the Circuit Court. It was subscribed and "agreed to and certified" by the Judge of the Circuit Court, the State's Attorney, the appellant and the attorney for the appellant before this Court who did not represent the appellant before the Circuit Court and presumably was not present at the hearing. It was not signed by the attorney who represented the appellant before the Circuit Court. (5) If the appellant had elected a trial before a jury and demanded a trial according to the usual criminal procedure, the judge of the Circuit Court, sitting as a Juvenile Court would have been required to waive the jurisdiction of the Juvenile Court, the appellant would have been dealt with according to the usual criminal procedure and a transcript of the trial would have been prepared. Article 26, Section 55, Code. (6) The appellant contended that the trial court committed reversible error because he was convicted solely upon the uncorroborated testimony of an accomplice, the boy who was the victim of the perverted act; because the trial court admitted evidence of another act of oral perversion by the appellant with another boy; and because after the trial court sentenced the appellant to be confined at the Maryland House of Correction for two years, the court further ordered that the appellant be transferred to Patuxent Institution for examination, treatment and a report, "subject to the further

Order of (the Circuit) Court in the premises" (E. 2). (7) The "Agreed Statement of Facts" did not contain any notation that the appellant raised in the trial court by motion or objection any of the alleged errors upon which he relied in this Court, or that the trial court considered or ruled upon such alleged errors. (8) Statements by the State's Attorney and the judge of the Circuit Court who prosecuted and heard, respectively, this case which affirmed that no such objections or motions were made by the appellant were appended to the appellee's brief. (9) No transcript of the testimony was filed with the clerk of the lower court or with this Court as required by Maryland Rule 826. The judgment of the lower court was reversed and the case remanded for a new trial. Mr. Bamberger represented the State.

George Thomas Jordan vs. State of Maryland. No. 65, September Term, 1958. The appellant in this case signed a form entitled "Petition and Suggestion and Waiver of Right to Indictment". This form stated that there was a criminal charge of motor vehicle larceny, a felony, pending against him. A criminal information, containing three counts, respectively for motor vehicle larceny, receiving stolen goods, an automobile of a value in excess of $100.00, and unauthorized use of a motor vehicle, was filed against him. Appellant acknowledged receipt of a copy of this criminal information, was arraigned and pleaded not guilty, all on April 2, 1958. Appellant neither before nor at any time during the trial raised any objection to the institution of the prosecution or to the criminal information; also, he waived his right to a jury trial and elected to be tried by the court. He was tried by Hon. Charles C. Marbury, Associate Judge. Both at the close of appellant's case and of the State's case, defense counsel moved for a directed verdict of not guilty on all three counts. Both motions were denied. Appellant was found guilty on the second count of receiving stolen goods, an automobile of a value in excess of $100.00. Appellant was sentenced to five years in the Maryland Penitentiary and was ordered transferred to Patuxent Institution for examination.

Rodney Blizzard vs. State of Maryland. No. 66, September Term, 1958. This was an appeal from a verdict and judgment of the Circuit Court for Baltimore County dated February 21, 1958, finding the appellant to be a defective delinquent as defined in Section 5 of Article 31B of the Annotated Code of Maryland (1957 Ed.), and directing that he be committed to the Patuxent Institution for an indeterminate period of time subject to the further Order of the Court. The judgment of the lower court was affirmed with costs. Mr. Kaufman represented the State.

Henry McGee vs. State of Maryland. No. 74, September Term, 1958. Henry McGee, the appellant, and his brother James McGee, were tried together in the Criminal Court of Baltimore before Judge Anselm Sodaro and a jury. Both James McGee and Henry McGee, the appellant, were represented by the same counsel. At the conclusion of the trial, the jury found James McGee guilty of assault with intent to murder, and Henry McGee guilty of murder in the second degree. James McGee was sentenced to eight years in the Maryland Penitentiary, and the appellant, Henry McGee, was sentenced to ten years in the Maryland Penitentiary. From the judgment against him, Henry McGee appealed.

James Curtis vs. State of Maryland. No. 75, September Term, 1958. This was an appeal from a judgment and sentence of the Criminal Court of Baltimore (Oppenheimer, Judge) entered upon a verdict of guilty on Counts One and Two of a two-count indictment, charging assault with intent to kill and murder in the first count and common law assault in the second count. The sentence was one year in the Maryland House of Correction. Verdicts of "not guilty" were rendered in Indictment No. 78, Assault upon Vera Peggy Smith and No. 79, Deadly Weapon Possession. After the Appellee's brief was printed, appellant filed a Motion to Dismiss and on October 27, 1958, the appeal was dismissed. On October 31st, this office filed a motion for the award of costs against the appellant, which motion was granted on November 20, 1958. Mr. Bamberger represented the State.

Civil Cases Tried in the Court of Appeals

Jacobs Instrument Company vs. Comptroller of the Treasury of the State of Maryland. No. 91, September Term, 1957. This was an appeal from the action of the Circuit Court for Montgomery County (Reeves, J.) in affirming a sales and use tax assessment on certain material and equipment purchased by appellant. The assessment in dispute amounted $1,904.62, including penalties and interest. Appellee moved the Court to dismiss the appeal for the reason that the extracts from the record which appellant included in the appendix were entirely insufficient for a proper determination of the manifold questions raised by the appeal. On March 31, 1958, a motion to dismiss the appeal was filed, and on April 17, 1958, a per curiam opinion was filed dismissing the appeal. Mr. Waters represented the Comptroller.

Comptroller of the Treasury of the State of Maryland vs. Rheem Manufacturing Company. No. 127, September Term, 1957. This case involved an application by Rheem Manufacturing Company for refund of Maryland sales and use taxes in the amount of $4,306.60. The taxes were paid to the Comptroller by Rheem on purchases made by Rheem during the period November 1952 through April 1955. The purchases were made by Rheem pursuant to the provisions of a facilities contract which Rheem had negotiated with the Ordnance Corps of the Department of the Army. After a hearing, the Comptroller ruled against Rheem and denied the refund. Rheem appealed to the Circuit Court for Baltimore County. At the hearing on the appeal, counsel for Rheem, who also represented the Martin Company in the companion case No. 128, and counsel for Comptroller agreed that the decision in the Martin appeal would be binding in the Rheem appeal. The lower court issued no separate opinion dealing with Rheem, but, on the basis of its holding in the Martin appeal, reversed the ruling of the Comptroller and entered judgment for Rheem in the amount of $4,306.60. From that judgment this appeal was taken by the Comptroller. The order of the lower court was

affirmed with costs. Mr. Reeves represented the Comptroller.

Comptroller of the Treasury of the State of Maryland vs. Glenn L. Martin Company. No. 128, September Term, 1957. This case involved an application by The Glenn L. Martin Company (now known as The Martin Company) for refund of Maryland sales and use taxes in the amount of $311,539.28. The taxes were paid to the Comptroller by Martin on purchases made by Martin during the period March 1, 1951 through April 30, 1954. The purchases were made by Martin pursuant to the provisions of three facilities contracts which Martin negotiated with agencies of the United States Government. After a hearing, the Comptroller ruled against Martin and denied the refund. That court reversed the ruling of the Comptroller and entered judgment for Martin in the amount of $311,539.28. From that judgment the Comptroller filed this appeal. The order of the lower court was affirmed with costs. Mr. Reeves represented the Comptroller.

Joseph H. Whitley vs. Director of Patuxent Institution. No. 140, September Term, 1957. This was an appeal from a verdict and judgment on a petition for review by the Circuit Court for Anne Arundel County sitting with a jury, dated June 28, 1957, finding the appellant to be a defective delinquent, and directing that he be recommitted to Patuxent Institution for an indefinite period, subject to the further order of the court. A petition to dismiss the appeal was filed on February 19, 1958, after the case had been heard. The case was dismissed on February 19, 1958. Mr. Norris represented the Director of Patuxent Institution.

Kenneth George Henauer vs. University of Maryland. No. 173, September Term, 1957. This was an appeal from the denial by the Circuit Court for Prince George's County of a Writ of Mandamus to the President and the Board of Regents of the University of Maryland to admit the appellant to the University without conforming to the general requirement that all able-bodied male undergraduates take basic military training on the basis that appellant was a

conscientious objector. The judgment of the lower court was affirmed with costs. Mr. Dietrich represented the University of Maryland.

Register of Wills for Kent County vs. Herman Blackway. No. 193, September Term, 1957. This case involved the exemption from inheritance taxes which may be implied when a transferee of property can show that he has paid full and adequate consideration for his interest so as to make the transaction a true sale or exchange, even though the transferor retained a beneficial interest during his lifetime. In this case, the owner of real property, reserving a life interest, conveyed four parcels of real property, located in Chestertown, Maryland, to his stepson, the appellee. The conveyance was allegedly made pursuant to an oral agreement of support. After the death of the life tenant, the Register of Wills for Kent County assessed inheritance tax plus penalty and costs against the appellee in the total amount of $1,384.75. The appellee filed a bill of complaint for declaratory judgment in the Circuit Court for Kent County. The case was transferred from the equity docket, where it had been originally filed, to the law docket, and was tried before Chief Judge William R. Horney, April 2, 1957. When appellee attempted to testify about his alleged oral agreement with the decedent, appellant filed his objection on the basis of the "dead man's statute", Article 35, Section 3, Annotated Code of Maryland (1951 Ed.). The court took this testimony subject to exception and asked for a memorandum of law on the subject. The court stated that the testimony was before the court and "no harm can be done anyway". The same procedure was followed as to appellee's three witnesses on the basis of the hearsay rule. After the trial, the matter was taken sub curia, and counsel for both sides were instructed to file memoranda within thirty days, which was done. Appellant also filed a motion to strike out the testimony of appellee and his witnesses relating to the alleged oral agreement between the decedent and the appellee. The lower court found that no inheritance tax was due. From that declaratory judgment, the Register of Wills filed this appeal. The judgment of the lower court

was affirmed with costs. Mr. Reeves represented the Register of Wills.

Maryland Glass Corporation vs. Comptroller of the Treasury of the State of Maryland. No. 244, September Term, 1957. This was an appeal from a judgment of the Baltimore City Court dated November 15, 1957, affirming the action of the Comptroller of the Treasury of Maryland in denying a claim for a refund of the appellant. The claim for refund arose out of an adjusted deficiency assessment filed by the Comptroller in the amount of $11,743.01, which was paid by the appellant. Appellant disputed only part of this adjusted deficiency assessment, namely, $4,309.38, plus interest of $786.48. The judgment of the lower court was reversed and the case remanded for a new trial. Mr. Kaufman represented the Comptroller.

Good Citizens Community Protective Association, et al. vs. Board of Liquor License Commissioners for Baltimore City and Nathan Polski. No. 247, September Term, 1957. These were two appeals in one record from the action of the Baltimore City Court (Mason, J.) in affirming the decision of the Board of Liquor License Commissioners of Baltimore City. That decision approved the application of Nathan Polski to transfer his liquor license from 900-02 Park Avenue to 1839 Linden Avenue, Baltimore, Maryland. Appellants based their right to appeal upon the purported existence of a variance on a point of law between Judge Mason's decision and the decision of Judge Michael J. Manley in the case of *George William DeAngelis, Trading as "The George Inn" v. Board of Liquor License Commissioners of Baltimore City* (Daily Record, July 26, 1955). The Board took the position: (1) Regardless of whether a variance existed, the procedural requirements for invoking this Court's jurisdiction had not been met, because Judge Manley's decision was not included in the record. (2). No variance on a point of law existed. The appeal was dismissed with costs. Mr. Waters represented the Comptroller.

Catherine LaBelle vs. State Tax Commission of Maryland. No. 252, September Term, 1957. Appellant entered a protest in writing to the Appeal Tax Court of Montgomery County, Maryland, on November 25, 1955, protesting the partial assessment on the dwelling constructed on part of Lot 9, Block 10, in subdivision known as and called "Meadowood" in Montgomery County, Maryland. Her protest was heard by the Appeal Tax Court under the provisions of Section 66, Article 81, Code (1951 Ed.) (Section 67 of the 1957 Code), and the Appeal Tax Court ordered a reduction in assessment. The Appeal Tax Court's finding was certified to the Supervisor of Assessments and the Director of Finance for Montgomery County for their approval, but they refused to accept the Appeal Tax Court's finding. From that decision, the appellant in April, 1956, entered an appeal to the State Tax Commission of the State of Maryland. A hearing was held before the State Tax Commission on May 2, 1956. The State Tax Commission found that it lacked jurisdiction to hear the matter and dismissed the appeal. From the decision of the State Tax Commission the appellant appealed to the Circuit Court for Montgomery County, which Court dismissed her appeal on the grounds that the State Tax Commission lacked jurisdiction to hear the case. From that decision, this appeal was taken. The order of the lower court was affirmed with costs. On June 20, 1958, appellant filed a motion for re-argument and reversal. On July 2nd the motion was denied. Mr. Prescott represented the State Tax Commission.

Richard R. Baker vs. Charles C. Marbury. No. 268, September Term, 1957. Appellant, an inmate of the Lorton (Va.) Reformatory, filed a petition "for writ of mandamus" against "Charles C. Marbury, Associate Judge, Seventh Circuit," addressed to the Chief Judge of the Seventh Judicial Circuit, Prince George's County. The petition requested the Court "to issue an order to remove the warrant that is lodged against your petitioner". Chief Judge John B. Gray, Jr., dismissed the petition on December 27, 1957, and the appellant appealed in proper person. A per curiam opinion

was filed May 16, 1958, affirming the order of the lower court with costs. Mr. Norris represented Judge Marbury.

Household Finance Corporation vs. State Tax Commission. No. 271, September Term, 1957. This appeal from an order of the Circuit Court of Baltimore City, affirming a corrected assessment against Household Finance Corporation, a foreign finance company, for the year 1953, was the second round in a battle between the Appellant and the State Tax Commission. In the assessment originally appealed to this Court, the taxpayer challenged the validity of the assessment on three separate issues, namely: (1) The method of determining the value of the capital stock of Household. (2) The gross receipts fraction used as the formula for apportioning capital stock value within and without Maryland failed to exclude "property and business" of the taxpayer outside of the State in respect to its general administrative operations and business. (3) The gross receipts fraction used as the formula for apportioning capital stock value within and without Maryland failed to exclude "property and business" of the taxpayer outside of the State in respect to the total gross receipts of wholly-owned subsidiaries of the taxpayer. This Court, by its unanimous opinion (212 Md. 80, 128 A. 2d 640), (1) affirmed the determination of value of the capital stock of the taxpayer; (2) affirmed the failure to exclude from taxation within Maryland so-called "headquarters" property and business; and (3) by a majority opinion remanded for re-examination by the State Tax Commission the allocation and apportionment of business done inside and outside of Maryland with regard to the gross receipts of subsidiaries. In accordance with directions contained in the opinion of this Court, the State Tax Commission reassessed the capital stock value in Maryland of the Household Finance Company for 1953. The order of the lower court was affirmed June 17, 1958. On July 5, 1958, a petition for rehearing was filed by the Appellant, which petition was denied on July 17, 1958. Mr. Kaufman represented the State Tax Commission.

Claude B. Hellmann, Secretary of State, vs. Louis W. Collier. No. 36 (Advanced), September Term, 1958. Appellee petitioned the Baltimore City Court on March 28, 1958, for issuance of a writ of mandamus to compel the Secretary of State to certify his candidacy for Republican nomination to the United States House of Representatives from the Fourth Congressional District in the primary election of May 20, 1958. Appellee was admittedly a resident of the Second Congressional District. The 1957 Legislature had added a provision to the election laws requiring a candidate for Congress to reside in the district for which he sought election. The Secretary of State had refused to certify Appellee's candidacy on the advice of the Attorney General, who cited the new provision. The Attorney General had expressed doubt as to the constitutionality of the provision, but declined to take the extraordinary action of declaring it unconstitutional. The issue was whether the new provision (Sec. 158(c) of Article 33 (1957 Code)) imposed an additional qualification on candidates for Congress in violation of Article I, Section 5 of the United States Constitution. The lower court declared Section 158(c) of Article 33 to be unconstitutional and on April 22, 1958, ordered the issuance of the writ. The Secretary of State appealed to the Court of Appeals, which advanced the case and heard argument on April 23, 1958. The Court of Appeals affirmed the judgment of the lower court. Mr. Reeves represented the Secretary of State.

Board of Supervisors of Elections of Baltimore City vs. Harold M. Weiss, et al. No. 46 (Advanced), September Term, 1958. Appellee petitioned the Baltimore City Court on April 29, 1958, for the issuance of a writ of mandamus to compel the Board to hold hearings for correction of registration lists on May 6, 1958, in accordance with Article 33, Section 41(b) (1957 Code). The issue was whether the Legislature in its recodification and revision of the election laws in 1957 had intended such hearings to be held before a primary election. Previously the law had required them only before a general election. The lower court heard the case May 1, 1958, and held that the hearings should be

conducted before the primary election, and ordered the issuance of the writ. The Board appealed. The Court of Appeals advanced the case and heard argument May 5, 1958. It issued a majority per curiam opinion the same day, affirming the lower court. The opinion was filed May 23, 1958. Judges Hammond and Prescott dissented. Mr. Reeves represented the Board.

State Board of Health vs. Mayor and Commissioners of Westernport. No. 49, September Term, 1958. This was an appeal by the Board of Health for the State of Maryland from a decree of the Circuit Court for Allegany County, dismissing a bill of complaint filed against the Mayor and Commissioners of Westernport, a duly incorporated municipal corporation, to enjoin and restrain the Town of Westernport from discontinuing the chlorination of the raw water supply at the Savage River Dam. The order of the lower court was reversed and the case remanded for the entry of an order not inconsistent with the opinion of this Court. Mr. Kaufman represented the State Board of Health.

State Tax Commission of Maryland vs. Bullis School, Inc. No. 103, September Term, 1958. This was an appeal from an order of the Circuit Court for Montgomery County (Judge E. McMaster Duer, especially assigned), reversing the action of the State Tax Commission in denying an application for exemption for certain real estate for the year 1954, under the provisions of Article 81, Section 9(8), Annotated Code of Maryland (1957 Ed.). The order of the lower court was affirmed. Mr. Waters represented the State Tax Commission of Maryland.

During the year 1957, at the request of the Court of Appeals of Maryland, the staff of the Attorney General's Office prepared memoranda for that Court in each case where a petition for leave to file an appeal in a habeas corpus case had been filed with that Court. The name of the staff member who prepared each memorandum is listed in brackets following each case number.

SEPTEMBER TERM, 1957

Roy E. Shockley vs. Warden, Maryland House of Correction. No. 55—(E. Clinton Bamberger, Jr.)

Bernard Clifton Allen vs. Warden, Maryland House of Correction. No. 57—(E. Clinton Bamberger, Jr.)

Allen E. Phillips vs. Warden, Maryland House of Correction. No. 58—(E. Clinton Bamberger, Jr.)

Herbert Gardner Bowers and Robert Allen Amsley vs. Warden, Maryland House of Correction. No. 59—(Theodore C. Waters, Jr.)

James C. Bradford vs. Warden, Maryland Penitentiary. No. 60—(Theodore C. Waters, Jr.)

Cecil Howell vs. Warden, Maryland House of Correction. No. 61—(Theodore C. Waters, Jr.)

Alton R. Woolford vs. Warden, Maryland House of Correction. No. 62—(Charles B. Reeves, Jr.)

Frederick M. Minnick vs. Warden, Maryland House of Correction. No. 63—(Charles B. Reeves, Jr.)

Salvatore L. Buscemi vs. Warden, Maryland House of Correction. No. 64—(Charles B. Reeves, Jr.)

Samuel L. Culley vs. Warden, Maryland House of Correction. No. 66—(Clayton A. Dietrich)

Fred Leslie Wain, Jr. vs. Warden, Maryland House of Correction. No. 67—(Clayton A. Dietrich)

John C. Walker vs. Warden, Maryland House of Correction, Nos. 68 and 69—(Joseph S. Kaufman)

Robert D. Thomas vs. Warden, Maryland House of Correction. No. 69—(Joseph S. Kaufman)

Charles Price, Jr. vs. Warden, Maryland Penitentiary. No. 70—(James H. Norris, Jr.)

Maron M. Cook vs. Warden, Maryland Penitentiary. No. 71—(James H. Norris, Jr.)

Thomas J. McGloin vs. Warden, Maryland House of Correction. No. 72—(James H. Norris, Jr.)

Edward J. Messick vs. Warden, Maryland House of Correction. No. 73—(James H. Norris, Jr.)

James McClain vs. Warden, Maryland Penitentiary. No. 74—(James H. Norris, Jr.)

William H. Peaton vs. Warden, Maryland House of Correction. No. 75—(E. Clinton Bamberger, Jr.)

Boyd Strosnider vs. Warden, Maryland Penitentiary. No. 76—(E. Clinton Bamberger, Jr.)

Russell Savoy vs. Warden, Maryland House of Correction. No. 77—(E. Clinton Bamberger, Jr.)

Beo S. Fritz vs. Warden, Maryland House of Correction. No. 78—(Clayton A. Dietrich)

Louis James Flynn vs. Warden, Maryland House of Correction. No. 79—(Clayton A. Dietrich)

John Elsworth Mooney vs. Warden, Maryland House of Correction. No. 80—(Clayton A. Dietrich)

Wilfred J. Meyers vs. Warden, Maryland House of Correction. No. 81—(Joseph S. Kaufman)

Robert Bruce Dowdy vs. Warden, Maryland House of Correction. No. 82—(James H. Norris, Jr.)

Clarence R. Mitchell vs. Warden, Maryland House of Correction. No. 83—(Joseph S. Kaufman)

John R. Melia vs. Warden, Maryland House of Correction. No. 84—(Charles B. Reeves, Jr.)

Barciel Wilson vs. Warden, Maryland House of Correction. No. 85—(Charles B. Reeves, Jr.)

William E. Smouse vs. Warden, Maryland House of Correction. No. 86—(Charles B. Reeves, Jr.)

Robert Murray vs. Warden, Maryland House of Correction. No. 87—(Theodore C. Waters, Jr.)

James Edward Price vs. Warden, Maryland Penitentiary. No. 88—(Theodore C. Waters, Jr.)

Howard Dowling vs. Warden, Maryland House of Correction. No. 89—(Theodore C. Waters, Jr.)

Frank Savage vs. Warden, Maryland Penitentiary. No. 91—(James H. Norris, Jr.)

James T. Gowdin vs. Warden, Maryland House of Correction. No. 92—(James H. Norris, Jr.)

Hugh Nettles vs. Warden, Maryland House of Correction. No. 93—(James H. Norris, Jr.)

Benjamin Davis vs. Warden, Maryland House of Correction. No. 94—(James H. Norris, Jr.)

Winfield Parker, Jr. vs. Warden, Maryland House of Correction. No. 95—(James H. Norris, Jr.)

Everett E. Parker vs. Warden, Maryland Penitentiary. No. 96—(Theodore C. Waters, Jr.)

Johnnie Smith vs. Warden, Maryland House of Correction. No. 97—(Charles B. Reeves, Jr.)

Edgar A. Chase vs. Warden, Maryland House of Correction. No. 98—(Clayton A. Dietrich)

Harry Parker vs. Warden, Maryland House of Correction. No. 100—(Joseph S. Kaufman)

Robert H. Fincher (James W. Brown) vs. Warden, Maryland House of Correction. No. 101 (E. Clinton Bamberger, Jr.)

Arthur H. Clements vs. Superintendent, Spring Grove State Hospital. No. 102—(James H. Norris, Jr.)

John Charles Boyd vs. Warden, Maryland House of Correction. No. 103—(James H. Norris, Jr.)

Dorsey C. Calp vs. Warden, Maryland House of Correction. Nos. 104 and 118—(James H. Norris, Jr.)

Joseph Jesse Reeder vs. Warden, Maryland House of Correction. No. 105—(E. Clinton Bamberger, Jr.)

William Person vs. Warden, Maryland Penitentiary. No. 106—(E. Clinton Bamberger, Jr.)

Stephen Lewandowski vs. Warden, Maryland Penitentiary. No. 107—(Joseph S. Kaufman)

John Marshall Nelson vs. Warden, Maryland Penitentiary. No. 108—(James H. Norris, Jr.)

Charles Henry Roberts vs. Warden, Maryland House of Correction. No. 109—(Clayton A. Dietrich)

James W. Plump vs. Warden, Maryland Penitentiary. No. 110—(James H. Norris, Jr.)

Wilmer E. Kye vs. Warden, Maryland Penitentiary. No. 111—(James H. Norris, Jr.)

Joseph Pacyna vs. Warden, Maryland House of Correction. No. 112—(James H. Norris, Jr.)

Walter Allen Hamilton vs. Warden, Maryland House of Correction. No. 113—(Charles B. Reeves, Jr.)

Joseph R. Ramberg vs. Superintendent, Spring Grove State Hospital. No. 114—(James H. Norris, Jr.)

Ira Chester Carter vs. Warden, Maryland House of Correction. No. 115—(James H. Norris, Jr.)

Samuel L. Cullen vs. Warden, Maryland House of Correction. No. 116—(Clayton A. Dietrich)

Olen A. Poole vs. Warden, Maryland House of Correction. No. 117—(Theodore C. Waters, Jr.)

Andrew J. Lloyd vs. Warden, Maryland Penitentiary. No. 119—(Joseph S. Kaufman)

Robert Byrd vs. Warden, Maryland Penitentiary. No. 120—(Theodore C. Waters, Jr.)

Walter Gardner vs. Warden, Maryland Penitentiary. No. 121—(E. Clinton Bamberger, Jr.)

Charles H. S. Keene vs. Warden, Maryland House of Correction. No. 123—(James H. Norris, Jr.)

Benjamin Davis vs. Warden, Maryland Penitentiary. No. 125—(Clayton A. Dietrich)

John Williams vs. Warden, Maryland House of Correction. No. 126—(Charles B. Reeves, Jr.)

James Carolina vs. Warden, Maryland Penitentiary. No. 127—(James H. Norris, Jr.)—(Transferred to Appeal Docket, September Term, 1958. See No. 82 Advanced)

Wilmer Lee Souers vs. Warden, Maryland House of Correction. No. 128—(Theodore C. Waters, Jr.)

SEPTEMBER TERM, 1958

James O. Ellis vs. Warden, Maryland Penitentiary. No. 1—(Theodore C. Waters, Jr.)

Richard Myers vs. Warden, Maryland Penitentiary. No. 2—(James H. Norris, Jr.)

William R. Bell vs. Warden, Maryland House of Correction. No. 3—(Application Withdrawn)

John Ellis Bell vs. Warden, Maryland Penitentiary. No. 4—(Application Withdrawn)

Joseph Garrigan vs. Superintendent, Maryland State Reformatory for Males. No. 5—(Clayton A. Dietrich)

Eugene Nick Skates vs. Warden, Maryland House of Correction. No. 6—(Joseph S. Kaufman)

Nathaniel Shields vs. Warden, Maryland House of Correction. No. 7—(James H. Norris, Jr.)

Calvin Shivers vs. Warden, Maryland Penitentiary. No. 8—(James H. Norris, Jr.)

Leroy Sylvester Ferguson vs. Warden, Maryland House of Correction. No. 9—(James H. Norris, Jr.)

Frederick Gene Bell vs. Warden, Maryland Penitentiary. No. 10—(E. Clinton Bamberger, Jr.)

Glenn Eugene Stouffer vs. Warden, Maryland House of Correction. No. 11—(Clayton A. Dietrich)

Ernest J. Ford, Jr. vs. Warden, Maryland House of Correction. No. 12—(James H. Norris, Jr.)

Bill Snyder vs. Warden, Maryland State Reformatory for Males. No. 13—(James H. Norris, Jr.)

William H. Jackson vs. Warden, Maryland House of Correction. No. 14—(James H. Norris, Jr.)

William H. Jackson vs. Warden, Maryland House of Correction. No. 14A—(James H. Norris, Jr.)

William E. Hardy vs. Warden, Maryland House of Correction. No. 15—(James H. Norris, Jr.)

John Austin Young vs. Warden, Maryland Penitentiary. No. 16—(James H. Norris, Jr.)

William Bryant vs. Warden, Maryland House of Correction. No. 17—(James H. Norris, Jr.)

Samuel L. Culley vs. Warden, Maryland House of Correction. No. 18—(James H. Norris, Jr.)

George Monroe Pumphrey, Jr. vs. Warden, Maryland House of Correction. No. 19—(James H. Norris, Jr.)

Cherry Austin Eldridge alias Cherry Gladden vs. Warden, Maryland House of Correction. No. 20—(James H. Norris, Jr.)

Thomas R. Ingram and Delano L. Tillett vs. Warden, Maryland House of Correction. No. 21—(James H. Norris, Jr.)

Louis H. Coston vs. Warden, Maryland House of Correction. No. 22—(Theodore C. Waters, Jr.)

William Joseph Day vs. Warden, Maryland House of Correction. No. 23—(Charles B. Reeves, Jr.)

Alonzo Boyd vs. Warden, Maryland House of Correction. No. 24—(Clayton A. Dietrich)

Daniel Paul Brown vs. Warden, Maryland House of Correction. No. 25—(Joseph S. Kaufman)

James West Brooks vs. Warden, Maryland Penitentiary. No. 26.—(E. Clinton Bamberger, Jr.)

CASES PENDING IN THE COURT OF APPEALS

Isaac Bulluck vs. State of Maryland. No. 113, September Term, 1958.

Robert H. Reddick vs. State of Maryland. No. 120, September Term, 1958.

Police Commissioner of Baltimore City vs. Elizabeth C. King, et al. No. 128, September Term, 1958.

Robert Miedzinski, Sheriff of St. Mary's County vs. Loren L. Landman, et al. No. 129, September Term, 1958.

Lloyd R. Roberts vs. State of Maryland. No. 142, September Term, 1958.

Frederick P. McBriety, et al. vs. Mayor and City Council of Baltimore, et al. No. 147, September Term, 1958.

James Samuel Colter vs. State of Maryland. No. 148, September Term, 1958.

Ethel Reynolds (alias) Marie Anderson vs. State of Maryland. No. 151, September Term, 1958.

Ronald Francis Rhodes vs. State of Maryland. No. 154, September Term, 1958.

Whitfield B. Case, Indiv. T/A W. B. Case Box Lunch Company vs. Comptroller of the State of Maryland. No. 155, September Term, 1958.

Andrew J. Lloyd vs. State of Maryland. No. 165, September Term, 1958.

State of Maryland to the use of John W. Clark, et al. and John W. Clark, Adm., etc. vs. Clement J. Ferling. No. 228, September Term, 1958.

Thomas Wardell Young vs. State of Maryland. No. 230, September Term, 1958.

William Bornstein, et al. vs. State Tax Commission of Maryland. No. 232, September Term, 1958.

Jarrell Lank vs. State of Maryland. No. 179, September Term, 1958.

Donald T. Holtman vs. State of Maryland. No. 187, September Term, 1958.

Alban Tractor Co., Inc. vs. State Tax Commission. No. 200, September Term, 1958.

Dyson Emory Humphries vs. State of Maryland. No. 201, September Term, 1958.

Raymond John Anthony Gray vs. State of Maryland. No. 205, September Term, 1958.

Amos E. Ward vs. State of Maryland. No. 207, September Term, 1958.

David Nathaniel Harris vs. State of Maryland. No. 209, September Term, 1958.

David Wright vs. State of Maryland. No. 210, September Term, 1958.

Hyman Goldstein vs. State of Maryland. No. 217, September Term, 1958.

Johnnie Brown vs. State of Maryland. No. 219, September Term, 1958.

Jerome B. Bell vs. State of Maryland. No. 223, September Term, 1958.

Calvin Johnson vs. State of Maryland. No. 224, September Term, 1958.

Edward Edwardsen vs. State of Maryland. No. 225, September Term, 1958.

Cases Finally Disposed of in Lower Courts

Comptroller of the State of Maryland vs. Donald Hammond and Mary Hammond. In the Circuit Court for Baltimore County, in Equity. This was an attachment proceeding instituted by the Comptroller for the collection of unpaid Maryland State income taxes. Pending the suit, the case was settled on the basis of monthly payments by the taxpayer of $500.00, commencing September 15, 1958, until the indebtedness was liquidated in full and a release of the State liens effected. Mr. Waters represented the Comptroller.

Bullis School, Inc. vs. State Tax Commission of Maryland. In the Circuit Court for Montgomery County. This was an appeal by Bullis School, Inc., from the ruling of the State Tax Commission that the assessment for the tax year 1954 was not governed by the previous judicial decision and, therefore, the matter was not *res judicata* and approved the assessment by the Appeals Tax Court for Montgomery County. The case was heard in the Circuit Court for Montgomery County. Judge E. McMaster Duer was specially assigned to hear this case and he reversed the decision of the Appeals Tax Court. The matter has been appealed to the Court of Appeals of Maryland. Mr. Kaufman represented the State Tax Commission.

Richard M. Cooley, Chairman, et al vs. Henry F. Lankford. In the Circuit Court for Somerset County, Civil Docket 1645. The Princess Anne Water and Sewer Authority, which was created under the provisions of Article 43, Sections 406-427, Annotated Code of Maryland (1951 Ed.), sought to condemn a certain parcel of land for construction of a sewage disposal facility. The owner of the property demurred to the petition of condemnation and sought to have the act declared unconstitutional insofar as it authorized the formation of water and sewer authorities and the grant to such authorities of the power of eminent domain. The State Board of Health intervened as *amicus curiae.* Judge E. McMaster Duer ruled that the statute was constitutional and that there was a valid grant of the right of

eminent domain to the water and sewer authority. After the demurrer was overruled, the condemnation proceeding was settled. Mr. Kaufman represented the State Board of Health.

In re John James Mooney. Before the Maryland Racing Commission. John James Mooney, a duly licensed trainer, was charged with having a horse under his control drugged during a race at Timonium on September 1, 1958. After a hearing before the Commission, it was found that the horse was stimulated by a drug in the nature of Amphetamine. Mooney was suspended for six months as a result of failing to guard against the administration of a drug to a horse. Mr. Kaufman represented the Racing Commission.

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. This was a bill of complaint filed by the State Board of Health in the Circuit Court for Cecil County to enforce an order of the State Board of Health dated July 15, 1955, requiring the construction and installation of certain necessary improvements to the public water distribution system of Chesapeake City. After the case was at issue, the President and Commissioners of Chesapeake City complied with the order in full; therefore, the bill of complaint was dismissed without prejudice. Mr. Kaufman represented the State Board of Health.

Gilbert O. Hart, Jr., vs. Paul C. Barnhart, County Superintendent of Schools of Charles County. Before the State Board of Education. The Petitioner appealed from the action of the County Superintendent of Schools of Charles County refusing to grant him transportation to the Indian Head School. After a hearing, the State Board of Education affirmed the action of the County Superintendent and found that the Superintendent in good faith had carried out the policy of the Charles County Board of Education. The appeal was accordingly dismissed. Mr. Reeves represented the State Board of Education.

Joseph Mayer, et al vs. Paul T. Pitcher, et al. In the Circuit Court for Anne Arundel County. Petitioners sought a writ of mandamus against Paul T. Pitcher, a candidate for election to the Board of County Commissioners of Anne Arundel County, and against George T. Cromwell, Clerk of the Circuit Court for Anne Arundel County and the Board of Supervisors of Elections of Anne Arundel County. The petition alleged that the candidate did not possess the statutory qualifications for the office. After a hearing before Judge James Macgill, specially assigned, the Circuit Court for Anne Arundel County ruled that the candidate possessed the statutory qualifications and dismissed the petition for writ of mandamus. Mr. Reeves represented the Clerk of the Circuit Court for Arundel County.

In the Matter of the Trust Created by Deed Dated May 21, 1949, by Robert Lee Graham, Grantor. In the Circuit Court No. 2 of Baltimore City. This matter involved the question of the domicile of Robert Lee Graham, deceased, at one time a resident of the State of Maryland. The Comptroller of the Treasury and the Register of Wills for Baltimore County were joined as parties defendant. After extended conferences and hearings, an agreement was entered into by the parties and it was recognized that the decedent was not a domiciliary of the State of Maryland. Mr. Reeves represented the Comptroller and the Register of Wills.

Household Finance Corp. vs. State Tax Commission. In the Circuit Court of Baltimore City. These were appeals from assessments made by the State Tax Commission on capital stock of a foreign finance corporation. Subsequent to the opinion of the Court of Appeals in the case of *Household Finance Corporation v. State Tax Commission,* 212 Md. 80, the State Tax Commission reassessed the capital stock value of Household Finance Corporation in Maryland for the year 1953. The taxpayer challenged the corrected assessment, particularly the apportionment of the stock valuation of Household for business done in Maryland in accordance with Article 81, Section 21, Annotated Code

of Maryland (1957 Ed.). Judge Edwin Harlan heard the case and held that the apportionment was proper. An appeal was filed to the Court of Appeals of Maryland. Mr. Kaufman represented the State Tax Commission.

Ex Parte in the matter of Bernard L. Carder, T/A Union Furniture Company. In the Circuit Court No. 2 of Baltimore City. This was a State receivership proceeding in Circuit Court No. 2 of Baltimore City involving priority as between the claim of the landlord for unpaid rent and the claim of the Comptroller for unpaid sales taxes. The case was settled. Mr. Waters represented the Comptroller.

Eagle Engineering Co., Eagle Manufacturing Co., William J. Curl and Norma M. Curl, his wife, individually and T/A Eagle Manufacturing Co. and Eagle Engineering Co. vs. J. Millard Tawes, Comptroller, State of Maryland. Before the State Tax Commission. This was a sales tax assessment which came on for hearing before the Commission on October 1, 1957. No testimony was offered by the taxpayer and the assessment became final. Mr. Waters represented the Comptroller.

John R. Fletcher, et al vs. Air Conditioning, Inc., of Maryland, etc. In the Circuit Court for Prince George's County. This was a receivership proceeding in Prince George's County involving the priority of tax claims of the United States and the Comptroller in a matter of sales tax. Mr. Waters represented the Comptroller.

Nick Mallis, T/A Shipyard Restaurant vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Baltimore County, Misc. Docket No. 1183. This case involved a sales tax assessment based upon the use of a factor developed by spot checks of the taxpayer's sales. The use of such a factor is authorized by statute where the taxpayer fails to maintain accurate records of sales. The case came on for hearing before Judge John E. Raine, Jr., who ruled that there was no suggestion of fraud or bad faith on the part of the taxpayer and that the only

basis for a deficiency assessment was a finding by the Comptroller that the taxpayer had filed an incorrect return, and he consequently upheld the contention of the taxpayer. Mr. Waters represented the Comptroller.

W. Kenneth Rettaliata vs. Frank J. Hanson, James A. Gary, Jr. and Alexander Lempert, Constituting the Board of Liquor License Commissioners for Baltimore City and Anne Quinn Rettaliata, Co-Executor of the Estate of Anthony V. Rettaliata and Anne Quinn Rettaliata. In the Circuit Court No. 2 of Baltimore City, Equity Docket 67A, Folio 184, File No. 35596. This case involved the issuance of a liquor license and the subsequent transfer of same. The case was dismissed on October 27, 1958. Mr. Waters represented the Board of Liquor License Commissioners.

State of Maryland for the use of Bowie State Teachers College vs. Charles Fleming, et al. In the Circuit Court for Prince George's County, Equity A-9287. This was an action brought by the State of Maryland for the use of Bowie State Teachers College to enjoin a neighboring landowner from using a road located on Bowie property as a means of ingress and egress to the landowner's property. The Court granted the injunction and thereafter an agreement was entered into between the State of Maryland and the landowner, granting the landowner an easement for ingress and egress across the Bowie property and further providing for conveyance by the landowner to the State of a strip of land heretofore separating State-owned property. Mr. Waters represented Bowie State Teachers College.

Battletown Transfer, Inc., Bankrupt. In the United States District Court for the District of Virginia, Bankruptcy No. 2072. This was a bankruptcy proceeding in Virginia wherein the Comptroller filed a claim for unpaid fuel taxes. The Comptroller's claim was paid in full. Mr. Waters represented the Comptroller.

Laurence M. Bekowitz vs. Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore

City. Petitioner filed suit April 22, 1958, for the issuance of a writ of mandamus to require the Board to give effect to his purported certificate of candidacy, and to place his name upon the ballot for the primary election on May 20, 1958, as a candidate for Republican State Central Committee for the Second Ward of the First Legislative District of Baltimore City. The issue was whether Petitioner's certificate was in order since the office which he sought was not indicated thereon. The case was tried May 2, 1958. The court found that the certificate was not in order and that Petitioner was not entitled to have his name placed upon the ballot. Mr. Reeves represented the Board.

Fernando Bertalo vs. Board of Supervisors of Elections. In the Superior Court of Baltimore City. Petitioner filed suit April 3, 1958, for the issuance of a writ of mandamus to require the Board to delete his name from the ballots for the primary election of May 20, 1958, as a candidate for Democratic nomination for the State Senate in the First Legislative District of Baltimore City. The issue was whether a certificate of withdrawal filed by the candidate had been rescinded. The case was tried April 16, 1958. The Court found that Petitioner was entitled to issuance of the writ. The Board was ordered to delete Petitioner's name from the ballot. Mr. Reeves represented the Board.

Edward Dabrowski vs. Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City. Petitioner filed suit May 6, 1958, for the issuance of a writ of mandamus to require the Board to rearrange the ballots and ballot labels for the primary election of May 20, 1958. The issue was whether the Board had arbitrarily arranged the names of the candidates for the Democratic nomination for State Senator from the First Legislative District of Baltimore City with the deletion of the name of Fernando Bertalo. The case was tried May 16, 1958. The court found that Petitioner was not entitled to issuance of the writ and that the Board had not acted arbitrarily. Mr. Reeves represented the Board.

Raymond V. Delvich vs. Arthur von Laszewski and Evelyn von Laszewski, his wife. In the Baltimore City Court, Page 272, Docket 1 C.J. This was a petition of the Sheriff of Baltimore City for leave to amend a return in the above case. An order was filed upon the petition granting the Sheriff leave to amend his return. Mr. Norris represented the Sheriff.

Samuel S. Eisenberg vs. Louis P. Lucas. In the Baltimore City Court, Docket f P.C.—Folio 325. This was a petition to strike out a levy made by the Sheriff under a writ of *fieri facias.* An answer was filed on behalf of the Sheriff of Baltimore City stating that the writ had been levied; however, he had no interest in the controversy and would submit his rights and interests to the protection of the court. Mr. Norris represented the Sheriff.

The Free State Realty Company, Inc. vs. Frank J. Gross and Jessie M. Gross, his wife. In the Baltimore City Court, Docket I CJ, Folio 244. This was a petition of the Baltimore Federal Savings and Loan Association to have excess money applied to a mortgage. An answer was filed for the Sheriff, stating that he had no funds to turn over to the Baltimore Federal Savings and Loan Association as prayed in this petition. Mr. Norris represented the Sheriff of Baltimore City.

Willie Fickenscher vs. Simon Schonfield, Justice of the Peace, Northeastern Police Station, Baltimore, Md. In the Baltimore City Court. This was a petition for writ of certiorari contending that the Trial Magistrate had no jurisdiction to hold the petitioner for action of the Grand Jury after a hearing was held. Judge Joseph Allen, after a hearing in the matter, found that the Magistrate had exceeded his powers and ordered that the proceedings be remanded to the Trial Magistrate with directions to him to render a verdict in the matter. Mr. Norris represented the Trial Magistrate.

John A. Foley vs. Superintendent, Spring Grove State Hospital. In the Baltimore City Court. This was a petition by which the petitioner, a patient at Spring Grove State Hospital, sought release from the hospital under Article 59, Section 21, Annotated Code of Maryland (1957 Ed.). The issue was the sanity of the petitioner, who was represented by court-appointed counsel. The jury found the petitioner insane and he was remanded to the hospital. Mr. Norris represented the Superintendent.

Estate of W. Roy Wilson, deceased, Thomas Norwood Wilson, Executor vs. J. Millard Tawes, et al., constituting the State Tax Commission. In the Baltimore City Court, 33/18P, Filed 7/16/58. This was an appeal from the decision of the State Tax Commission affirming the Comptroller of the Treasury in disallowing a claim for return of inheritance taxes. The case came on for hearing October 15, 1958, before Judge John T. Tucker, who affirmed the ruling of the State Tax Commission that the claim was barred by limitations. Mr. Reeves represented the Comptroller and the State Tax Commission.

Louis H. Fried v. Board of Supervisors of Elections of Baltimore City. In the Superior Court of Baltimore City, Docket 1958, Folio 1287, No. 53043. This was an appeal from the action of Charles A. Dorsey and Thomas J. D'Alesandro, III, sitting as a board for the purpose of hearing challenges of the right to vote. The board had determined that Morton C. Pollack, a challenged voter, was a duly registered voter of the Fourth District. The appeal was heard by Judge John T. Tucker, forthwith. The action of the board was affirmed. Mr. Reeves represented the Board of Supervisors of Elections.

Melvin J. Borkowski and Bernice N. Borkowski vs. Henry Miller, et al. and Gilbert E. Miller, Sheriff of Baltimore County. In the Circuit Court for Baltimore County, In Equity—File 39674—Docket 63, Folio 310. This was a bill of complaint for an injunction to restrain the respondents from advertising a certain leasehold property at

a public sale. An answer was filed on behalf of the Sheriff of Baltimore County to the effect that he had no personal interest in the subject matter of the proceedings and would abide by such order as may be passed by the court. Mr. Norris represented the Sheriff of Baltimore County.

In the matter of the Estate of Frank Newcomer Hack. In the Orphans' Court of Baltimore County. This was a petition filed by this office in a case pending in the Orphans' Court of Baltimore County in which we prayed to be made a party to the proceeding in order to preserve the interests of the State in the collateral inheritance tax. As a result of this action, administration was ordered in Baltimore County. The estate is now closed and a substantial amount of inheritance taxes were duly paid to the Register of Wills. Former Assistant Attorney General, Charles McC. Mathias, Jr., represented the Register of Wills.

Melvin Perkins vs. Secretary of State and Board of Election Supervisors for Baltimore County. In the Circuit Court for Baltimore County, Misc. Docket 6/135—No. 1962. This was a proceeding to require the removal of a name from the ballot and off the polling list. The Circuit Court for Baltimore County dismissed the petition on the theory that the Court lacked jurisdiction to consider the matter. Mr. Reeves represented the Secretary of State and the Board of Election Supervisors.

Allied Terminal Corp. vs. Western Maryland Railway. In the Circuit Court for Anne Arundel County. In Equity No. 12,254. This was a bill of complaint for specific performance and injunction against the respondent. An answer was filed on behalf of the Sheriff of Baltimore City to the effect that he had no interest in the subject matter of this proceeding and would abide by and perform such order as the court may direct. This case has been appealed to the Court of Appeals (No. 243, September Term, 1958). Mr. Norris represented the Sheriff.

Frank A. Peterson and Susanna Peterson, his wife vs. Paul A. Richter and Anna F. Richter, his wife, and the State of Maryland. In the Circuit Court for Howard County. In Equity No. 5282. This was a bill to foreclose the right of redemption under a tax sale. An answer was filed for the State of Maryland indicating that it had no interest in the matter and submitting its rights and interests to the protection of the court. Mr. Norris represented the State.

Otis Beall Kent vs. State Tax Commission. In the Circuit Court for Montgomery County. This was an appeal from a decision of the Commission affirming an assessment made by the State Comptroller of an income tax deficiency for the year 1958. After argument and submission of briefs, Judgment was rendered by Judge Anderson affirming the decision of the Commission. The Appellant filed a motion for reconsideration which the trial court denied after argument. Mr. Prescott represented the Comptroller.

Loren L. Landman vs. Robert Miedzinski, Sheriff of St. Mary's County, and Avary C. Monroe, Sheriff of Charles County. In the Circuit Court for St. Mary's County. A bill of complaint was filed in the Circuit Court for St. Mary's County requesting the court to determine and establish the constitutionality and validity of Chapter 18 of the Laws of 1958, which forbid any person to bet or gamble upon any piers or vessels on any waters of the State which cannot be entered from the shore of the State of Maryland. The petitioner contended that Chapter 18 was invalid and unconstitutional because it was enacted in violation of Section 15 of Article III of the Maryland Constitution, that it violated the Fourteenth Amendment to the Constitution of the United States and that it was unenforceable because it was ambiguous and inconsistent. A hearing was held before Chief Judge John B. Gray and Associate Judge Philip H. Dorsey who ruled that Chapter 18 was unconstitutional since it violated Section 15 of Article III of the Maryland Constitution, and enjoined the sheriffs of St. Mary's and Charles Counties from enforcing Chapter 18. An appeal

was filed to the Court of Appeals of Maryland. Mr. Prescott and Mr. Norris represented the sheriffs of St. Mary's and Charles Counties.

In re Thomas J. Browning. Before the Board of Examiners and Registration of Architects. Because of complaints and inquiries from other states concerning the validity of the registration of Thomas J. Browning as an architect in the State of Maryland, the Board held a hearing on June 26, 1958, at which Mr. Browning was represented by counsel and testified as to his qualifications. After reviewing the proceedings thoroughly, the Board at a meeting held on July 21, 1958, concluded that Mr. Browning's registration in the State of Maryland was valid. Mr. Reeves represented the Board.

Clarence M. Plitt vs. Board of Liquor License Commissioners. In the Superior Court of Baltimore City. This was a petition for a writ of mandamus to compel the Board of Liquor License Commissioners to issue a duplicate beer and wine license to one Eugene Titus in order that the Sheriff might levy, seize and sell the goods, including the license of Eugene Titus, in order to satisfy the judgment obtained by Clarence M. Plitt against Titus. Inasmuch as the whereabouts of Titus are unknown and the matter moot, the petition was dismissed, the petitioner to pay the costs. Mr. Waters represented the Board of Liquor License Commissioners.

Henry G. Bartsch, et al. vs. State Board of Health. In the Superior Court of Baltimore City. Mr. Bartsch, a resident of Waldorf, Maryland, filed a petition for mandamus in the Superior Court of Baltimore City against the State Board of Health, seeking to require the Board to order the County Commissioners of Charles County to install a public system of water supply and sewage disposal in the unincorporated town of Waldorf. A demurrer to the petition for mandamus was overruled by Judge Joseph R. Byrnes, and the case then came up for hearing. It was heard by Judge John T. Tucker and the court refused

to issue the mandamus as prayed. An appeal was taken to the Court of Appeals of Maryland but was abandoned. Mr. Kaufman represented the State Board of Health.

John W. Clark, Adm., Estate of William G. Clark, infant deceased vs. Board of Correction of the State of Maryland and Superintendent of Maryland State Reformatory for Males. In the Superior Court of Baltimore City. William G. Clark was sentenced to the Maryland Reformatory for Males, and shortly after his arrival at the institution, he was brutally beaten by certain other inmates and, as a result of said beating, subsequently died. Action was brought by his surviving parents as well as his personal representative, claiming negligence on the part of the Board of Correction, its Chairman and the Superintendent of the Reformatory for causing Clark to be confined with inmates who were alleged to have been vicious, brutal and having homicidal tendencies. A demurrer was filed on behalf of the Board of Correction, and Judge E. Paul Mason in the Superior Court of Baltimore City sustained said demurrer without leave to amend. An appeal has been taken to the Court of Appeals from this decision. Mr. Kaufman represented the Board of Correction.

Eisenhart's Dairy, Inc. vs. Maryland State Board of Health, et al. In the Circuit Court No. 2 of Baltimore City. The State Board of Health revoked the license of Eisenhart's Dairy, Inc., on the ground that their product had continuously not met the requirements of Article 43, Section 193, Annotated Code of Maryland (1957 Ed.). Upon appeal of Eisenhart's Dairy, Inc., to the Circuit Court No. 2 of Baltimore City, the Court assumed jurisdiction and allowed the Dairy to continue operation under the supervision of the Court. Mr. Kaufman represented the State Department of Health.

George W. Miller vs. James W. Curran, Superintendent of Prisons. In the Circuit Court No. 2 of Baltimore City. George W. Miller, an inmate of the House of Correction, sought to have the court require the Warden of the House

of Correction and the Superintendent of Prisons to transfer certain moneys in the prisoner's institutional account to persons designated by him. A demurrer was filed on behalf of the Board of Correction and Judge Joseph L. Carter in the Circuit Court No. 2 of Baltimore City sustained the demurrer and dismissed the bill of complaint. Mr. Kaufman represented the Department of Correction.

Whitfield B. Case, individually and d/b/a W. B. Case Box Lunch Company vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court of Baltimore City. This was a bill for declaratory decree to determine whether the driver-salesmen of the W. B. Case Box Lunch Company were hawkers and peddlers within the definition of Article 56, Section 21, of the Annotated Code of Maryland. The lower court (Judge Joseph L. Carter) held that the complainants were in fact hawkers and peddlers. This was appealed to the Court of Appeals of Maryland. Mr. Kaufman represented the Comptroller.

Melvin J. Marshall and Mary Lou Marshall—Frank C. Marino, Trustee—and Gordon W. Gent and Anna Gent vs. State Tax Commission. In the Baltimore City Court. These three real estate tax assessments were appealed on the ground that said assessments were excessive. The taxpayers failed to make a record before the State Tax Commission and the Baltimore City Court, on appeal, had nothing before it on which to rule. The assessments were accordingly affirmed. Mr. Waters represented the State Tax Commission.

Joseph Daniel Brouillette vs. Wallace, Director of the Department of Parole and Probation. In the Baltimore City Court. Mr. Brouillette was an inmate of the Maryland Penitentiary and sought by way of mandamus to require the Director of the Department of Parole and Probation to allow him good time credit against his sentence for the time while he was out of the institution on parole and before revocation of parole. The lower court (Judge John T. Tucker) ruled that this was a matter of discretion for

the Director of the Department of Parole and Probation, and there being no showing of abuse of discretion, mandamus would not lie. Mr. Kaufman represented the Director of the Department of Parole and Probation.

Louis A. Crystal, et al. and Maryland Beef and Provision Company vs. State Tax Commission. In the Baltimore City Court. This case involved an appeal from a personal property tax assessment. While the appeal was pending, the taxpayers dismissed same. Mr. Waters represented the State Tax Commission.

George Karageorge, t/a Acco Cleaners vs. State Tax Commission. In the Baltimore City Court. The taxpayers were engaged in the dry cleaning and laundry service in Baltimore City during 1952 through 1954. Although entitled to the manufacturers' exemption, they neglected to apply for same during the years in question. They thereafter brought suit after the assessments had become final on the theory that they were entitled to a refund of these taxes. The court held that the burden was on the taxpayer to make a timely claim for the exemption and since the taxpayers in this case have failed to do so, their right to recover same was barred. Mr. Waters represented the State Tax Commission.

Edward N. Deitsch vs. Board of Liquor License Commissioners for Baltimore City. In the Baltimore City Court. This case involved the question of whether a liquor license was subject to execution by the Federal Government for unpaid income taxes. The Baltimore City Court held that a liquor license had some attributes of property and that it was subject to execution under Federal and State law. Mr. Waters represented the Board of Liquor License Commissioners.

Stanley Hornstein vs. J. Millard Tawes, Comptroller of the Treasury. In the Baltimore City Court. This was a receivership proceeding involving claims, including the claim of the Comptroller, for unpaid sales taxes. The Comp-

troller's claim was settled and the court action dismissed. Mr. Waters represented the Comptroller.

The Saint Paul Holding Company vs. State Tax Commission. In the Baltimore City Court. This was a real property assessment appeal on the ground that the owner of the Saint Paul Holding Company was a fraternal organization within the meaning of the exemption. Saint Paul Holding Company was owned by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and a labor union composed of the employees of the B. & O. Railroad. The Court held, under a strict construction of the exemption, that the union did not qualify as a fraternal organization. Mr. Waters represented the State Tax Commission.

Home Development & Supply Company, Inc. vs. State Tax Commission of Maryland. In the Circuit Court of Baltimore City. This case involved a personal property tax assessment against a corporation which had sold a portion of its assets prior to the date of finality. While the case was on appeal from the Commission's assessment, it was settled and the taxpayer filed an order dismissing the appeal. Mr. Waters represented the State Tax Commission.

State Department of Health vs. James Westmoreland. In the People's Court of Baltimore City. This case involved an automobile collision with a car operated by an employee of the State Department of Health. It was tried in the People's Court of Baltimore City. The driver of the State car was found to be contributorily negligent and no recovery was allowed. Mr. Kaufman represented the Health Department.

Comptroller of the State of Maryland vs. Donald Hammond and Mary S. Hammond. In the Circuit Court for Baltimore County, in Equity. This was an attachment proceeding instituted by the Comptroller for the collection of unpaid Maryland State Income taxes. Pending the suit, the case was settled on the basis of monthly payments by

the taxpayers of $500.00, commencing September 15, 1958, until the indebtedness was liquidated in full and the State liens released. Mr. Waters represented the Comptroller.

Perry F. Prather, et al. constituting the State Board of Health vs. the Mayor and Commissioners of Westernport. In the Circuit Court for Allegany County. The State Board of Health instituted action against the Mayor and Commissioners of Westernport to restrain them from discontinuing chlorination of water served to certain residents of Garrett and Allegany Counties near the Savage River Dam. Although the water from the Savage River was concededly polluted, the lower court ruled that the State Board of Health had no authority to require chlorination of water outside of the town limits of Westernport. The case was appealed to the Court of Appeals and was reversed. Mr. Kaufman represented the State Board of Health.

Hazel C. Fields, et al. vs. County Commissioners of Anne Arundel County, et al. and George T. Cromwell, Clerk of the Circuit Court for Anne Arundel County, et al. In the Circuit Court for Anne Arundel County, No. 12,422 Equity. This case involved the right of Auditorium, Inc., to a refund of the moneys paid for a jai lai license. The Court held that the licensee was entitled to such a refund in view of legislation barring jai lai throughout the State, and signed an order directing the Clerk of the Court and the County Commissioners to refund the moneys paid. Mr. Waters represented the Clerk and the County Commissioners.

Samuel Horwitz, t/a Eagle Dry Cleaners vs. State Commission. In the Baltimore City Court. The taxpayers were engaged in the dry cleaning and laundry service in Baltimore City during 1952 through 1954. Although entitled to the manufacturers' exemption, they neglected to apply for same during the years in question. They thereafter brought suit after the assessments had become final on the theory that they were entitled to a refund of these taxes. The Court held that the burden was on the taxpayer to make a

timely claim for the exemption, and since the taxpayers in this case have failed to do so, their right to recover was barred. Mr. Waters represented the State Tax Commission.

State of Maryland, Retail Sales Tax Division, Comptroller of the Treasury vs. Morey Machinery Co., Inc. In the Circuit Court for Baltimore County. This case involved a sales tax assessment which the taxpayer refused to pay. After the institution of an attachment proceeding, the taxpayer paid his indebtedness and the suit was settled. Mr. Waters represented the Comptroller.

King & Sanders vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Baltimore County. This was an appeal from a use tax assessment made by the State Comptroller on certain construction equipment rented by the taxpayer. After a hearing, the court affirmed the Comptroller's assessment on March 3, 1958. Mr. Waters represented the Comptroller.

Bradmar Theatres, Inc. vs. J. Millard Tawes, Comptroller of the Treasury, and Ellis C. Wachter, Clerk of the Circuit Court for Frederick County. In the Circuit Court for Frederick County. This was a bill for declaratory decree in the Circuit Court for Frederick County asking to have a ruling of the Comptroller relating to the license fee for open air moving picture theatres set aside. Article 56, Section 146, Annotated Code of Maryland (1951 Ed.) requires licensing of motion picture theatres, the license fee being graduated according to the number of seats. The open air moving picture theatres have no seats, and the court ruled that the open air moving picture theatres are entitled to be licensed at the minimum fee. No appeal was taken from this ruling. Mr. Kaufman represented the Comptroller.

Temple Emanuel vs. State Tax Commission of Maryland. In the Circuit Court for Montgomery County, Law No.

5622. This case involved the question as to whether or not a certain building qualified for exemption as a building used for public worship. The Circuit Court for Montgomery County held that temporary use did not meet the strict test of this statute and for this reason denied the exemption. Mr. Waters represented the State Tax Commission.

The Hayes Lithograph Company, Inc. vs. J. Millard Tawes, Comptroller of the State of Maryland. In the Circuit Court for Montgomery County. This matter involved a use tax assessment made by the Comptroller on certain property of the taxpayer. The case was compromised and the suit subsequently dismissed by the taxpayer. Mr. Waters represented the Comptroller.

Gaithersburg Methodist Episcopal Church vs. Appeal Tax Court of Montgomery County. In the Circuit Court for Montgomery County. This case involved an appeal from a real property assessment which was dismissed by the Circuit Court for Montgomery County on the ground that the appeal was not taken within thirty days of the decision of the State Tax Commission and that the court was, accordingly, without jurisdiction to hear the appeal. Mr. Waters represented the State Tax Commission.

William Bornstein, et al. vs. State Tax Commission. This case involved an assessment upon apartment properties. The taxpayer contended that the assessment was improper because the assessor used capitalization of rentals as the exclusive measure of value. The Circuit Court for Montgomery County dismissed the appeal on the ground that the record did not support this contention. An appeal was noted to the Court of Appeals. Mr. Waters represented the State Tax Commission.

Cases Pending in Lower Courts

Lawrence Rye vs. James Maddox, et al. In the Circuit Court for Baltimore County, In Equity, No. 36816 60/25.

Ronald G. Regester vs. General Automatic Products Corporation. In the Circuit Court for Baltimore County, Docket 56, Folio 365, File No. 39724.

Allied American Mutual Fire Insurance Company vs. James B. Monroe, Commissioner of Motor Vehicles. In the Circuit Court of Baltimore City.

William M. Augustine, et al vs. Division of Social Security of the Employees Retirement System of the State of Maryland. In the Circuit Court of Baltimore City.

Fidel G. Bueno and Agnes M. Kaspar vs. Frank C. Robey, Clerk of the Court of Common Pleas. In the Superior Court of Baltimore City.

County Commissioners of Worcester County vs. Frank W. Hales, Clerk of the Circuit Court, and Hooper S. Miles, State Treasurer. In the Circuit Court for Worcester County, No. 7304, Chancery.

John Herbert Davis vs. Linwood G. Koger. In the Baltimore City Court.

Louise E. Magruder vs. Frederick W. Brune, et al., Hall of Records Commission and Theodore R. McKeldin, et al., Board of Public Works. In the Circuit Court for Anne Arundel County. No. 12,836 Equity.

National Electrical Contractors Association, Inc., vs. Charles S. Jackson, State Insurance Commissioner. In the Baltimore City Court.

Perry F. Prather, et al., constituting the State Board of Health vs. Atlantic Ocean Estates, Inc. In the Circuit Court for Worcester County.

Southern Municipal Corporation vs. Worthington McCager Mills, et al. In the Circuit Court for Anne Arundel County.

State of Maryland vs. National Hospitalization, Inc. In the Circuit Court of Baltimore City.

In the matter of the Appeal of Kevin R. Wade from ruling of the State Tax Commission. In the Circuit Court for Montgomery County.

MacLea Lumber Company vs. Owen E. Hitchins, et al., constituting the State Tax Commission of Maryland. In the Circuit Court of Baltimore City.

J. Thomas Requard, James W. Leyko, the Equitable Trust Company, Executors of the Estate of Julius H. Requard vs. Joseph P. Connor, Register of Wills for Baltimore County. In the Circuit Court for Baltimore 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, a body corporate, vs. the State Board of Health of the State of Maryland. In the Circuit Court for Cecil County.

Robert J. Martin vs. D. Eldred Rinehart, et al., constituting the Maryland State Racing Commission. In the Baltimore City Court.

Alexander B. Kloze vs. State of Maryland. In the Baltimore City Court.

In the matter of the Appeal of Kevin R. Wade from the ruling of the State Tax Commission. In the Circuit Court for Montgomery County.

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

The Berwick Development Company vs. Edward Parks Wilson. Before the Commissioner of the Land Office of Maryland.

Robert O. Bonnell, et al, vs. Thomas F. Bennett, Sr., et al. In the Circuit Court for St. Mary's County.

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

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

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

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

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

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

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

Elizabeth C. King and Edward A. King, infant, et al. vs. James M. Hepbron, Commissioner of Police of Baltimore City. In the Superior Court of Baltimore City.

Pietro D. Liberto vs. J. Harold Grady, State's Attorney for Baltimore City, and Board of Barber Examiners of the State of Maryland. In the Circuit Court of Baltimore City.

In the Matter of the Trust Estates Created by the Will of George Whitelock, deceased-Mercantile-Safe Deposit and Trust Company, etc., vs. The Seeing Eye, Inc., et al. In the Circuit Court No. 2 of Baltimore City.

National Brewing Company vs. State Tax Commission. In the Circuit Court No. 2 of Baltimore City.

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

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

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

William W. Robbins vs. J. Millard Tawes, Comptroller of the State of Maryland, and Charles Foster. In the Circuit Court for Montgomery County.

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

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

Harry R. Shull, t/a Peerless Distributing Company vs. Sydney R. Traub, et al., Maryland State Board of Motion Picture Censors, etc. 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.

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.

H. G. Taubman, Inc. vs. State Tax Commission of Maryland. In the Circuit Court of Baltimore City.

Martin J. White, Jr., Substituted Trustee of the Estate of Martin J. White, deceased vs. State Tax Commission. In the Circuit Court of Baltimore City.

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

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

John C. Gager vs. State Tax Commission. In the Superior Court of Baltimore City.

Gulf Oil Corporation vs. Maryland Line Garage, Inc. In the Circuit Court for Baltimore County, in Equity.

Samuel S. Eisenberg vs. Louis P. Lucas. In the Baltimore City Court.

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.

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

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

Report of Joseph D. Buscher
Special Assistant Attorney General
For The State Roads Commission

This report covers the calendar year 1958, during which period this office advised and represented the State Roads Commission in all legal matters pertaining to its operations.

For the period mentioned this office filed 382 condemnation cases in the several counties of the State. This repre-

sents a material increase over the total of 300 filed during 1957, the total of 217 filed during 1956, and the total of 318 filed during 1955.

The activity with reference to rights of way being acquired by the Commission continued at an increased rate. In addition to the above mentioned condemnation cases and the filing of petitions under the new land acquisition law of 1956, which created the Boards of Property Review, this office forwarded 3,009 title requests for title examinations in the various counties of the State and, upon receipt thereof, reviewed and checked the searches submitted.

For the year 1958 the Special Assistant Attorney General to the State Roads Commission and the members of his staff tried, or settled immediately prior to trial, 137 condemnation cases. Also, during this period his office represented the Commission before the various Boards of Property Review in 320 cases. All such cases, either before the Courts or the Boards of Property Review, involved land acquisitions made necessary by the Commission's Twelve Year Program of Highway Construction and Reconstruction and the construction program resulting from the passage of the Federal-aid Highway Act of 1956. A number of the cases tried during this period were appealed to the Court of Appeals of Maryland by either the property owners or the Commission. In all such cases the Commission was represented by this office before the Appellate Court.

There is still a large amount of legal work performed in connection with the construction of the Baltimore Harbor Tunnel. A few condemnation cases regarding this project are still pending and if settlement through negotiation is unavailing, it follows that they must be brought to trial.

In this connection we desire to report that after much legal maneuvering we finally succeeded in having the Commission intervene as a party defendant in a case pending in the U. S. District Court wherein the U. S. Department

of Labor was seeking an injunction against the firm of Singstad & Baillie for an alleged violation of the Fair Labor Standards Act of 1938, as amended, while working on the Tunnel Project. Several pre-trial conferences have been held before Judge Thomsen and we expect the matter to be heard during the early part of 1959.

This office has on many occasions been called upon to interpret the Trust Agreement, in addition to holding many conferences with the Commission, the J. E. Greiner Company, Consulting Engineer on the Tunnel Project, Singstad & Baillie, Designing Engineers of the Tunnel, and with Covedale & Colpitts, the Traffic Engineers on this Contract. This Department also represented the Commission at many conferences involving settlements with property owners and claims of various contractors and engineers interested in the various construction of the Tunnel.

The State Roads Commission and its members individually were represented by this office in suits or causes of action filed against them in the several counties of the State and in Baltimore City. Such representation necessitated the preparation and the filing of proper pleadings and the appearance of attorneys from this Department. In addition thereto, this office prepared and approved numerous agreements or other legal documents entered into between the Commission and the various Federal, State or County agencies or individuals concerned. This Department also approved as to legal form and sufficiency all contracts with the Commission for highway construction, reconstruction, maintenance, the securing of materials and supplies, and for engaging the services of consulting engineers for engineering work on behalf of the Commission.

As stated in the 1957 Report covering the activities of the Department, Chapter 59 of the Acts of the General Assembly Session, created a new method for land acquisitions and was primarily to prevent land speculations in those localities where such acquisitions were necessary. This method of operation continues to work quite success-

fully and it appears that speculation has decreased, if not been eliminated. All of the Boards of Property Review, authorized by the aforegoing statute for the several counties of the State, have been appointed and are hearing and deciding the numerous cases certified to them for determination. Having now had an opportunity to gain considerable experience in this field, it is our feeling that in the majority of instances these Boards are operating on a more efficient and effective basis and are fulfilling one of the main reasons for their creation, i. e., the elimination of crowded court dockets.

A regular thirty-day Session of the General Assembly was held beginning February 5, 1958, in addition to Special Sessions in March and June. Several Bills pertaining to outdoor advertising, powers of the State Roads Commission and the financing of State Highway Construction Bonds were introduced in the Legislature at the request of the Commission. This office prepared the necessary legislation and in connection therewith the Special Assistant Attorney General attended many hearings before various Committees of the Legislature in support of the Commission's program, in addition to appearances before Committees in opposition to any legislation which the Commission felt was inadvisable.

In addition to handling individual cases and problems, it is the responsibility of this Department to coordinate the legal aspects of all operations of the Commission and to furnish such legal information and advice as may be necessary or desirable to assure the continued meeting of the requirements of the law. The quantity and type of legal matters handled by this office increased to such an extent during the year 1958 that it was necessary to secure additional personnel. At present our staff comprises: Mr. Frederick A. Puderbaugh, Mr. Robert S. Rothenhoefer, Mr. Earl I. Rosenthal, Mr. T. Thornton Murray, Mr. Walter W. Claggett, Mr. J. Thomas Nissel, Mr. Eugene G. Ricks, Mr. Herbert L. Cohen and Mr. Charles C. Seymour.

Report of Leroy W. Preston
Special Assistant Attorney General
in Charge of Subversive Activities Control

I am pleased to submit my report as Special Assistant Attorney General in charge of Subversive Activities.

The office has continued its past policy of operation, that is, to work quietly and effectively investigating, collecting, indexing and properly utilizing information about subversive persons and organizations within the State of Maryland.

This department has worked closely with all proper law enforcement branches of the Federal, State and City governments on any matter of a subversive nature. Contacts are made daily with the office for pertinent information relevant to individuals seeking employment in important and classified positions in all branches of Government as well as the Armed Forces. By the requirements of the law itself, all information contained in the files is strictly confidential and not available to the public. As, in the past, we are continuing our endeavor to at all times protect the rights of all citizens as well to thoroughly investigate all matters of a subversive nature.

By reason of the decision in the recent *Nelson* case and the resultant lessening need for full-time investigators, two of the four have been released to the Baltimore City Police Department. We are presently operating with a Special Assistant Attorney General, two Special Investigators and a secretary. Plans are now being processed to staff the department in the new State Office Building.

The Subversive Activities Act of 1949 (Article 85A of the Annotated Code of Maryland) requires that all persons employed by the State of Maryland and its political subdivisions, all State aided institutions and all candidates for election shall be cleared on loyalty grounds. In conjunction with this requirement, the Special Investigators of the office have made a complete survey of the State, the City of Baltimore, the twenty-three Counties and all municipalities

situated therein, encompassing every governmental agency. The responsible authority in each and every branch of State, City and County government has been contacted personally, as listed below:

State:	Insurance Commissioner
	Military Department
	Department of Employment Security
	State Aviation Commission
	Department of Parole & Probation
	Department of Correction
	State Tax Commission
	Public Service Commission
	Workmen's Compensation Commission
	State Accident Fund
Baltimore City:	Superior Court
	Court of Common Pleas
	Baltimore City Court
	Circuit Court
	Circuit Court No. 2
	Probation Department
	Circuit Court—Juvenile Division
	Criminal Court
	Register of Wills
	Sheriff
	People's Court
	Park Police
	Baltimore City Police Department
	City Service Commission
	Liquor License Board
23 Counties: (Incorporated Towns)	Mayor
	County Commissioners
	Town Treasurer
	State's Attorney
	Liquor Boards
	Sheriff
	Trial Magistrates

Supervisor of Elections
Court House
Civil Defense
Bureau of Planning & Zoning
Bureau of Weights & Measures
Bureau of Assessments
Health Department
Police Department
Department of Highways
Department of Public Welfare
School Boards

This was the first such survey conducted since the inception of the Ober Law, and it established that in most cases the various departments were cooperating with the loyalty requirements to the fullest extent. In those instances where it was ascertained that the requirements were not being adhered to, the discrepancies were pointed out and immediately corrected. The Loyalty Program was explained in full, proper forms for same were provided, office personnel, files and records were brought up-to-date, etc. Thus, I would say that the loyalty provisions of the Ober Law are now being complied with one hundred percent.

We will continue the same policy of operation and enforcement of the Subversive Activities Act of 1949, thereby restricting and limiting subversive activity within the State, insuring that no subversive person shall be in the employ of the State or its political subdivisions or any State aided institution, as well as safeguarding and protecting the rights of the citizens of Maryland.

REPORT OF BERNARD S. MELNICOVE
SPECIAL ASSISTANT ATTORNEY GENERAL
MARYLAND EMPLOYMENT SECURITY BOARD

At the beginning of the year 1958, there were pending in the courts 26 cases. 23 of these cases had been instituted in 1957 and 3 cases were instituted prior to 1957. During the course of the year 1958, 37 additional cases were appealed to court, making a total of 63 pending cases. Of these 63

cases, 45 were heard and decided by the courts, and the remaining 18 cases are pending.

There were 5 cases in the Court of Appeals. 3 were tried and the remaining 2 cases have not yet been set for hearing.

There are 18 open cases; 4 in the Superior Court of Baltimore City; 2 in the Circuit Court for Carroll County; 2 in the Circuit Court for Baltimore County; 2 in the Circuit Court for Talbot County; 1 in the Circuit Court for Wicomico County; 1 in the Circuit Court for Worcester County; and 1 in the Circuit Court for Washington County.

During the year 1958 we filed in the courts one hundred and nine (109) petitions and nisi orders to enjoin employers from operating their businesses for failure to pay contributions incurred under our Act. Thirty-six (36) final injunctions were issued. We also filed in the courts fifty-five (55) petitions and nisi orders for failure to file contribution reports.

It was necessary in the administration of the law to file in the courts eighty (80) petitions and nisi orders requiring employers to appear before the Department of Employment Security, or its agent, either to offer testimony regarding past due contributions incurred under the Maryland Unemployment Compensation Law, or to produce the necessary records for the filing of contribution reports which were delinquent.

The Department obtained nineteen hundred and twenty-one (1,921) judgments during the year 1958 against delinquent taxpayers. The sum of Two Hundred Forty-nine Thousand, One Hundred Forty-three Dollars and Ninety-five Cents ($249,143.95) was collected from accounts in which judgments had been obtained, and Fifty Thousand Dollars ($50,000) was recovered in bankruptcies, receiverships and other trust proceedings. (This figure is a close estimate of that part of the "non-judgment" receipts which were recovered from the types of cases mentioned.) These collections involved the issuance of twelve hundred and seventy-one (1271) attachments and other executions, and

two hundred and five (205) claims in bankruptcy, Orphans' Court proceedings and receivership cases.

In addition to the above, it has been necessary during the course of the year to give a number of opinions concerning interpretations under the Maryland Unemployment Insurance Law and other related statutes, and to attend conferences in connection therewith.

The above functions were carried out with the cooperation and assistance of the General Counsel to the Executive Director and the General Counsel to the Board of Appeals of the Department of Employment Security.

Report of Eli Baer
Special Assistant Attorney General
For Department of Motor Vehicles

Because of the increase in the number of legal problems which have been presented to the Department of Motor Vehicles in recent years and the urgency of a large number of them, including court cases filed throughout the State, I was appointed by you on January 23, 1958, as Special Assistant Attorney General for the Department of Motor Vehicles, with an office in the Department's headquarters, to assist and advise the Department.

Accordingly, I am pleased to submit herewith my report covering the period from my appointment on January 23, 1958, until June 30, 1958.

The following matters were involved:

Questions concerning legal interpretations arising primarily under the General Motor Vehicle Laws of the State of Maryland. A system was provided whereby an index could be published as an addendum to the old and new codifications of the volume of these laws, thereby avoiding the expense of reprinting this volume annually.

Approximately forty court cases in Baltimore City and elsewhere in the State, involving appeals from revocations and suspensions of licenses, application of the Financial Responsibility Law, as well as automobile titling and registration, were handled. In addition, a number of cases involving suspensions and revocations of licenses, wherein the licenses were returned to the operators under Section 109(b) of Article 66½, which had been pending before various State's Attorneys, were finally disposed of, and defenses were prepared and filed in thirty-six cases docketed against the Commissioner.

This Assistant represented the present Commissioner and the former Commissioner in two actions against them as individuals, although arising out of acts in their official capacities, and demurrers were filed thereto. The cases are pending.

The Commissioner, his department heads and other personnel were advised regarding legal problems presented to the Department. "On-the-spot" opinions have been rendered for the guidance of clerks, unit chiefs and others of the Department. Inquiries made by the general public and members of the Bar, either by telephone or letter, were answered when possible. Legal opinions, both formal and informal, have been rendered to the Department.

Conferences were held with the various License Reviewers of the Department and they have been counseled as to their powers and duties under the Code. They were advised of the necessity of keeping a docket on all of their hearings which would be available for presentation as evidence in the event a matter should become a court case. The system of furnishing transcripts of records for use in court cases was modernized, resulting in great savings in time and money.

More than fifty forms, which had been used by the Department for many years, were revised in order to conform with the provisions of the 1957 Edition of the Annotated Code of Maryland.

Forty-six court cases were disposed of since January 23, 1958; twenty-seven legal opinions were rendered to various officials of the Department and twenty-four appeal cases are still pending.

Report of J. Howard Holzer
Special Attorney for the State Accident Fund

The present membership of the Commissioners of the State Accident Fund are: Thomas W. Offutt of Baltimore County, Chairman; Joseph D. Weiner of St. Mary's County, Vice-Chairman; C. Rutledge Turner of Dorchester County, Secretary; Mr. Abraham Watner of Baltimore City; and Dr. Robert Stofberg of Baltimore City.

Mr. Abraham Watner of Baltimore City replaced Dr. Elmer W. Sterling of Queen Anne's County as a Commissioner, effective May 24, 1958.

Mr. John W. Mitchell of Prince George's County replaced Mr. Ernest N. Cory, Jr., of Prince George's County, effective April 9, 1958. Mr. J. Howard Holzer of Baltimore City and Mr. U. Theodore Hayes of Baltimore City remained as Assistants.

Cases tried by these Assistants before the Workmen's Compensation Commission in Baltimore City, including Medical Board for Occupational Diseases, numbered 696 cases.

Mr. John W. Mitchell handled all of the cases before the Workmen's Compensation Commission, including Medical Board for Occupational Diseases, in the various counties of the State, and they numbered 227 cases.

Approximately 200 cases were disposed of by final settlement agreements.

Numerous suits were filed and are pending. Judgments were entered on delinquent accounts of the State Accident Fund's policyholders. Collections on these accounts for the year amounted to $7,997.23.

A total of $6,929.66 was received by the State Accident Fund as reimbursement on third-party cases during the year 1958.

These Assistants met with the Commissioners at most of their meetings and were available to the Fund's personnel for legal consultation during the year.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1, 1957 and Ending June 30, 1958.

Appropriations and Budget Credits:

Program .01	$125,763.69	
Program .02	17,020.00	
		$142,783.69

Program .01

Legal Counsel and Advice:

Appropriation		$125,385.00
Appearance Fees		170.55
Miscellaneous Refunds		2,228.07
Budget Credits		378.69
		$128,162.31
Appearance Fees and Miscellaneous Refunds paid into State Treasury		2,398.62
		$125,763.69

Salaries:

Attorney General	$12,000.00	
Deputy Attorney General	10,000.00	
Assistant Attorney General (4)	36,000.64	
Special Assistant Attorney General	5,500.00	
Administrative Assistant, State Law Department	6,336.00	
Stenographer-Secretary, State Law Department (3)	10,639.08	
Law Stenographer	3,842.00	
Additional Clerical Assistance	400.00	
	$84,717.72	
Communication	3,681.23	
Travel	2,352.52	
Motor Vehicle Operation and Maintenance	987.68	
Contractual Services	5,828.90	
Supplies and Materials	1,325.21	
Equipment-Replacement	4,575.50	
Equipment-Additional	3,807.83	
Fixed Charges	13,900.53	
	$36,459.40	$121,177.12
Reverted to State Treasury		$ 4,586.57

Program .02

Subversive Activities Control:

Appropriation		$ 17,020.00
Salaries:		
Special Assistant Attorney General	$ 7,471.10	
Stenographer-Secretary, State Law Department	4,423.64	
	$11,894.74	
Communication	18.00	
Travel	1,949.32	
Contractual Services	2,436.81	
Supplies & Materials	175.49	
Equipment-Replacement	420.00	
Fixed Charges	125.64	
	$ 5,125.26	$ 17,020.00
Total Funds Available:		
Program .01	$125,763.69	
Program .02	17,020.00	$142,783.69
Total Expenditures:		
Program .01	$121,177.12	
Program .02	17,020.00	$138,197.12
Reverted to State Treasury		$ 4,586.57

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGES—LICENSES—RENEWAL—LICENSES MUST BE RENEWED ON BASIS OF ORIGINAL APPLICATION —APPLICATION FOR RENEWAL EITHER INCREASING OR DECREASING THE CLASS OF BEVERAGES LICENSEE IS AUTHORIZED TO SELL MUST BE TREATED AS A NEW APPLICATION.

March 19, 1958.

Mr. Frank W. Hales, Clerk,
Circuit Court for Worcester County.

We have your recent letter stating that certain holders of beer and wine licenses have applied for renewal thereof as beer licenses only. You ask whether it is proper for you to renew the licenses on this limited basis, or whether the licensee must make a new application.

The procedure for the renewal of licenses is generally governed by Section 68 of Article 2B (1957 Code). Subsection (b) thereof provides as follows:

> "(b) *License holder not qualified for renewal; order of restriction or suspension.*—If the licensing official finds that the license holder is not qualified to obtain a renewal of the expiring license said official shall not renew said expiring license but shall issue to him by way of renewal the class or type of license for which they find him qualified. If an expiring license is subject to any order of restriction or suspension the new license shall be issued subject to said order. All applications for renewal received otherwise than as herein stated shall be treated as original applications."

The above sub-section vests in the licensing official authority to determine whether the licensee is qualified for renewal. If the licensee is not qualified, the licensing body is directed to issue by way of renewal the class or type of license for which he is found qualified. The last sentence of

this sub-section treats all applications for renewal received otherwise than as stated therein, as original applications.

The holders in question presumably qualify for renewal of their licenses. According to your letter, they desire to eliminate from their licenses the authority to sell wine because of the expense incident to federal stamps, and not because of a lack of qualification for beer and wine licenses, or by virtue of any orders of restriction or suspension. As we read sub-section (b), and particularly the last sentence thereof, the Legislature contemplated license renewal on the basis of the original application, and any application for renewal, either increasing or decreasing the class of beverages the licensee is authorized to sell, must be treated as an original application.

This result may seem harsh to a holder, otherwise qualified for renewal, who voluntarily asks for elimination of one of the beverage classes from his license, but this is a matter for legislative consideration. We are accordingly of the opinion that you may not renew the licenses in question on any basis other than the original applications, and that if the holders wish to limit their authorization, they must do so by making a new application.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

ALCOHOLIC BEVERAGES—LICENSES—EXECUTION—LIQUOR LICENSES ARE SUBJECT TO EXECUTION TO SATISFY SALES TAX INDEBTEDNESS AND AN ORDINARY JUDGMENT—SHERIFF SHOULD INFORM PROSPECTIVE PURCHASERS THAT THEY MAY NOT OPERATE UNDER LICENSE UNLESS AND UNTIL APPROVAL OF THE LIQUOR BOARD IS OBTAINED.

September 2, 1958.

Mr. Joseph C. Deegan,
Sheriff of Baltimore City,
and
Mr. Joseph Van Collum, Secretary,
Board of Liquor License Commissioners of Baltimore City.

The recent opinion of the Baltimore City Court in *Deitsch v. Board of Liquor License Commissioners of Baltimore City* (Tucker, J., Daily Record, May 6, 1958), has raised further questions regarding the right to execute upon liquor licenses. These questions may be summarized as follows: (a) whether such a license is subject to execution in order to satisfy retail sales tax indebtedness; (b) whether it may be subjected to execution in satisfaction of an ordinary judgment; and (c) whether the Sheriff, before selling such a license, is obligated to inform prospective purchasers that they may not operate under the license unless and until approval of the Liquor Board is obtained.

The *Deitsch* case upheld the right of the federal government to execute upon a liquor license to satisfy the income tax indebtedness of the licensee, pursuant to provisions of the Internal Revenue Code (Title 18, U. S. C. A., Section 6321) creating a lien upon all property and rights to property, real or personal, of the tax debtor, and providing for levy, distraint and sale thereof. The Court concluded that a license is "property" within the meaning of Section 6321, reasoning that it is something of value, and has the attributes of property. It rejected the contention that a liquor license is a mere privilege. It also rejected the contention

that the provisions of Section 72 of Article 2B (1957 Code) declaring that licenses shall not be regarded as property or as conferring property rights, removed licenses from the scope of execution, on the theory that the purpose of this Section is "to make clear that such a holder, at least insofar as the State is concerned, was not entitled to the ordinary protection of the Constitution as to property rights."

The provisions of Section 342(b), Article 81 (1958 Supp.) relating to the lien for unpaid sales taxes are substantially the same as those in the Internal Revenue Code and we have no difficulty in concluding that a liquor license is subject to execution thereunder. That Section creates a lien upon the real and personal property of the taxpayer after notice has been duly recorded in the circuit court for the county where the property is located, or in the Superior Court of Baltimore City if located in Baltimore City, and provides that the recorded lien shall have the full force and effect of a lien of judgment.

We are also of the opinion that a liquor license may be seized to satisfy an ordinary judgment. Although the authorities in other jurisdictions are not unanimous on this question, the trend appears to be in accord with this view, particularly when the license is transferable under statute. See 148 A.L.R. 492-496. As the court pointed out in the *Deitsch* case, liquor licenses may be sold or assigned pursuant to Section 74(a), Article 2B(1957 Code), subject, however, to the approval of the Board. The Court also relied upon *Rowe v. Colpoys*, 137 F. 2d 249, cert. den. 320 U. S. 783, which sustained the right of an ordinary judgment creditor to execute upon a District of Columbia license which was transferable by statute.

Since the transfer of a license is specificially declared by statute to be subject to approval by the Board under Section 74, we are of the opinion that the final question must be answered in the affirmative. The Sheriff states that the executing judgment creditor objects to communication of the requirement of Board approval to prospective purchasers, presumably because this information may adversely affect

the sale. As a matter of fundamental fairness to interested buyers, we believe that they should be informed that transfer of the license to the high bidder is conditioned upon approval by the Board in the same manner as an original application for a license must be approved.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

ALCOHOLIC BEVERAGES—LIQUOR LICENSES—RULE OF THE BOARD OF LIQUOR LICENSE COMMISSIONERS FORBIDDING THE TRANSFER OF A LIQUOR LICENSE UNLESS ALL OBLIGATIONS OF THE TRANSFEROR HAVE BEEN FULLY PAID OR AN ARRANGEMENT SATISFACTORY TO HIS CREDITORS HAS BEEN MADE, APPLIES TO TRANSFERS AT PRIVATE SALE, BUT NOT TO TRANSFERS EFFECTED THROUGH EXECUTION.

October 7, 1958.

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

This office ruled in 43 Opinions of the Attorney General, 83, that liquor licenses are subject to execution in satisfaction of ordinary judgments. Your recent letter asks whether Rule 41 of the Board is applicable to transfers of licenses pursuant to execution.

Rule 41 reads as follows:

> "No application for transfer of a license may be granted unless all obligations of the transferor (former licensee) pertaining to the licensed establishment have been fully paid or some arrangement concerning said debts and obligations, satisfactory to his creditors, has been made."

We are of the opinion that the provisions of this Rule apply to transfers at private sale, but not to those effected through execution. The Rule, of course, was promulgated before the decision in *Deitsch* v. *Board of Liquor License Commissioners* (Daily Record, May 6, 1958) recognizing the right of the federal government to execute upon liquor licenses to satisfy income tax indebtedness, and this office's ruling in 43 Opinions of the Attorney General 83, that a license is subject to execution in satisfaction of an ordinary judgment. It was manifestly designed to protect creditors of the licensee in the event of a transfer at private sale. You advise that the Board itself has administratively interpreted the Rule to exclude sales by receivers, trustees,

executors and administrators from its operation, clearly evidencing an intention to restrict its application to non-judicial private sales.

To hold that the regulation embraces transfers effected through a sheriff's sale would render the executing creditor's remedy virtually meaningless, for it is unlikely that much interest would be stirred in the sale and transfer of a liquor license contingent upon the fulfillment of its demands. We believe that such a construction of the rule would tend to deprive the creditor of a remedy which has heretofore been recognized, a result for which we can find no justification.

We are accordingly of the view that Rule 41 is inapplicable to transfers effected through execution.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

ALCOHOLIC BEVERAGES—CLASS B LICENSES—WORCESTER COUNTY—CLASS B LICENSES ARE RESTRICTED TO LOCATION WITHIN THE CORPORATE LIMITS OF OCEAN CITY.

December 16, 1958.

Mr. Frank W. Hales,
Clerk of the Circuit Court for Worcester County.

Application has been made for a Class B beer, wine and liquor license for a location in the First Election District of Worcester County. Your recent letter states that the application meets the requirements of subsections (o) and (p), Section 2, Article 2B (1957 Code), but that the premises for which the license is sought are located without the corporate limits of Ocean City. The applicant has tendered the annual license fee of $750 prescribed by Section 19, Article 2B (1957 Code), and you ask whether you should issue a license.

Until 1947, there was no provision for such licenses anywhere in Worcester County. By Chapter 501, Acts of 1947, the Legislature generally revised and re-codified Article 2B, and incorporated therein all public local laws relating to alcoholic beverages. Specifically, this enactment repealed Sections 106-124, incl., of Article 24 of the Code of Public Local Laws of Maryland (1930 Ed.), as amended by Chapter 192, Acts of 1941, relating to alcoholic beverages in Worcester County. Section 17 of Chapter 501 (now Section 19, Article 2B, 1957 Code) provided for the issuance of Class B licenses in Baltimore City, six counties, and two towns (North Beach and Chesapeake Beach) in a seventh county. The applicability clause (subsection (i)) specifically enumerated Baltimore City, the six counties and the two towns in Calvert County, but did not mention Worcester County. In the next succeeding subsection (i.e. (j)), provision was made for the issuance of an "on sale" beer, wine and liquor license confined to locations within the corporate limits of Ocean City.

In the 1951 Code (Section 19, Article 2B), subsection (j) was placed by the codifier ahead of the applicability clause

and was designated subsection (k). The applicability clause again failed to refer to Worcester County, although a footnote thereto states that "Talbot and Worcester counties should be added, as such licenses are authorized in said counties by ch. 516, 1947, and sec. 19(k) of this Article." By Chapter 648, Acts of 1953, the applicability provision was amended to read that "Such licenses shall only be issued in Baltimore City, Anne Arundel County, Baltimore County, the towns of North Beach and Chesapeake Beach in Calvert County and Cecil, Montgomery, Prince George's, Talbot, Washington and Worcester Counties," apparently in accordance with the suggestion contained in the codifier's footnote above mentioned. Except for an amendment not important here (Chapter 680, Acts of 1953), subsection (k) of Section 19 reads just as it did when first enacted as subsection (j) of Section 17 in Chapter 501, Acts of 1947. As previously noted, however, it was placed ahead of the applicability clause in the 1951 Code (Section 19, subsection (b)), as well as in the 1957 Code (Section 19, subsection (m)), and the applicability provision was broadened in 1953 to specifically enumerate Worcester County. It should be added that the limitation in the applicability provision to the towns of North Beach and Chesapeake Beach in Calvert County has been removed (Chapter 35, Acts of 1957), and subsection (d) of Section 19 relating to Calvert County has been amended so as to permit licenses to be issued throughout that county.

We feel that the legislative history of Section 19 reveals evidence of an intention on the part of the General Assembly to confine Class B licenses to Ocean City. Subsection (m) of Section 19 (1957 Code), relating to the issuance of Class B licenses in Ocean City, reads just as it did when originally enacted in 1947 as subsection (j) of Section 17 (Acts of 1947), except for an amendment not significant here. The only change in Section 19 germane to the inquiry before us is the codifier's revision of the order of that subsection in the 1951 Code so as to place the Ocean City provision ahead of the applicability clause, and the broadening of the latter clause in 1953 to include Worcester County.

The rearrangement of subsection (m) was obviously designed to place this provision in alphabetical order with those governing other political subdivisions, as well as to place it before the applicability clause. Inclusion of Worcester County in the applicability provision was similarly intended to give effect to the subsection relating to Ocean City. We find no evidence in Chapter 648 (Acts of 1953) of an intention to authorize the issuance of county-wide Class B licenses in Worcester County.

We are somewhat strengthened in these views by the legislative treatment accorded such licenses in Calvert County. When the General Assembly intended to permit the issuance of licenses throughout that county it did so by amending *both* the applicability provision (subsection (n), Section 19, 1957 Code) and subsection (d). It is thus clear that applicability is restricted to the specific geographical area authorized in the preceding subsections governing the subdivisions in question.

The use of the words "Such licenses" in the applicability clause is also significant. That phrase manifestly refers to the licenses authorized in the preceding subsections. Since Class B licenses within the corporate limits of Ocean City are the only licenses of this nature authorized under subsection (m), it must follow that *such* licenses cannot be issued for locations without those limits in Worcester County.

It is true that, under the applicability clause, Class B licenses are authorized in Baltimore City, although there is no preceding subsection dealing therewith. The Clerk of the Court of Common Pleas of Baltimore City is designated as the issuing authority of such licenses in accordance with the general provisions of Section 19 in subsection (a) thereof. Of course, Class B licenses in Baltimore City must first be approved by the Board of Liquor License Commissioners for Baltimore City in accordance with Section 29, Article 2B (1957 Code), and the rules and regulations of that body. The absence of any specific subsection governing Bal-

timore City in Section 19 may be explained by the existence of other provisions in Article 2B covering the same subject matter.

For the foregoing reasons, we are of the opinion that the application in question should be denied.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

BANKS AND BANKING

BANKS AND BANKING—INDUSTRIAL FINANCE LICENSEE—SUNDAYS AND LEGAL HOLIDAYS SHOULD NOT BE INCLUDED IN COMPUTATION OF PERIOD OF FIVE DAYS AFTER WHICH DELINQUENT CHARGE MAY BE COLLECTED.

January 27, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

A licensee under the Industrial Finance Law may collect from the borrower a delinquent charge of five cents (5¢) for each default continuing for five or more days in the payment of One Dollar ($1.00) or a fraction thereof at the time any periodical instalment is due. Article 11, Section 196(A)(3), Annotated Code of Maryland (1951 Ed.).

You inquire whether Sundays and legal holidays should be included in the computation of the period of five days after which the delinquent charge may be collected.

In our opinion, Sundays and legal holidays may not be included in the computation of the period of five days prescribed by Section 196(A)(3) of Article 11. When the period of time prescribed or allowed by statute is seven days or less, intermediate Sundays and holidays shall not be counted. Article 94, Section 2, Code (1957 Supp.). This was the common law rule in Maryland before the enactment of the statute in 1941. *American Tobacco Co. v. Strickling,* 88 Md. 500, 508-510 (1898); *Yerkes v. Board of Supervisors,* 140 Md. 455, 463 (1922); *Stiegler v. Eureka Life Ins. Co.,* 146 Md. 629, 656-657 (1925); *Ivrey v. State,* 178 Md. 638, 639 (1940). The statute has been applied to compute the period of time within which a candidate for election to public office may withdraw his candidacy and to compute the time within which an appeal to the Court of Appeals must be filed. *Pumphrey v. Stockett,* 187 Md. 318 (1946); *Fischer v. Fischer,* 193 Md. 501 (1949).

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BANKS AND BANKING—BRANCH BANK—PRINCIPAL OFFICE OF BANKING INSTITUTION IN COUNTY WHERE SATURDAY CLOSING IS PERMITTED MAY CLOSE, WHILE BRANCH OFFICE IN COUNTY WHERE SATURDAY CLOSING IS NOT PERMITTED MUST REMAIN OPEN.

May 6, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

A banking institution which has its principal office in Kent County maintains a branch office in Queen Anne's County. In Kent County, but not in Queen Anne's County, banking institutions may remain closed on Saturdays. Article 13, Section 10, Annotated Code of Maryland (1957 Ed.). In both Kent and Queen Anne's Counties banking institutions may close for business at 12:00 o'clock noon on Saturdays. Article 13, Section 13, of the Code.

The banking institution proposes that its principal office in Kent County will remain closed on certain Saturdays and you ask whether the branch office in Queen Anne's County must remain closed or may remain open for business until noon on Saturdays, even though the principal office in Kent County is closed.

In 33 Opinions of the Attorney General 100 (1948), we advised you that the branch office of a banking institution could remain open to conduct business on a Saturday when the principal office was closed. These offices were situated in different political subdivisions in each of which the banks could close on Saturday. We relied upon the holding of the Court of Appeals of Maryland in *Dean v. Eastern Shore Trust Co.*, 159 Md. 213 (1930), that branch offices of a bank are entities distinct from the parent institution for some purposes. In 31 Opinions of the Attorney General 132 (1946), we held that the main office and branch office of a banking institution are separate entities, so that one rate of interest may be paid on deposits at the main office and another rate of interest paid on deposits at the branch office. See also the cases collected in the annotations entitled

"Branch Banks" in 30 A.L.R. 927 (1924); 50 A.L.R. 1340 (1927); and 136 A.L.R. 471 (1942).

In our opinion, when the principal office and branch office of a banking institution are situated in different political subdivisions of the State, they may be regarded as separate entities to determine the applicability of the statutes which regulate banking hours on Saturdays and from which several counties are excepted. Because Queen Anne's County is excepted from the provisions of Section 10 of Article 13 of the Code, which permits banks in other counties of the State to remain closed on Saturdays, we conclude that the branch bank in Queen Anne's County must be open for business until noon on Saturday even though the principal office of the same banking institution in Kent County is closed.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BANKS AND BANKING—BORROWER'S TOTAL LIABILITY MAY NOT EXCEED TEN PERCENT (10%) OF SURPLUS AND PAID-IN CAPITAL OF LENDER EVEN IF SECURED BY MORTGAGES OF REVERSIONARY INTERESTS IN MANY GROUND RENTS.

September 8, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

The total liabilities of any person, firm or corporation to any bank or trust company for money borrowed may not at any time exceed ten per cent (10%) of the amount of the surplus and paid-in capital of the lender. Article 11, Section 91, Annotated Code of Maryland (1957 Ed.). There are exceptions which are not material to this discussion.

A bank has asked you whether it may lend money to a single borrower in excess of the legal limitation if such loans are secured by mortgages of the reversionary interests in many ground rents. Loans secured by such mortgages are not among the exceptions enumerated by the statute.

Ground rents have peculiar characteristics and mortgages of reversionary interests in ground rents are desirable security. *Owens v. Graetzel*, 149 Md. 689, 693 (1926); *Moran v. Hammersla*, 188 Md. 378, 381-382 (1947); *Kolker v. Biggs*, 203 Md. 137, 141 (1953); *Jones v. Magruder*, 42 F. Supp. 193 (D. Md. 1941); *The Maryland Ground Rent—Mysterious But Beneficial*, Frank A. Kaufman, 5 Md. Law Rev. 1 (1940). However, the additional security which may be afforded by a mortgage of the reversionary interest in a ground rent does not alter the liability of the borrower whose loan is thus secured. The statute limits the aggregate liability of a borrower without regard for the type of security for the obligation, except for the specific situations recited in the statute which do not include interests in ground rents.

In our opinion, the liability of a borrower to a bank may not exceed the limitations prescribed by Section 91 of

Article 11 of the Code, even if the borrower's obligation is secured by mortgages of the reversionary interests in many ground rents.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BANKS AND BANKING—BRANCH BANKS—A BRANCH BANK MAY NOT CEASE BUSINESS ENTIRELY DURING CERTAIN MONTHS OF THE YEAR, BUT MUST REMAIN OPEN DURING SOME PART OF EVERY BUSINESS DAY WHICH IS NOT A LEGAL HOLIDAY OR ON WHICH THE LAW DOES NOT PERMIT BANKS TO CLOSE.

November 19, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

A bank on the Eastern Shore of Maryland operates a branch in a neighboring town. The branch is small and is maintained in leased space in a store to conserve operating expense. The store's business in the town is seasonal and it proposes to close when business is diminished during the months of December to March, inclusive. If the branch bank may not close during these months it must obtain other quarters. The managers of the Bank's business have concluded that the cost of operation in other quarters would be too expensive to justify the operation of the branch throughout the year. If the branch bank may not close when the store is closed, the bank desires to discontinue entirely the operation of the branch bank.

You have asked whether you may permit the bank to suspend the operation of its branch office during the months of December to March, inclusive, in each year.

The relationship between a parent bank and its branch bank is that of principal and agent for most purposes, but a branch office of a bank is an entity distinct from the principal office for some purposes. *Dean v. Eastern Shore Trust Company*, 159 Md. 213, 217 (1930). In 31 Opinions of the Attorney General 132, (1946), this office concluded that the main office and branch office of a banking institution are separate entities so that one rate of interest may be paid on deposits at the main office and another rate of interest paid on deposits at the branch office. In deciding that a branch bank in a county where banks may close on Saturday may

remain open when the parent bank is closed on Saturday we considered the branch and the parent as separate entities. 33 Opinions of the Attorney General 100 (1948).

In an opinion in 43 Opinions of the Attorney General, 93, we concluded that a branch bank is so separate from the parent bank that the branch bank *must* remain open on Saturday, when the parent bank was closed, because the law did not permit banking institutions to close before noon on Saturday in the county where the branch was located. The law in the county where the principal office was located permitted closing on Saturday.

Banks must be open to conduct business during some part of every business day which is not a legal holiday or on which the law does not permit banks to elect to close. Article 13, Sections 9-13, inclusive, Annotated Code of Maryland (1957 edition) ; 31 Opinions of the Attorney General 60 (1946) ; II Paton's Digest of Legal Opinions, page 2013, opinion 1:2. In order to permit this branch bank to cease business from December to March in each year, we would have to consider the parent and the branch as a single banking institution. We are not able to reach that conclusion in the face of our previous opinions on the hours and days when branch banks may be open or closed which have considered the branch and parent banks as separate entities.

In our opinion, the branch bank may not cease the conduct of business from December to March, inclusive, in each year but may only close during the hours and on the days when the statutes permit banking institutions to close in the county where the branch bank is located.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BANKS AND BANKING—BOARD OF DIRECTORS—VACANCY MUST BE FILLED PROMPTLY BY REMAINING DIRECTORS —ARTICLE 11, SECTION 34, OF THE ANNOTATED CODE OF MARYLAND.

November 25, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

A by-law of a bank chartered under the laws of Maryland requires that there be at least six and not more than nine members of the board of directors of the bank. Nine directors were elected at the most recent annual meeting of the stockholders of the bank in January, 1958. Since then one of the directors has died.

You have asked whether the vacancy on the board of directors must be filled before the next annual meeting of the holders of stock of the bank.

Section 34 of Article 11 of the Annotated Code of Maryland (1957 Ed.) provides that " . . . Any vacancy in the board of directors (of a bank subject to your supervision) shall be filled by the board, and the directors so appointed shall hold office until the next election . . . ".

The officers and the remaining directors of the bank have expressed their opinion that the affairs of the bank will be governed well by eight directors until the next annual meeting of the stockholders. Counsel for the bank urges that it is not mandatory to choose another director to fill the vacancy. He relies upon the opinion of this office in 19 Opinions of the Attorney General 176 (1934) which stated that a similar statutory provision for filling vacancies on the board of directors of a trust company is directory and not mandatory. That opinion relied upon summaries of the law applicable to general business corporations. We do not think it gave proper consideration to the applicable statute, Section 60 of Article 11 of the Code.

In the very next year, the Attorney General advised that the statutory provision pertinent in this situation is man-

datory rather than directory. He concluded that a vacancy on the board of directors of a bank must be filled promptly by the remaining directors and may not be delayed until the next annual meeting of stockholders. 20 Opinions of the Attorney General 164 (1935).

Whether a particular provision of the statute is mandatory or directory depends upon the intent of the legislators. *State v. McNay*, 100 Md. 622, 632 (1905); *Bond v. Mayor and City Council of Baltimore*, 118 Md. 159, 166-167 (1912). The use of the word "shall" in the statute is a strong indication that the Legislature intended that the statutory provision should be mandatory. *County Commissioners of Dorchester County v. Meekins*, 50 Md. 28, 45 (1873).

If we now had any doubt of the legislative intent, it would be dispelled by the acquiescence of the legislators in the interpretation of the statute by this office and your office since 1935. In our opinion, the vacancy created on the board of directors of the bank must be filled promptly by the remaining directors.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BANKS AND BANKING—INDUSTRIAL FINANCE LAW—WHEN BLANKS LEFT IN INSTRUMENTS TO BE FILLED IN AFTER EXECUTION.

December 8, 1958.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

A licensee under the Maryland Industrial Finance Law has advised you that when a husband or a wife inquires alone about a loan to him or to her and spouse, the licensee gives him or her a promissory note in which the provisions which state the amount of the monthly payments, the service charge and the discount are not completed, but are in blank. The amount of the proposed loan is usually written in the form of the note but the other variable terms are not complete. The licensee says that this is done because often the spouse who inquires is not certain of the exact amount which the other spouse desires to borrow. The applying spouse then discusses the loan and the promissory note with his or her wife or husband and returns with the signature of the absent spouse upon the promissory note. When the applicant returns to the licensee's office, the blanks in the note are completed before the second spouse signs the note. If the amount to be borrowed is changed, this part of the note, which may have been completed upon the original visit, is changed and the husband or wife who returns the note initials this change.

You have inquired whether this practice is prohibited by the provision that no licensee under the Maryland Industrial Finance Law shall take "any instrument in which blanks are left to be filled in after execution". Article 11, Section 198, Annotated Code of Maryland (1957 Ed.).

In 1935 the Attorney General concluded that a similar practice was not prohibited by the provision of the Petty Loan Act which enjoined a licensee from taking "any instrument in which the blanks are left to be filled after execution". Article 58A, Section 16, Annotated Code of Maryland (1924 Ed.) ; 20 Opinions of the Attorney General 683 and 686 (1935). The same conclusion has been reached by courts

of other jurisdictions. *Trustees System Co. of Newark v. Stoll,* 13 N. J. Misc. Rep. 400, 179 Atl. 372 (1935); *Domestic Finance Corp. v. Williams,* 174 Misc. 227, 20 N. Y. Supp. 2d 467 (1940). See also *Columbus Postal Employees Credit Union, Inc. v. Mitchell,* 62 Ohio App. 343, 23 N.E. 2d 989 (1939), modified on another ground on rehearing, 63 Ohio App. 281, 26 N.E. 2d 593 (1940).

In our opinion this practice by licensees under the Maryland Industrial Finance Law is not prohibited by Section 198 of Article 11 of the Code. The instrument is only partly executed when the first spouse signs. It is not wholly executed until finally completed and signed by both borrowers.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BOARD OF PSYCHOLOGY EXAMINERS

BOARD OF PSYCHOLOGY EXAMINERS—OFFICERS—APPOINTMENT BY GOVERNOR—TERM OF OFFICE OF OFFICERS APPOINTED BY GOVERNOR DURING RECESS OF SENATE BUT SUBJECT TO ADVICE AND CONSENT OF SENATE, ENDS AT CONCLUSION OF NEXT SESSION OF SENATE WHEN SENATE FAILS TO CONFIRM OR REJECT APPOINTMENTS AND GOVERNOR MAY RE-NOMINATE SAME APPOINTEES.

April 15, 1958.

Hon. Theodore R. McKeldin,
Governor of Maryland.

Chapter 748 of the Laws of Maryland of 1957, which is codified as Sections 618-644, inclusive, of Article 43 of the Annotated Code of Maryland (1957 Ed.) and which may be cited as the "Psychologists' Certification Act", created the Board of Examiners of Psychologists and charged them with the duty of administering the Act. Section 621 of Article 43 of the Code provides that the Board shall consist of five psychologists who shall be appointed by the Governor, with the advice and consent of the Senate of Maryland, from a list of nominees presented by the Maryland Psychological Association, Inc. The law became effective on July 1, 1957, and the first members of the Board were appointed by you on July 1, 1957, to serve for terms of office prescribed by the statute. Doctors Ross and Waldrop were appointed for terms of one year; Doctors Imber and Roseman were appointed for terms of two years; and Doctor Carter was appointed for a term of three years from July 1, 1957. Section 621 of Article 43 of the Code further provides that at the expiration of the term of each member of the Board, you shall appoint his successor for a term of three years. The first members of the Board properly qualified by taking the constitutional oath of office.

The General Assembly of Maryland next convened after these appointments were made, on February 5, 1958, and you submitted these appointments to the Senate of Maryland for approval. The Senate adjourned without approving or rejecting these appointments.

You have asked us to advise you whether the members of the Board appointed by you on July 1, 1957, continue to hold their office. You have further asked us to advise you whether you may reappoint the same persons to serve on the Board for the unexpired staggered terms if they no longer hold office under the original appointments.

Section 11 of Article II of the Constitution of Maryland provides as follows:

> "In case of any vacancy during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force *until the end of the next session of the Legislature,* or until some other person is appointed to the same office, whichever shall first occur; and the nomination of the person thus appointed during the recess, or of some other person in his place, shall be made to the Senate on the first day of the next regular meeting of the Senate." (Emphasis supplied.)

In *Sappington v. Slade,* 91 Md. 640 (1900), the Court of Appeals held that the term of office of an officer appointed by the Governor subject to confirmation by the Senate terminated at the expiration of the next session of the General Assembly if the appointment was not confirmed by the Senate.

In our opinion, the terms of office of the members of the Board appointed by you on July 1, 1957, expired when the Senate adjourned its regular session in 1958 *sine die* without confirming these appointments.

Section 12 of Article II of the Constitution of Maryland provides as follows:

> "No person, *after being rejected by the Senate,* shall be again nominated for the same office at the same Session, unless at the request of the Senate; or, be appointed to the same office during the recess of the Legislature." (Emphasis supplied.)

We have not found in the Constitution of Maryland or the statutes of Maryland any prohibition against reappointment of a person whose initial appointment has not been confirmed by the Senate. Section 12 of Article II of the Constitution bars reappointment of a person whose nomination has been rejected by the Senate, but does not prohibit reappointment of a person whose original nomination was not acted upon by the Senate, as in this case.

In our opinion, the same five psychologists who were originally appointed by you on July 1, 1957, may be reappointed to serve on the State Board of Examiners of Psychologists if their names are included in the list of nominees presented to you by the Maryland Psychological Association, Inc. You should request another list of nominees from the Maryland Psychological Association, Inc.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

BUDGET

BUDGET AND PROCUREMENT—MARYLAND PORT AUTHORITY NOT SUBJECT TO PROCEDURES OF PURCHASING BUREAU IN CERTAIN PURCHASES OF PROPERTY.

July 22, 1958.

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

You have recently asked whether ordinary purchases of property by the Maryland Port Authority should be subject to the procedures of the Purchasing Bureau of the Department of Budget and Procurement by reason of the provisions of Article 15A, Section 29, Annotated Code of Maryland (1957 Ed.).

We have previously discussed the nature and function of the Maryland Port Authority at some length. In an informal opinion dated May 1, 1956, we advised the State Commissioner of Personnel that employees of the Authority were subject to the conditions of the Merit System but not to those of the Standard Salary Board. In an opinion in 41 Opinions of Attorney General 301, we advised the Chairman of the Authority (1) that the Authority was not subject to preliminary budget procedure, and (2) that the Authority was not subject to the control and supervision of the Department of Public Improvements.

We do not believe it is necessary to repeat the discussion in our opinion 41 Opinions of Attorney General 301, as to the autonomy which the Legislature apparently intended to give the Authority. In our discussion of the matter of budget in that opinion, we pointed out that it appeared to be the legislative intent that the Authority be allowed to budget its funds as it alone should see fit, and that the Legislature indicated that it would be satisfied with the Authority's annual report. Amplifying this opinion and reiterating that the expenditure of certain funds may be subject to certain conditions and specific purposes set forth in Article 62B, we herewith advise you that it is our further

opinion that it was apparently not the intent of the Legislature to make purchases by the Maryland Port Authority subject to the procedure set forth in Article 15A, Section 29, 1957 Code. This purchasing power is not without limitation in certain specific areas, such as the purchase by the Authority of property already owned by the State of Maryland, which would be subject to the consent of the Board of Public Works under the provisions of Section 6(d).

In the future, if the Maryland Port Authority in a particular case should ask the Bureau of Purchasing to handle a specific purchase for it, we see no reason why the Bureau of Purchasing should not do so. However, we recommend that the Bureau require the Authority to agree that it will comply with all of the rules, regulations and practices of the Bureau and will be bound by the Bureau's action in that particular purchase. Otherwise, the work of the Bureau in such a situation would be useless and a waste of the State's time and money if the Authority were not bound by the Bureau's action and simply chose to disregard it when it was completed.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

CLERKS OF COURT

CLERKS OF COURT—RECORDING RELEASES OF MORTGAGES—LONG FORM RELEASES OF MORTGAGES MUST BE INDEXED AMONG THE LAND RECORDS—SHORT FORM RELEASES OF MORTGAGES ARE NOT REQUIRED TO BE INDEXED—FEES FOR INDEXING NAMES ON LONG FORM RELEASES.

January 13, 1958.

Mr. George L. Byerly, Clerk,
Circuit Court for Baltimore County.

You have asked whether or not long and short form releases of mortgages and deeds of trust must be indexed by the Clerks of Court when such releases are recorded among the Land Records. You inform us that in one county long form releases are not presently being indexed, and that in many of the counties short form releases are not being indexed by the Clerks of Court.

Article 17, Section 67 of the Annotated Code of Maryland (1957 Supp.), prescribing some of the duties of the Clerks, reads as follows:

> "They shall make a full and complete general alphabetical index (unless the same shall have already been done) in a book or books, well bound for that purpose, of all deeds, mortgages, bills of sale, short assignments of mortgages, mechanics' liens, and other conveyances of record in their respective offices, which index shall be both in the names of each and all the grantors, bargainors, donors, mortgagors or assignors, and each and all of the grantees, bargainees, donees, mortgagees, or assignees, and shall refer to the book and page of the record of the several conveyances designating the same. The said clerks shall also make a similar full and complete alphabetical index of all chattel records in a well bound book or books, which index shall be in the names of each and all grantors and each and all grantees. Provided, however, that the provisions of this section shall be deemed satisfied,

with respect to an index for mechanics' liens, if said clerks shall maintain such index in the mechanics' liens docket or books."

We are of the opinion that the words "and other conveyances of record" in the statute were intended to include all separate instruments recorded among the land records and do include long form releases of mortgages and deeds of trust.

A mortgage is an absolute conveyance of title to realty, subject to the condition that the conveyance become void upon the payment in full by the mortgagor of the debt secured thereby. *Bank of Commerce v. Lanahan,* 45 Md. 396. The mortgagee becomes the legal owner of the property, *Williams v. Safe Deposit & Trust Co. of Baltimore,* 167 Md. 499; *Kramer v. United States,* 190 F. 2d 712. The long form of release is a separate deed of grant by which the mortgagee reconveys the title to the realty to the mortgagor. It must be executed with the same formalities as a deed. It is an entirely separate instrument from the original mortgage or deed of trust itself, and is recorded in a different place among the Land Records than is the mortgage or deed of trust which it releases. A long form release of a mortgage has been held to be a conveyance. *Gately v. Gately,* 169 N.Y.S. 280; *Palmer v. Bates,* 22 Minn. 532; *Bacon v. Van Schoenhoven,* 87 N.Y. 446; *Baker v. Thomas,* 15 N.Y.S. 359.

Section 48 of Article 21, Annotated Code of Maryland (1951 Ed.), does provide that a memorandum of the place in the Land Records where a long form deed of release is recorded shall be made by the Clerk of Court in the margin of the record of the original paper. Should the Clerk make an error in entering or fail to enter the required memorandum, it would be virtually impossible to locate the release. Indexing such an instrument would also enable a person to find it without first going back and looking at the margin of the record of the original instrument.

A short form release of a mortgage has the same effect and accomplishes the same purpose as a long form release of a mortgage. It, however, is not a separate conveyance as

is the long form of release. Section 42, Article 21, Code (1957 Supp.), provides for it to be made in the following form:

> "I hereby release the above (or within) mortgage (or deed of trust).
>
> "Witness my hand and seal this.....day of.....
>
> .....(SEAL)"

Such release may be written by the mortgagee or trustee under the deed of trust upon the record in the office where the original instrument is recorded in a blank space left at the foot of the record of the original instrument for that purpose by the Clerk as provided by Section 43, Article 21, Code (1957 Supp.), provided the same be attested by the Clerk; or it may be endorsed on the original mortgage or deed of trust itself by the mortgagee or the trustee under the deed of trust, in which case the Clerk is required to record the release in the space provided at the foot of the record of the original instrument in the Land Records and to retain the original for a period of 25 years thereafter, as provided by Sections 44 and 45, Article 21, Code (1957 Supp.). The short form of release becomes part of the original instrument among the Land Records and is not a separate conveyance within the meaning of Section 67, Article 17. It is our opinion that the Legislature did not intend it to be indexed. There is no purpose to be accomplished by requiring it to be indexed because where it is recorded anyone can find it simply by looking at the original instrument.

You are, therefore, advised that long form releases of mortgages and deeds of trust must be indexed by the Clerks of Court, but that short form releases are not required to be indexed.

You also ask what you should charge for indexing the long form releases of mortgages and deeds of trust. Article 36, Section 12 (13), (1951 Code,) provides that the Clerk of Court shall charge 25c for each index. Section 12A, Article 36, Code (1957 Supp.), provides that the Clerk of any court

in this State, with the approval of the State Comptroller, may charge an additional amount not in excess of 50% of the amount specified in Section 12, provided that if any specified charge is for an amount less than 50c, a minimum of 50c may be made therefor. We have previously ruled in 42 Opinions of the Attorney General 114, that the charges must be uniform in all the offices of the Clerks of Court throughout the State and that if any one Clerk of Court increased his fees, all others would have to do likewise. Since the Comptroller has already approved the increased charge for some of the Clerks of Court, all the Clerks must now make the minimum charge of 50c for each name indexed.

C. FERDINAND SYBERT, *Attorney General.*

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

CLERKS OF COURT—NOTARY PUBLIC—CLERKS OF COURT NEED NOT KEEP ON RECORD A COMPLETE COPY OF A NOTARY'S COMMISSION.

March 19, 1958.

Mr. Frank W. Hales, Clerk,
Circuit Court for Worcester County.

In your recent letter you ask whether or not it is necessary for you as Clerk of Court to record and keep on file a complete copy of all commissions issued by the Governor to Notaries Public.

Article 41, Section 86, Annotated Code of Maryland (1957 Ed.) provides that the Secretary of State shall record in a book in his office all commissions issued by the Governor to civil officers of the State and transmit the commissions to the Clerks of the several Circuit Courts for the counties. Article 17, Section 70 provides that the Clerks of Court, upon receipt of all such commissions from the Secretary of State, shall immediately deliver the same to the persons to whom they are directed. Article 68, Section 1 provides that a Notary Public shall take the oath of office before the Clerk of the Circuit Court for his county, and that each Notary Public shall pay 50c to the Clerk for the registration of his name and address in that Clerk's office. Article 70, Section 7 provides that all other officers, elected or appointed to any office of trust or profit under the Constitution and laws of the State of Maryland, shall take and subscribe the oath prescribed by the Constitution before the Clerk of the Circuit Court in their home county.

A Notary Public is an officer who holds an office of profit under the provisions of Article IV, Section 45 of the Constitution of Maryland. See 13 Opinions of the Attorney General 209, 214; 20 Opinions of the Attorney General 584, 585; 22 Opinions of the Attorney General 470, 473; 24 Opinions of the Attorney General 610, 616; 26 Opinions of the Attorney General 281.

Article 70, Section 8, Code, reads as follows:

> "The said clerks shall each procure and keep in his office a well-bound book to be called a test book, in which shall be printed or conspicuously written the oaths aforesaid, and every person taking or subscribing the same shall annex to his signature the title of the office to which he shall have been elected or appointed and the date of his signature."

Article 17, Section 72, reads as follows:

> "Each clerk of the circuit court for the counties, and the Superior Court of Baltimore City, shall, when required to do so by any person, give a certificate, under the seal of his office, of the qualification of any public officer who has taken and subscribed the oaths of office before him, or whose oath of office is recorded in his office."

I have found nothing in the law which requires that an exact copy of the actual commission itself, issued by the Governor to a Notary Public, be recorded by the Clerk of Court among the records of his office, and, consequently, I am of the opinion that it is not necessary that he do so. It is quite evident that the statutes require the Clerks of Court to keep a record of all civil commissions issued through their offices, including those issued to Notaries Public, and a record of all oaths administered to such officers by them. The Clerk must keep the test book containing the oath of office subscribed to by the Notaries Public, and a record of their names and addresses, as provided in Article 68, Section 1.

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

CLERKS OF COURT—INSTRUMENTS WHICH DO NOT COMPLY WITH THE PROVISIONS OF SECTION 51, ARTICLE 17, ANNOTATED CODE OF MARYLAND (1957 EDITION), ARE STILL TO BE RECORDED—CLERKS ARE TO CHARGE THREE TIMES NORMAL FEE TO RECORD SAME.

July 28, 1958.

Mr. W. Waverly Webb, Clerk,
Circuit Court for Prince George's County.

In your recent letter you have asked whether or not you should accept instruments for recording which are printed in blue letters and upon white paper, in the light of Section 51 of Article 17, Annotated Code of Maryland (1957 Ed.), after the effective date of that statute, which is January 1, 1959. Section 51 was passed as Chapter 95 of the 1957 session laws and reads as follows:

> "Any person, firm or corporation offering for recordation in the Clerk's office of the Superior Court of Baltimore City, or in the Clerk's offices of the Circuit Courts for the several counties, any deed, mortgage, lease, agreement, conditional sales contract, chattel mortgage, or any other recordable instrument upon a printed form shall cause said printed form to be printed in not less than eight-point type, in black letters and upon white paper of sufficient weight and thickness as to be clearly readable. If such recordable instrument shall be wholly typewritten or typewritten on a printed form, the typewriting shall be in black letters, in not less than elite type and upon white paper of sufficient weight or thickness as to be clearly readable. Provided, however, that the provisions relating to the size type and color shall not apply to manuscript covers or backs customarily used on documents offered for recording. The recording charges for any such instrument not conforming to the requirements of this section but offered for recordation shall be three times the charge now allowed by law for the recording of the

same. In those clerks' offices where such instruments are photostated or microfilmed no instrument upon which a rider or riders have been placed or attached in such a manner as to obscure, hide or cover any other part of the instrument shall be offered or received for record and no instrument not otherwise readily subject to photostating or microfilming shall be offered or received for record until a charge equal to three times the fee now allowed by law for the recording of the same shall have been paid to such clerk.

"Sec. 2. And be it further enacted, That this Act shall take effect January 1, 1959."

The statute does not forbid the recording of instruments which do not comply with the requirements of its provisions, but, on the contrary, it provides that the Clerk shall charge for recording such non-complying instruments three times the recording charge currently allowed by law for recording instruments which do comply with its provisions. It is quite evident from reading Section 51 that the Legislature intended that the Clerks of Court continue to record instruments which do not comply with the terms of the statute.

It is our opinion that the instruments must be accepted by you for recording, but that you are required to charge three times the ordinary recording charge for such instruments.

C. FERDINAND SYBERT, *Attorney General.*

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

CLERKS OF COURT—TAXATION—RECORDATION TAX STAMPS ONLY PAYABLE ONCE ON FULL PURCHASE PRICE WHEN PROPERTY DEEDED TO A STRAW PARTY—IF PROPERTY IS REFINANCED THEN TAX PAYABLE ON AMOUNT OF NEW DEED OF TRUST.

September 25, 1958.

Mr. W. Waverly Webb, Clerk,
Circuit Court for Prince George's County.

In your recent letter you have asked whether or not recordation tax stamps are required to be placed on all deeds when the facts are as follows:

The A corporation owns a tract of land upon which it has erected 50 homes. It has contracted to sell them in groups of ten to each of five different co-op corporations. The A corporation will convey ten lots with the improvements thereon to the B co-op corporation for a total consideration of $123,000. At the time of the conveyance, $4,200 will be paid in cash and the balance will be secured by a purchase money deed of trust in the total amount of $118,800. The B co-op corporation will have ten members who will have paid into the corporation the $4,200 in cash prior to the time that the co-op corporation actually receives the conveyance of the ten lots from the A corporation. The co-op corporation will, within ten days after it receives the lots, transfer one of them to each of the ten members of the co-op corporation, who will at that time individually execute a deed of trust on their respective lot to secure one-tenth of the amount of $118,800. The original blanket purchase money deed of trust will then be released of record.

Article 81, Section 277 (a) and (b), Annotated Code of Maryland (1957 Ed.) imposes a tax based upon the actual consideration paid or to be paid, or upon the amount of debt secured, upon *every instrument of writing* conveying title or creating liens or encumbrances upon real or personal property offered for record and recorded in this State with the Clerks of the Circuit Courts, and further provides that

the term "instruments of writing" shall include deeds and deeds of trust.

It is my opinion that no recordation tax stamps are required on the deed of transfer from the B co-op corporation to its members. It appears that the B co-op corporation is only acting as a straw party in the transaction for the real purchasers, and that no money is passing between the parties at the time of the second transfer. Article 81, Section 277 imposes the recordation tax only on the actual consideration paid or to be paid for the transfer of title to property and if there is no consideration for the transfer, then there is no tax payable. 31 Opinions of the Attorney General 70; 22 Opinions of the Attorney General 701, 712. A straw party is a mere conduit for convenience in holding and passing of title and acts in the capacity of a trustee for the real purchaser. *Van Raalte v. Epstein,* (Mo.) 99 S.W. 1077. The deed from the A corporation (the real vendor) to the B co-op corporation (the straw party) however, is required to have recordation tax stamps thereon for the total amount of the actual consideration ($123,000) being paid by the individual members of the co-op (the real vendees) for the properties. The individual members of the co-op corporation are the ones who will pay the tax on the deed to the straw party and it is my opinion that the Legislature did not intend that they pay the tax on the same transaction twice. 23 Opinions of the Attorney General 574.

The Deeds of Trust given by the individual members of the B co-op corporation, however, appear to me each to be subject to the tax. I am aware that Section 277(h) reads as follows:

> "No tax shall be required for the recordation of any instrument securing a debt that merely confirms, corrects, modifies or supplements an instrument previously recorded, or conveys or pledges property in addition to, or in substitution for the property originally conveyed or pledged, if such supplemental instrument does not increase the

amount of the debt secured by the instrument previously recorded."

However, in construing this very Section in *Hammond v. Philadelphia Elec. P. Co.*, 192 Md. 179 at 190, the Court of Appeals said if the new financing is accomplished without the need of the original mortgage, then the new instrument is not supplemental, but original, and the tax must be paid.

The new deeds of trust given by the individual members, upon the transfer of the property to them from the co-op corporation, represent entirely new and separate transactions. They do not confirm, correct, modify or supplement an instrument previously recorded, or convey additional property in substitution for property originally conveyed or pledged. They are entirely new instruments which establish new obligations without the use and need of the original deed of trust. There is a new and original financing of each piece of property. The individual deed of trust placed thereon by each member is in substitution for the original deed of trust rather than in confirmation, correction, modification or supplementation thereof, and will, therefore, be subject to the recordation tax.

The result reached in this opinion may seem harsh, but no matter how I feel about the matter, I am bound to follow the law as I find it. If the law is to be changed, it must be done by the General Assembly and not by a member of the staff of the State Law Department.

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

CLERKS OF COURT—DEPUTY CLERK'S TERM IS CO-EXISTENT WITH CLERK'S TERM—MUST BE APPOINTED AND SWORN IN AT BEGINNING OF EACH TERM.

November 10, 1958.

Mr. George T. Cromwell, Clerk,
Circuit Court for Anne Arundel County.

In your recent letter you have asked whether or not it is necessary to reappoint and swear in all deputy clerks of court at the beginning of each term of office of the Clerk of Court.

Section 26, Article IV, Maryland Constitution, provides that the Clerks of Courts for the Counties shall appoint, subject to the confirmation of the Judges of their respective courts, as many deputies under them as the said Judges shall deem necessary to perform, together with themselves, the duties of the said office, which deputies shall be removable by the said Judges for incompetency or neglect of duty.

The Constitution and statutes do not provide the term of the deputy clerks of court, but it has been the custom throughout this State to reappoint and swear in the deputy clerks of court for the same term of office as the Clerk. A deputy clerk's term is co-existent with that of the Clerk of Court appointing him and is subject to renewal every four years, the same as that of the Clerk. If this were not so, the deputies could not receive increases in salary under the provisions of Article III, Section 35 of the Maryland Constitution, since they have been held to be public officers by the Court of Appeals in *State v. Turner*, 101 Md. 584, and by this office in a number of opinions. See 13 Opinions of the Attorney General 209; 16 Opinions of the Attorney General 268; 20 Opinions of the Attorney General 584; 26 Opinions of the Attorney General 337; and 37 Opinions of the Attorney General 183.

C. FERDINAND SYBERT, *Attorney General.*

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

CLERKS OF COURT—TAXATION—RECORDATION TAX PAYABLE ON ASSIGNMENTS OF LEASE AND ON REASSIGNMENTS OF LEASE.

November 13, 1958.

Mr. Joseph W. T. Smith, Clerk,
Circuit Court for Wicomico County.

In your recent letter you ask whether or not it is necessary to affix recordation tax stamps to an assignment of a lease. You tell us that the B corporation, as lessee, leased certain real estate from F and wife, as lessors, in 1955. Recordation tax stamps were affixed to that lease. The B corporation later assigned the lease to K and wife and recorded the same without affixing any recordation tax stamps to the same. K and wife have now reassigned the lease to the B corporation, and the reassignment has been presented to you for recordation. You want to know whether such reassignment of lease must have recordation tax stamps affixed to it before you may accept it for recording. We do not find that this question has been answered by this office before.

Pursuant to Section 277, Article 81, Annotated Code of Maryland (1957 Ed.), a tax, based upon the actual consideration paid or to be paid, is imposed upon every instrument of writing conveying title to real or personal property offered for record and recorded with a Clerk of the Circuit Court in this State. The statute further provides that the term "instruments of writing" shall include deeds, mortgages, chattel mortgages, bills of sale, leases, deeds of trust, contracts and agreements, but shall not include mechanics' liens, crop liens, purchase money mortgages, assignments of mortgages, conditional sales contracts, judgments, releases or orders of satisfaction. An assignment of lease is clearly an instrument which conveys an interest in real property. Section 119, Tiffany, *Real Property* (3rd Ed.).

You will notice that assignments of leases are not exempted from the tax by the statute as are so many other instruments, and since it is an established rule of law that tax exemptions are to be strictly construed, we are of the

opinion that the assignment of lease in question is subject to the recordation tax if any consideration was paid for the same. *Steiner Construction Co. v. Comptroller*, 209 Md. 453; *Levin v. B. & O. R. R.*, 179 Md. 125; *Celanese Corp. v. Davis*, 186 Md. 463; *Mayor & City Council of Baltimore v. Price*, 168 Md. 174.

The fact that the tax was paid upon recording the lease has no bearing on the assignment of lease since it is not part of the original leasing agreement, but is an entirely separate and distinct business transaction. Anything paid by the B corporation to K and wife for the reassignment would be an entirely new consideration passing between the parties, and we are of the opinion that recordation tax stamps must be affixed to such assignment of lease. If, of course, no consideration was actually paid for the reassignment of the lease, then the instrument need have no recordation tax stamps affixed thereto. 31 Opinions of the Attorney General 70; 24 Opinions of the Attorney General 965; 22 Opinions of the Attorney General 700.

It might also be pointed out that the parties should be required to affix stamps to the assignment of lease from the B corporation to K and wife, since the period of limitations has not expired. See Article 81, Section 212, Code (1957 Ed.).

C. FERDINAND SYBERT, *Attorney General.*

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

CLERKS OF COURT—OATHS—CLERK SHOULD NOT ADMINISTER OATH OF OFFICE TO NEWLY ELECTED COUNTY COMMISSIONER UNTIL COMMISSION ISSUED BY GOVERNOR.

November 14, 1958.

Mr. George T. Cromwell,
Clerk of the Circuit Court for
Anne Arundel County.

In your letter of November 13, 1958, you have asked us to advise you whether you should administer the oath of office to those persons who apparently were elected County Commissioners of Anne Arundel County at the general election, November 4, 1958, as soon as they have filed their accounts of campaign receipts and expenditures or whether you must wait until the Governor has delivered their commissions. We herewith advise you that it is our opinion that you should not swear in these candidates until their commissions have been issued. Our reasons are as follows:

Article 33, Section 134 of the Annotated Code of Maryland (1957 Edition) requires the Board of Supervisors of Elections to meet as a Board of Canvassers on the Thursday following the election. Section 135 requires them to add up the votes and make separate statements of votes for (1) the office of Governor (2) all other State officers (3) Presidential electors (4) Judges of Courts (5) Senators and Delegates to the General Assembly (6) any other office and (7) for or against any proposition submitted to a vote of the people.

Section 136 (a) then requires the Board of Canvassers to submit these statements to the Clerk of the Circuit Court who is, in turn, required to send a copy to the Secretary of State. Section 136 (c), under the sub-heading "State and Federal Offices" requires the Clerk of the Circuit Court to transmit certified copies of the statements from the Board of Canvassers to the Governor, Secretary of State and State Treasurer. Section 136 (d) provides:

> "*Local offices.*—The Clerk of the court shall issue and deliver to each person having the highest num-

> ber of votes for the several county and city offices a certificate of election."

This section does not, however, specify when the certificate should be issued.

Section 137, entitled "Declaration of election" provides:

> "In the canvass of votes by the canvassing board for the city or county herein provided, said board shall, unless otherwise provided in the Constitution of this State, declare who is elected or nominated, as the case may be, to or for any city or county office or to or for any office voted for only within the territory of such city or county."

Article IV, Section 11 of the Constitution of Maryland requires the Clerk of the Circuit Court to certify the "election for Judges . . . and all elections for Clerks, Registers of Wills and other officers, provided in this Constitution, except State's Attorneys" and to make returns to the Governor "who shall issue commissions to the different persons for the offices to which they shall have been, respectively, elected . . ."

Article VII, Section 1, of the Constitution of Maryland provides for the election of County Commissioners. The County Commissioners would thus fall within the category of "other officers, provided in this Constitution" for whom commissions must be issued by the Governor under Article IV, Section 11.

In the case of *Magruder* v. *Tuck*, 25 Md. 217 (1866), a mandamus proceeding involving the office of Judge, the Court of Appeals pointed out that under the Maryland Constitution a commission must be issued to the person elected to the office of Judge. The Court of Appeals then flatly stated: *"No clerk has a right to qualify a person before he has been commissioned." Supra*, 25 Md. 217, 218. (Emphasis supplied.) In reaching its decision that the petitioner was not entitled to the writ of mandamus, the Court of Appeals stated that Article 68, Section 10 of the 1860 Code, dealing with official oaths, indicated that a commission was a pre-

requisite where the law or Constitution required one to be issued. This section concerning official oaths now appears in substantially the same language as Article 70, Section 11, (1957 Code.)

Since the Constitution, as above set forth, requires that a County Commissioner be issued a commission by the Governor and since the Court of Appeals in the *Magruder* case, *supra* has unequivocally stated that a clerk may not qualify a person until he has received his commission, we herewith advise you that you should not swear in any of the apparently successful candidates for the office of County Commissioner until after the Governor has issued the respective commissions in due course, notwithstanding the provisions of Article 33, Section 136 (d) (1957 Code) relating to the issuance by your office of certificates of election for local offices.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

CLERKS OF COURT—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT REQUIRES AFFIDAVIT OF NON-MILITARY SERVICE OF DEFENDANT BEFORE ENTRY OF DEFAULT DECREE OR JUDGMENT.

December 1, 1958.

Mr. Patrick C. Mudd,
Clerk of the Circuit Court
for Charles County.

In your recent letter you have asked whether or not it is still necessary that an affidavit showing that the defendant is not in the military service be filed before entry of a judgment or decree by default in the courts of Maryland.

Title 50, Appendix, U.S.C.A., War and National Defense, Section 520, part of the Soldiers and Sailors Civil Relief Act, provides that if in any action or proceeding commenced in any court, there shall be a default of any appearance by the defendant, the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service, and that if an affidavit is not filed showing that the defendant is not in military service, no judgment shall be entered. The provisions of Section 520 were held to be mandatory in *In re: Realty Associates Securities Corp.*, 53 Fed. Supp. 1015.

Maryland enacted the Soldiers and Sailors Relief Act in 1941, and it was codified as Article 87A in the Annotated Code of Maryland (1951 Ed.). Section 5 of the Maryland Act contained the same provisions as did Section 520 of the Federal Act. The provisions of Article 87A of the Maryland Code expired by operation of Section 20, Article 87A, on October 28, 1952. Section 20 of Article 87A, Code (1951 Ed.) reads as follows:

> "This Article shall remain in force until May 15, 1945; provided, that should the United States be then engaged in a war, this Article shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter; provided, further, that wher-

> ever under any section or provision of this Article a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed prior to the date herein fixed for the termination of this Article, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting or other transaction."

Title 50, Appendix, U.S.C.A., War and National Defense, page 3 shows that by Proclamation No. 2950 of October 25, 1951, 16 F.R. 10915, 66 Stat. Chapter 3, the state of war between the United States and Germany was terminated on October 19, 1951. It also appears that Resolution of Ratification of the Japanese Peace Treaty is reported in Congressional Record, Volume 98, No. 46, for Thursday, March 20, 1952, page 2634, and that the Treaty came into force on April 28, 1952. The Maryland Act expired six months thereafter on October 28, 1952.

The Federal statute, Title 50, Appendix, U.S.C.A., War and National Defense, Section 584, contained exactly the same provisions as Section 20 of Article 87A, Annotated Code of Maryland (1951 Ed.). However, the United States Congress passed Title 50, Appendix, U.S.C.A., War and National Defense, Section 464, extending the operation of the Soldiers and Sailors Relief Act until the same is repealed or otherwise terminated by subsequent Act of the Congress. We have examined the records of Congress since the enactment of Section 464, and find that there has been no repeal or termination of the Soldiers and Sailors Civil Relief Act to date. The laws of the United States Congress are the supreme law of the land, and the Judges in every State are bound by them. Article VI, Clause 2, United States Constitution. You are, therefore, advised that it is necessary, by virtue of Federal law, that an affidavit that the

defendant is not in the military service be filed in the courts of this State before a judgment or decree by default may be entered against any defendant.

C. FERDINAND SYBERT, *Attorney General.*

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

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW — OFFICERS — NOTARY PUBLIC MAY NOT ALSO BE JUSTICE OF THE PEACE — ACCEPTANCE OF AN ADDITIONAL OFFICE OF PROFIT BY ONE WHO ALREADY HOLDS AN OFFICE OF PROFIT AMOUNTS TO A VACATION OF FIRST OFFICE.

January 2, 1958.

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

We have your recent letter in which you ask whether or not a person presently holding a commission as a Notary Public may at the same time accept a commission as a Justice of the Peace.

Article 35 of the Declaration of Rights of the Maryland Constitution provides that no person shall hold at the same time more than one office of profit created by the Constitution or laws of this State. This office has ruled on many occasions that the office of Notary Public is an office of profit within the meaning of Article 35. 22 Opinions of the Attorney General 470; 20 Opinions of the Attorney General 584. We have also ruled many times that the office of Justice of the Peace is an office of profit within the meaning of Article 35. 11 Opinions of the Attorney General 236; 18 Opinions of the Attorney General 403; 20 Opinions of the Attorney General 586 and 587. Both are offices created by the Constitution of Maryland. Article IV, Section 45, of the Constitution provides for the office of Notary Public, and Article IV, Section 42, of the Constitution provides for the office of Justice of the Peace.

A person is a Justice of the Peace whether he be designated as a Committing Magistrate or as a Trial Magistrate, since both derive their office under the provisions of Article IV, Section 42, of the Constitution. We therefore advise you that a person may not hold both the office of Notary Public and the office of Justice of the Peace at the same time.

The Court of Appeals of Maryland, however, has held that the acceptance of an additional office of profit or of an additional constitutional office by a person who already holds an office of profit or a constitutional office, amounts to a vacation of the first office held. The acceptance by a Notary Public of a commission as a Justice of the Peace will amount to a vacation by him of the office of Notary Public. *Truitt v. Collins*, 122 Md. 526.

A Justice of the Peace may take acknowledgments as well as a Notary Public. Section 10 of Article 18, (1951 Code,) reads as follows:

> "The acknowledgment of any instrument may be made in this State before: (1) A Judge of a court of record; (2) A Clerk or Deputy Clerk of a court having a seal; (3) A Notary Public; (4) A Justice of the Peace; or (5) A Master in Chancery."

We are therefore of the opinion that a person presently holding a commission as a Notary Public may accept a commission as a Justice of the Peace but that when he does so, he abandons the office of Notary Public. He may take acknowledgments as a Justice of the Peace on deeds, mortgages, or any other papers on which he might have previously taken acknowledgments as a Notary Public.

C. FERDINAND SYBERT, *Attorney General.*

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

CONSTITUTIONAL LAW — SUPPLEMENTARY APPROPRIATION BILL — VETO — BILL AUTHORIZING TEACHER SALARY RAISES IS VALID WHERE REVENUES WERE ADEQUATE AT THE TIME OF ORIGINAL PASSAGE TO SUPPORT THE MEASURE, EVEN THOUGH INADEQUATE AT THE TIME OF ENACTMENT OVER THE GOVERNOR'S VETO—REVENUES TO BE PRORATED.

February 14, 1958.

Re: House Bill No. 253, 1957 Session

Hon. J. Millard Tawes,
Comptroller of the Treasury.

I have your recent letter in which you ask whether House Bill No. 253 is constitutionally valid. This Bill was passed in the late stages of the 1957 legislative session, but was vetoed by the Governor. It thus became a first order of business at the current legislative session, and was passed by the General Assembly over the veto.

The Bill, (Chapter 1, 1958) generally provides for a minimum schedule of salaries to be paid public school teachers, principals, supervising teachers, and other personnel for the school year 1957-1958. As the Bill was originally conceived, the salary schedules were to be supported by increased income taxes estimated to produce $10,440,000 in revenues. In its form at the time of passage at the 1957 session, and its enactment last week, the salary increases are supported by a state-wide tax on cigarettes. The so-called Tobacco Tax Bill had been originally introduced as a separate measure at the 1957 session to meet the need for increased general fund revenues, and was estimated to produce for the fiscal year 1958 approximately the same revenues anticipated from increased income taxes.

Estimated revenues from the tobacco tax were considered entirely adequate, at the time of the Bill's passage in 1957, to support the increases for the fiscal year 1958. In his budget message last week, however, the Governor stated that the total estimated cost of this program for the fiscal year 1959 amounts to $12,273,712, or $2,156,212 above antici-

pated revenues from the tobacco tax. See *Budget Message* (page 4) delivered by Governor McKeldin on February 5, 1958. Even if provision for retirement and Social Security costs be deferred, the message notes that estimated revenues would still fall short of requirements by $908,714. The increased cost of the program is attributable to expanded school enrollment over the past year, which has resulted in a corresponding increase in teaching and other personnel in our school system.

House Bill No. 253 was introduced as a Supplementary Appropriation Bill and, as such, it must comply with the provisions of Article III, Section 52(8) of the Maryland Constitution, which declares that "Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill." Since the revenues are now insufficient to support the appropriation, you ask whether the Bill is constitutionally valid. I think it is.

The background and purposes of Section 52(8) were discussed at some length in *McKeldin v. Steedman*, 203 Md. 89 (1953). That case involved the validity of a provision in the General Construction Loan of 1953 (Chapter 780, Acts of 1953) authorizing the use of general funds to support a supplementary appropriation, and providing that the tax imposed by a preceding section should not be levied unless general funds were not present and available. In holding invalid the use of general funds to defray the supplementary appropriation, the Court of Appeals summarized the design of Section 52(8) at pages 99-100 as follows:

> ". . . An important, if not the supremely important, reason for the provision is that it is the constitutional design to assure that the fiscal requirements of the State, as fixed in the Budget prepared by the Governor and passed by the General Assembly, shall not be enlarged unless a tax to meet the increased need is incorporated in the proposal as an integral part of it. The key idea is that

legislators will be less facile in passing Supplemental Appropriation bills if they must in the same act assume the uncongenial task of directing a specific tax. Where the item originates with the Governor in his Budget estimate, his is the responsibility of suggesting the means of balancing the expenditure with revenue; but where the item originates in a Supplemental Budget Bill the legislature must find and provide a specific tax for this purpose.

"If the legislature is left free to appropriate without taxing then Supplemental Appropriation Bills offer an open door for the entry of the very evil the executive budget was designed to exclude. The clear insistence of Section 52 that the *onus* of imposing a tax shall go hand in hand with the granting of public monies is not based upon abstract political theory but is the result of the State's alarming experiences under the practice of legislatively-initiated appropriations which flourished without restraint before the Budget Amendment. The framers of that amendment made their intention plain. They were practical men who thought Section 52(8) a necessary anchor to preserve the executive budget system."

In short, a Supplementary Appropriation Bill must stand on its own two feet in order to comply with the mandate of Section 52(8).

The crucial question is whether compliance is to be determined as of the time of the Bill's original passage by the General Assembly in 1957, or as of the time of its enactment over the Governor's veto this month. For if I am required to apply the test of Section 52(8) to the date of enactment into law, the Bill would obviously be invalid. I am of the opinion, however, that a proper construction of this Section calls for its application at the time of the Bill's passage in 1957.

It is important to notice that but for the accident of veto, full compliance with the constitutional mandate would have

been present. By its terms, the Bill provides teacher salary raises for the school year 1957-1958 and thereafter. Revenue estimates understandably proceeded on the premise that the Bill would become effective June 1, 1957, and were considered sufficient to meet the personnel requirements which then existed for fiscal 1958. With the intervention of the veto, and the passage of the Bill thereover this month, this legislation was postponed for one year until its now effective date is June 1, 1958. Maryland Constitution, Article II, Section 17. During that period, expanded enrollment has enlarged personnel requirements, thus creating a need for additional revenues. In short, revenues which were adequate for fiscal 1958 have become inadequate for fiscal 1959. If I were to hold that Section 52(8) must be applied at the time of the Bill's enactment into law, the Governor would be presented with an opportunity to invalidate any Supplementary Appropriation Bill of a comparable nature by the simple act of veto where economic and social conditions, in the course of the year, operate to render supporting revenues insufficient. I can find no basis in reason or law for such a proposition.

Nor do I find any evidence of such an intention on the part of the framers of Section 52(8). On the contrary, my views are reinforced by the language of this Section itself. Subsection (b) thereof declares that "Each Supplementary Appropriation *Bill* shall provide the revenue necessary to pay the appropriation . . ." (Emphasis supplied.) This refers, I believe, to the Bill in its legislative form, at the time of original passage, and not to its state after enactment over veto one year later.

This view finds further support in the process of estimating revenues. Under the provisions of Section 174 of Article 41 (1957 Code), the Governor is given for his guidance the assistance of the Bureau of Revenue Estimates and that of the Board of Revenue Estimates, composed of the Treasurer and Comptroller and the Director of the Budget and Procurement, with the Chief of the Bureau of Revenue Estimates as its executive secretary. Sub-section (c) directs the Board of Revenue Estimates to study the information and

recommendations "supplied by the Bureau, and . . . prepare and submit to the Governor for submission to the General Assembly, an itemized statement of the estimated revenue from all sources for the budgetary period next succeeding and any recommendations the Board may care to make." In 37 Opinions of the Attorney General 121, this office ruled that estimates of revenues for the ensuing fiscal year may not be altered by the General Assembly; and it was stated in that opinion that the Chief Executive, aided by the Board of Revenue Estimates, must take the responsibility for submission of revenue resources. Since the General Assembly is powerless to change revenue estimates prepared by the executive branch of the government, added assurance is given that the mandate of Section 52(8) will be satisfied.

The revenue aspect of the Bill was obviously designed to meet specific personnel requirements for fiscal 1958. While the State Department of Education foresaw increased personnel needs for those years subsequent to the school year 1957-1958, it was immediately concerned, at the time of the Bill's original passage, with those needs for the first school year, and the revenue required to support same. As I have heretofore indicated, I find no requirement in the law for a projection of needs, and the revenue to sustain them, beyond the first fiscal year with which the legislation is concerned.

In order to meet the deficiency in the revenue requirements of the Bill, the General Assembly may, if it so desires, provide for additional revenues by another Supplementary Appropriation Bill for that purpose. It is clear, of course, that general funds appropriated in the budget for the fiscal year 1959 may not be used to make up the deficiency. *McKeldin v. Steedman, supra.* In the event that a Supplementary Appropriation Bill is not passed, or is passed and then vetoed, the question arises as to the distribution of revenues produced by the cigarette tax.

House Bill No. 253 requires the Comptroller to collect local cigarette taxes heretofore imposed by certain political subdivisions of the State as well as the new revenues under the Bill. After payment of the salaries and expenses of

administration, and setting aside such amounts as may be required for payment of refunds of cigarette taxes, the Comptroller is directed in Section 443 of the Bill to pay to each county and Baltimore City the local tax collected, if any, less its proportionate share of the salaries and expenses of administration and less a reserve for refunds. Section 443(c) then directs that the balance of the proceeds shall be paid into the general funds of the State. You ask how the balance should be distributed.

In the event the Legislature does not provide additional revenue to make up the deficiency, I think the balance of the proceeds should be prorated. The principle of proration has been generally applied in cases where there have been insufficient public funds to retire bonds, 171 A.L.R. 1033, and I believe that its application here would carry out, so far as possible, the intention of the General Assembly in passing the measure.

For the reasons herein set forth, I am of the opinion that House Bill No. 253 is constitutionally valid, and will take effect June 1, 1958. 36 Opinions of the Attorney General 135.

C. FERDINAND SYBERT, *Attorney General.*

CONSTITUTIONAL LAW—CIGARETTE TAX—EFFECTIVE DATE OF LEVY AND IMPOSITION OF TAX.

February 27, 1958.

Re: House Bill No. 253, 1957 Session

Hon. J. Millard Tawes,
Comptroller of the Treasury.

I recently advised you that House Bill No. 253 of the 1957 Session of the General Assembly, generally providing for teacher salary raises, is constitutionally valid. It was passed at the 1958 Session over the Governor's veto. A further question now presents itself, namely, the date upon which the cigarette tax supporting the measure becomes operative. I am of the opinion that the tax must be imposed as of July 1, 1958.

The Bill declares that it shall take effect June 1, 1957. The tax imposition section (Section 414 (a) of Article 81 of the Annotated Code), however, provides as follows:

> "In addition to any and all other taxes which have been or may hereafter be levied and imposed by the State of Maryland, there is hereby levied and imposed a tax to be paid and collected, as hereinafter provided, on all cigarettes used, possessed or held in the State of Maryland by any person for sale or use in the State of Maryland on or after July 1, 1957."

While the Act is made effective June 1, 1957, it appears clear that it was the legislative plan to postpone the levy and imposition of the tax until July 1, 1957, the beginning of the next succeeding fiscal year.

Since this is a bill passed over the Governor's veto, its effective date is governed by Section 17 of Article II of the Maryland Constitution, which provides, in part, as follows:

> "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."

In view of the fact that the bill is not an emergency measure, it becomes effective June 1, 1958.

I do not think that the provisions of Section 17 operate to alter the manifest intention of the General Assembly to postpone the levy and imposition of the tax for one month after the Bill's effective date, that is, to July 1, 1958. It is significant, I believe, that this date marks the beginning of the next fiscal year, as well as the beginning of the school year 1958-1959. The obvious purpose of the General Assembly was to make the taxing provisions of the Bill coincide with the next succeeding fiscal and school years after the Act's effective date.

I am accordingly of the opinion that the Bill becomes effective June 1, 1958, but that the levy and imposition of cigarette taxes is postponed until July 1, 1958.

C. FERDINAND SYBERT, *Attorney General.*

COUNTY COMMISSIONERS

COUNTY COMMISSIONERS—COUNTY COMMISSIONERS MAY NOT PASS PENAL REGULATIONS UNLESS AUTHORITY IS DELEGATED TO THEM BY THE LEGISLATURE.

November 26, 1958.

Judge G. W. Eklof, Jr.,
Trial Magistrate for Howard County.

In your recent letter you ask whether or not the County Commissioners of Howard County may validly provide a penalty for the violation of rules and regulations passed by them to govern the Howard County Police Department firearms range.

Article VII, Section 1, of the Maryland Constitution provides for the office of County Commissioner and further provides that County Commissioners shall have such powers and duties as may be prescribed by law. Until the Constitution of 1867, County Commissioners in Maryland were simply administrative officers in charge of county finances and public roads. Since 1867, however, they have had such powers and duties as the Legislature has delegated to them. *Cox v. Anne Arundel Co.*, 181 Md. 428. The counties of this State derive whatever powers they possess from the Legislature. They do not have any inherent rights or powers. Such powers as they have are all delegated and may be changed or added to only by the Legislature. *Tasker v. Garrett Co.*, 82 Md. 150; *Barnett v. Charles Co.*, 206 Md. 478. County Commissioners may only perform acts expressly or impliedly permitted or conferred on them by the General Assembly. *Peter v. Prettyman*, 62 Md. 571; *Chaney v. County Commissioners*, 119 Md. 385. The Court of Appeals, in *Barnett v. Charles Co., supra*, said that the powers granted to the County Commissioners must be strictly construed, for they confer a special and limited jurisdiction. See also *Brady v. Road Directors*, 148 Md. 493; *Cumberland Valley R. Co. v. Martin*, 100 Md. 165.

Examining the legislative grants of power to the Howard County Commissioners, we find authority in them to enact

penal regulations only in matters dealing with nuisances and public health. The Legislature has granted no other power to them to pass penal regulations. Strictly construing the grant of power to them, we find that there is no power vested in the Howard County Commissioners to validly provide a penalty for violation of regulations passed by them governing the police firearms range. A penalty prescribed by an ordinance or regulation without authority of law is void. Sec. 17.03, McQuillin, Municipal Corporations, 3rd Ed. You are therefore advised that in our opinion, since the penal part of the regulations in question was passed without authority of law, it is invalid.

C. FERDINAND SYBERT, *Attorney General.*

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

COUNTIES—BONDED INDEBTEDNESS—PARTICIPATION IN STATE SCHOOL CONSTRUCTION PROGRAM DOES NOT MAKE COUNTY A DEBTOR OF THE STATE.

October 31, 1958.

Hon. J. Millard Tawes,
Comptroller of the Treasury.

I have received the letter dated October 30, 1958, addressed to you by bond counsel for Baltimore County, in which the four following questions are asked:

1. Does Baltimore County become the debtor of the State of Maryland by reason of its participation in the State School Construction Program after January 1, 1958?

2. Is Baltimore County obligated to levy taxes in rate and amount sufficient to repay the principal of and interest on funds received by it from the State as a result of its participation in the State School Construction Program?

3. Is it necessary for Baltimore County to include in its schedule of bonded indebtedness amounts received by it after January 1, 1958 from the State School Construction Program?

4. Is it proper for the State Comptroller's books to reflect payments made to Baltimore County from the State School Construction Program in such a way that an inference could be drawn that participation in the Program created a debtor-creditor relationship between the County and the State?

Counsel points out that Baltimore County participates in the State School Construction Loan of 1956, which was authorized by Chapter 80 of the Acts of 1956, and further that Baltimore County has received funds from this source during the calendar year 1958.

Counsel also points out that Baltimore County is authorized by Chapter 644 of the Acts of 1949 to issue bonds for

the purpose of borrowing funds to build school buildings. Under the provisions of Chapter 620 of the Acts of 1953, no such payment may be issued unless the sum of money to be borrowed shall be submitted to a referendum of all the registered voters of Baltimore County for their approval or rejection.

Counsel advises me that on November 6, 1956, the voters of Baltimore County authorized the county to borrow $12,000,000 during the calendar year 1958 for the purpose of financing public schools under the terms of Chapter 644 of the Acts of 1949. The General Assembly of Maryland, in 1958, enacted Chapter 86 which, in my opinion, is a constitutionally valid Act, and which provides as follows:

> *"The indebtedness of any county or the City of Baltimore shall not be considered to be increased by reason of the receipt by said county or by said city, after January 1, 1958, of money from participation by such political subdivision in the General Public School Construction Loan of 1956 authorized by Chapter 80 of the Acts of the General Assembly of 1956, or any similar act passed or to be hereafter passed. No county nor the City of Baltimore shall be required to levy ad valorem taxes upon its taxable basis for the purpose of repaying to the State any such money received during the calendar year 1958 or any subsequent year, or the interest or carrying charges with repect to such money, by said counties or city.* All monies received by any county or the City of Baltimore during the calendar year 1958 or any subsequent year by reason of the participation of such political subdivisions in the General Public School Construction Loan of 1956 authorized by Chapter 80 of the Acts of 1956, or any similar act passed or to be hereafter passed shall be deducted from funds due said counties and City under applicable provisions of State law relating to the income tax, the tax on racing, the recordation tax, the tax on amusements, the license tax and the incentive fund for

school buildings; any and all obligations in connection with funds received by the counties or the City of Baltimore from the State School Construction Loan of 1956, or any similar Act passed or to be hereafter passed, are hereby declared to be self liquidating obligations, incurred for self liquidating projects within the meaning of those terms as used in any charter, public general or public local law now or hereafter in force in this State. *All laws or parts of laws which are inconsistent with the provisions of this Act are hereby repealed to the extent of such inconsistency.*" (Emphasis supplied.)

In answer to counsel's four questions addressed to you, I herewith advise you as follows:

1. Baltimore County does not become the debtor of the State of Maryland by reason of its participation in the State School Construction Program after January 1, 1958, since Chapter 86 expressly provides that: "The indebtedness of any county . . . shall not be considered to be increased by reason of the receipt by said county . . . after January 1, 1958, of money from participation by such political subdivision in the General Public School Construction Loan of 1956 authorized by Chapter 80 of the Acts of the General Assembly of 1956, or any similar act passed or to be hereafter passed".

2. Baltimore County is not obligated to levy taxes in rate and amount sufficient to repay the principal of and interest on funds received by it from the State as a result of its participation in the State School Construction Program, since Chapter 86 expressly provides that "No county . . . shall be required to levy ad valorem taxes upon its taxable basis for the purpose of repaying to the State any such money received during the calendar year 1958 or any subsequent year, or the interest or carrying charges with respect to such money, by said counties . . .".

3. It is not necessary for the county to include in its schedule of "bonded indebtedness" amounts received by it

after January 1, 1958, from the State School Construction Program since there are no bonds issued by the county in connection with the funds received, and Chapter 86, as above set forth, specifically provides that the indebtedness of any county shall not be considered to be increased by reason of its receipt after January 1, 1958 of such funds.

4. In view of the express provisions of Chapter 86, above set forth, I do not believe that it is proper for the State Comptroller's books to reflect payments made by Baltimore County from the State School Construction Program in such a way that any inference could be drawn that participation in the program created a debtor-creditor relationship between the county and the State. The report of the Comptroller of the Treasury of Maryland for the year 1957 shows the amounts received by the various counties under the General Public School Construction Loans of 1949, 1953 and 1956 as "Notes receivable as of June 30, 1957". It is my understanding that your report as Comptroller of the Treasury of Maryland for the fiscal year 1958 will contain a similar reference. In the event that it does, I believe that the appropriate schedule should carry a footnote advising any interested person that in accordance with the provisions of Chapter 86 of the Acts of 1958 General Assembly of Maryland, any sums received by a county under the General Public School Construction Loans after January 1, 1958, are not an indebtedness of the particular county.

C. FERDINAND SYBERT, *Attorney General.*

DENTISTS

DENTISTS—ADVERTISING—GROUP OF DENTISTS MAY NOT USE THE NAME "DENTAL HEALTH CENTER" OR "DENTAL HEALTH CENTER BUILDING" ON THEIR OFFICE BUILDING.

January 22, 1958.

Dr. Wilbur D. Burton, Jr., Secretary,
Maryland State Board of Dental Examiners.

You ask whether or not the use of the name "Dental Health Center" by a group of dentists in the front yard of the building occupied by them violates the provisions of Article 32, Annotated Code of Maryland (1951 Ed.). You also ask whether or not the same group of dentists may use the name "Dental Health Center Building" for the same building.

Section 1, Article 32, reads in part as follows:

> "All licenses issued by the Board shall be issued to individual persons, and it shall be unlawful for any dentist to practice in this State under any name except his own true name. No license shall be issued to any corporation, association, partnership, parlor, or any entity or association of any kind or character. It shall be unlawful for any individual or group of individuals to practice dentistry in this State as a corporation or under a corporate name; or under a partnership name; as an association or under an association name; as a parlor or under any parlor name, or an entity or under the name of any entity of any kind or character."

Section 11, Article 32, reads in part as follows:

> "Following a hearing, as hereafter provided, the Board may revoke or suspend for such period as the Board in its sole discretion may determine, the license of any dentist practicing in this State upon a finding by the Board that the dentist whose license was revoked or suspended: * * *

"(5) Has practiced or offered to practice dentistry as defined in this Article under any name except his proper name; which is the name as set forth in the license granted to him or has used the name of any company, association, corporation, trade name, parlor, dental clinic or business name in connection with the practice of dentistry as defined in this Article; has permitted, directly or indirectly, an unregistered or unlicensed dentist to practice dentistry under his or her direction;"

Sections 15 and 16 read as follows:

"15. All signs prohibited by this Article shall be removed within three months after June 1, 1937. Any person or persons who shall prohibit, neglect, fail or refuse to remove any sign prohibited by this Article is guilty of a violation of this Article and subject to the penalties thereof.

"16. Each person holding a license under this Article shall exhibit on the door or the wall of the building wherein he shall practice dentistry, not more than two signs on which shall be placed the name and title or degree of such person, the letters of which shall not exceed three inches square. Any person practicing dentistry in any building may exhibit such sign on the door of his office in addition to those on the door or wall of such building."

It is my opinion that the use of either the name "Dental Health Center", or "Dental Health Center Building" violates the statute. The only purpose the group of dentists could have in using either name for the building which is solely occupied by that group of dentists is to advertise the business carried on therein by them as dentists. Since that is their purpose, it is my opinion that it is a violation of the statute. The Legislature has clearly shown that it was its intention that dentists be limited in their use of signs for the purpose of advertising. The only signs permitted by the statutes for use by a dentist to advertise his business are signs containing his name and title or degree. Such signs

may only be written in letters which do not exceed three inches square in size, placed upon the door or wall, or both, of the building wherein the dentist practices. He also may place the same type of sign on the door of his office within the building. No other signs are permitted.

It is my opinion that the use of either sign in question by the dentists not only violates the letter of the law but also the spirit of the law, and that your Board should take every action to see to it that the violations are not continued.

STEDMAN PRESCOTT, *Deputy Attorney General.*

DEPARTMENT OF RESEARCH AND EDUCATION

DEPARTMENT OF RESEARCH AND EDUCATION—SOVEREIGN IMMUNITY FROM STATE CRIMINAL LAWS—EMPLOYEES OF DEPARTMENT OF RESEARCH AND EDUCATION MAY COLLECT SPECIMENS IN VIOLATION OF FISH AND GAME LAWS.

December 9, 1958.

Dr. L. Eugene Cronin, Director,
Department of Research and
Education.

In 1941 the General Assembly created the Department of Research and Education "to develop a comprehensive research and educational program covering the natural resources of the State". The Department is charged with the responsibility of studying and investigating the State's commercial tidewater fisheries; the capacity of the State's waters to maintain and develop fish life; the food, cover and habitat of the game and bird population of the State; water pollution; the control of vermin and predators; the diseases of game and fish; and statistics of the game and fish natural resources of the State. Article 66C, Sections 18-21, Annotated Code of Maryland (1957 Ed.).

The Department must collect specimens of game and fish to conduct the studies and make the investigations which the law requires. Sometimes the Department collects these specimens by methods which the law of the State prohibits for individuals and at times when the law of the State proscribes the taking of such animals by individuals.

You ask whether the employees of the Department who collect animals for research and study at times, and by methods otherwise prohibited, have violated the laws and may be prosecuted.

The word "person" in a statute has not been defined by the General Assembly to include the State. Article 1, Section 15, Code. Generally, the word "person" is not construed to include the State. *State v. Rich,* 126 Md. 643, 648-649

(1915); *Huffman v. State Roads Commission*, 152 Md. 566, 584 (1927); *State v. Ambrose*, 191 Md. 353 (1948).

When the State acts in the exercise of the police power, in good faith and to promote the safety and welfare of the public with reasonable care and by reasonable means, criminal liability may not be imposed upon the State or its agents. *State v. Mayor and Aldermen of Knoxville*, 80 Tenn. 146, 154-157 (1884). General statutes are not to be construed to affect the sovereign unless they are specifically applicable. *Necedah Manufacturing Corp. v. Juneau County*, 206 Wisc. 316, 237 N.W. 277 (1931). The ancient rule is that the crown is not bound by a statute unless named in the law. Statutes are *prima facie* presumed to be made for the subjects of the sovereign only. The general business of the Legislature is to establish laws for individuals, not for the sovereign. *Baker v. Kirschnek*, 317 Pa. 225, 176 A. 489 (1935); 35 Opinions of the Attorney General 273 (1950); 36 Opinions of the Attorney General 154 (1951).

In our opinion, the employees of your Department do not violate the law when in good faith and by reasonable means they collect specimens of game and fish by methods and at times otherwise prohibited. To avoid the possibility of delay and embarrassment, you should consider the desirability of legislative approbation of these acts.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

EDUCATION

EDUCATION—APPROPRIATIONS—MEDICAL EXAMINATION OF SCHOOL BUS DRIVERS—APPROPRIATION SPECIFICALLY DESIGNATED TO BE CHARGED AGAINST GENERAL STATE SCHOOL FUND MUST BE CHARGED AGAINST THAT FUND AND MAY NOT BE CHARGED AGAINST EQUALIZATION FUND.

January 8, 1958.

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

You have recently asked us to advise you whether appropriations for the medical examination of school bus drivers should be charged against the General State School Fund or against the Equalization Fund.

Article 77, Section 209(b) of the Annotated Code of Maryland (1957 Supp.) provides that the Comptroller shall charge against and pay as thereinbefore or thereinafter provided from the General State School Fund various appropriations, one of which is "the annual appropriation . . . for medical examination of . . . school bus drivers." The same Section, at the end, provides for "such special appropriations to be known as an Equalization Fund, as may, from time to time, be made by private bill or supplementary appropriation bill", in order to enable the County Boards of Education of various counties and the Mayor and City Council of Baltimore City to pay minimum teachers' salaries, "and the necessary costs of transporting pupils to public schools", when approved by the State Superintendent of Schools.

Although it might be argued that the medical examination of school bus drivers should be considered a cost of transporting pupils, we feel that this appropriation must be charged against the General State School Fund because of the express provisions of Section 209(b).

C. FERDINAND SYBERT, *Attorney General.*
CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—PUBLIC SCHOOLS—PROPOSED BY-LAW OR POLICY OF COUNTY BOARD OF EDUCATION BARRING MARRIED PUPILS FROM SCHOOLS MIGHT VIOLATE CONSTITUTIONAL GUARANTEES.

January 27, 1958.

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

You have asked us to give you our opinion as to whether there is any possible legal objection to a County Board of Education adopting a by-law or policy under which high school students would be barred from attendance at school by reason of marriage. As you understand, a County Board of Education is entitled to its own counsel, and we do not presume to advise it, but in answer to your request for general guidance, we do advise you as State Superintendent of Schools that it is our opinion that any such by-law or policy might be held by a court to violate constitutional guarantees.

There is to our knowledge no judicial authority on this point in this State, and we have discovered only one appellate decision directly in point. *McLeod v. State,* 154 Miss. 468, 122 So. 737. However, that case, decided by the Supreme Court of Mississippi, is very well reasoned, and we believe that its conclusion is sound. In that decision, that court pointed out that the basic question was whether an ordinance forbidding the attendance of married students at school was so unreasonable and unjust as to amount to an abuse of discretion in its adoption. The court, after pointing out that the ordinance was based alone upon the ground that the admission of married children as pupils in the public schools would be detrimental to the good government and usefulness of the schools, stated, as follows:

> "It is argued that marriage emancipates a child from all parental control of its conduct, as well as such control by the school authorities; and that the marriage relation brings about views of life which should not be known to unmarried children;

> that a married child in the public schools will make known to its associates in schools such views, which will therefore be detrimental to the welfare of the school. We fail to appreciate the force of the argument. Marriage is a domestic relation highly favored by law. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life. And they are as much subject to the rules of the school as unmarried pupils, and punishable to the same extent for a breach of such rules.
>
> "We are of opinion that the ordinance in question is arbitrary and unreasonable, and therefore void."

Supra, 154 Miss. 468, 122 So. 737, 738-739.

Based on the above quoted decision, it is our opinion that a County Board of Education by-law or policy denying the admission of married pupils to high schools might be held by a court to violate constitutional guarantees.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—COUNTY BOARD OF EDUCATION SHOULD NOT PURCHASE FOOD FOR SCHOOL CAFETERIAS FROM COMPANY IN WHICH BOARD MEMBER HAS FINANCIAL INTEREST.

May 20, 1958.

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

You have recently asked us whether it would be proper for school cafeterias in one of the counties to make purchases of food from a corporation in which a member of the County Board of Education is financially interested. You have advised us that, although the cafeterias are individually managed, they are under the central financial control of the County Board of Education which handles all receipts and disbursements.

Based on these facts, we believe that the County Board should not make purchases from the company in which the particular Board member is financially interested. Article 77, Section 74, Annotated Code of Maryland (1957 Ed.) specifically makes it unlawful for any member of the Board of Education in any county to be interested for profit in any contract or purchase to which the Board of Education in that county is a party. The facts which you have given us clearly show that the Board member would be financially interested in these purchases of food by the school cafeterias, and that the Board of Education would be a party to the transactions in question since the Board actually pays the bills for the food. This office has reached similar conclusions in cases involving newspaper advertising and printing, 25 Opinions of the Attorney General 203; insurance, 26 Opinions of the Attorney General 299; and real property, 38 Opinions of the Attorney General 166.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—MEMBER OF MONTGOMERY COUNTY BOARD WHO WAS PROPERLY CHOSEN NOT DISQUALIFIED BY REASON OF REMOVAL DURING TERM TO ANOTHER DISTRICT.

May 22, 1958.

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

You have recently asked us whether a member of the Montgomery County Board of Education, who was properly elected from the Third Council District in 1954, is disqualified by reason of his removal in February, 1958, to the Second Council District. His term would ordinarily expire December 31, 1958.

Although we ordinarily would not advise a county board of education, since it has its own counsel, we do so in this case since both local counsel for the board and the County Superintendent of Schools have asked you for a ruling from us.

Article 77, Section 12, 1957 Code, provides in pertinent part, as follows:

> "(a) After January 1, 1952, the County Board of Education of Montgomery County, shall be composed of seven members, qualified voters of Montgomery County, *who shall be chosen* as follows: One from each of the five council districts and two at large, and who shall serve as hereinafter provided in this section, . . ." (Emphasis supplied).

Section 12(c) sets up a procedure for filling vacancies on the Board.

The quoted part of Section 12(a) provides only that five members shall be *chosen* from the council districts and that two other members shall be chosen at large. It is silent as to what happens, as in the case under consideration, when a member properly chosen from a council district moves, during his term, to another district. It does not specifically state that he must continue to reside in the district from

which he is chosen. In view of this, it is our opinion that the member who moved into another district is entitled to serve the remainder of his term so long as the applicable provisions of law remain in the present form.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—MARYLAND SCHOOL FOR DEAF—CHILDREN OF NON-RESIDENTS NOT ENTITLED TO STATE AID.

June 17, 1958.

Mr. Lloyd A. Ambrosen, Superintendent,
Maryland School for the Deaf.

In your letter of June 11, 1958, you have asked whether children of parents who work in Maryland but who reside outside of the State are entitled to financial assistance in attending the Maryland School for the Deaf located in Frederick. You also asked whether the children of persons who own real property in Maryland, but who live outside the State, are entitled to this aid.

Article 30, Sections 1 and 2 of the Annotated Code of Maryland, (1957 Edition), provide for certain assistance for deaf and dumb persons of teachable age and capacity, not exceeding twenty-one years of age, on the application of any parent, guardian or next friend "provided such parent, guardian and next friend has been a *bona fide citizen of this State* for at least two years previous to such application". Section 1, *supra* (emphasis supplied). In view of this language, it is our opinion that the legislature intended such assistance to be given only to the children of parents who are bona fide citizens of Maryland or to children who have as a legal guardian or next friend a bona fide citizen of Maryland. In this case and under the facts which you have given us, it appears that the parents are not bona fide citizens of Maryland since they reside outside the State. It is accordingly our opinion that their children are not entitled to State aid despite the fact that the parents either work in the State or own real property in the State.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—SCHOLARSHIPS—PERSON APPOINTED TO FILL VACANCY ENTITLED TO FULL FOUR-YEAR TERM—DEPARTMENT MAY APPOINT MORE THAN ANNUAL MAXIMUM IN ANY ONE SCHOLASTIC YEAR IN ORDER TO FILL VACANCIES BUT MAY NOT EXCEED OVERALL MAXIMUM.

July 3, 1958.

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

Your recent letter asks our advice as to how the program of scholarships in education should be administered by your department so as most fully to comply with the expressed legislative intent of the General Assembly of Maryland in connection with the filling of vacancies.

Article 77, Section 284(d), Annotated Code of Maryland (1957 Ed.) provides for the certification of applicants for scholarships in education and concludes as follows:

> "* * * It is the legislative intent that applicants be certified for the full number of scholarships, and that vacancies and unfilled scholarships and unused funds be distributed so long as the requirements of this section are observed."

Section 284(e), as amended by Chapter 53 of the Acts of 1958, after providing for conditions of admission of applicants to eligible institutions, states that "Once appointed to a scholarship and accepted by one of the eligible institutions, the applicant may hold it for four years . . ." subject to certain conditions.

Section 284(f) provides as follows:

> "Over a period of four consecutive scholastic years, at the maximum rate of one hundred and fifty-two annually, the maximum of six hundred and eight applicants may be certified for and placed in scholarships in education. Thereafter the

program shall continue from year to year, subject to the same annual and overall maximum figures."

The scholarship program was enacted by Chapter 127 of the Acts of 1956 and became effective July 1, 1956. You advise us that some of the successful applicants have already dropped out of the program for various reasons, and that vacancies have consequently occurred. You ask (1) whether a person who is appointed to fill one of these vacancies is entitled to a full four-year scholarship; and (2) whether your Department may award more than 152 scholarships in any one scholastic year.

In answer to your first question, in view of the fact that Section 284(e) unequivocally states that an applicant may hold a scholarship for four years once he has been appointed to it and has been accepted by an eligible institution, we believe that a person appointed to fill a vacancy should also be entitled to hold his scholarship for four years since, in the words of that Section, he is an "applicant" and has been "appointed" and "accepted".

In answer to your second question, although by reason of filling of vacancies it is conceivable that more than 152 persons may actually be appointed by your Department in any one scholastic year, it is our opinion that this would not violate the legislative intent as long as there are not more than a total of 608 appointees at any one time. You will note that Section 284(f) specifies that scholarships shall be placed "at the maximum *rate* of one hundred and fifty-two annually" (emphasis supplied), with a maximum of six hundred and eight over-all. Since the Legislature in Section 284(d) has specifically stated its intent to be that applicants be certified for the full number of scholarships and that "vacancies and unfilled scholarships and unused funds be distributed so long as the requirements of this section (284) are observed", we believe that your Department should fill the vacancies as they occur, despite the fact that this may mean that in any one scholastic year you might actually appoint more than 152 applicants by reason of the filling of these vacancies. The program will, of course,

at all times, be subject to the maximum figure of 608 once the fourth year commences and the full number of scholarships has been appointed.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EDUCATION—GENERAL PUBLIC SCHOOL CONSTRUCTION LOANS —STATE BOARD OF EDUCATION, UPON REQUEST OF BOARD OF PUBLIC WORKS, MAY MAKE DETERMINATION OF PRIORITY OF NEED FOR SCHOOL BUILDINGS FOR PARTICULAR COUNTY OR FOR BALTIMORE CITY.

November 25, 1958.

Dr. Thomas G. Pullen, Jr.
State Department of Education.

In reference to your recent letter concerning the so-called entitlements established by the State Department of Education for each of the counties and for Baltimore City for participation in the General Public School Construction Loans of 1949, 1953 and 1956, and following up our several conversations with Mr. Sartorius and other representatives of the Department, we herewith advise you that in our opinion there is no legal bar to the reallotment of such entitlements within certain limitations, as hereinafter set forth, and subject to the approval of the Board of Public Works.

The above three School Construction Loans were authorized respectively by Chapter I of the 1949 Extraordinary Session of the General Assembly of Maryland, by Chapter 609 of the 1953 Session and by Chapter 80 of the 1956 Session. All three Acts contain substantially similar provisions and the following discussion, with particular reference to Chapter 80 of the 1956 Acts, is equally applicable to the other two Acts.

Section 5 (2) (a) of Chapter 80 provides that if a county or Baltimore City desires to participate in the financial assistance provided for under the terms and conditions of the Act, then it shall certify certain information to the State Board of Education. Section 5 (2) (b) then provides as follows:

> "Upon receipt of the certified statement as specified in sub-paragraph (a) of this sub-section, the State Board of Education shall make a written finding of fact which shall be addressed to the

> Board of Public Works, said finding of fact to be in the form of a recommendation to the Board of Public Works advising said Board which of the requests for financial assistance made by any of the counties or made by the City of Baltimore, as aforesaid, should be allowed and which of such requests for financial assistance should be denied. *In making the aforesaid finding of fact, the State Board of Education shall, at the request of the Board of Public Works, determine a priority of need for school buildings as between any county in the State or as between any county in the State and the City of Baltimore.* No grant of financial assistance as provided for in this Act shall be allowed until such grant has been finally ratified and approved by the Board of Public Works. The decision of the Board of Public Works in this regard shall be in such form as the said Board shall deem advisable and proper and shall be final and conclusive upon all parties concerned." (Emphasis supplied.)

Section 5 (2) (c) provides certain limitations upon the amount of financial assistance which any county or the City of Baltimore may be granted and Section 5 (2) (c) (4) provides that the calculation shall be made as of the date when the application for financial assistance is made by the particular county or by Baltimore City.

In view of the foregoing provisions, particularly that portion of Section 5 (2) (b) providing for a determination of priority of need by the State Board of Education, we herewith advise you that, if a request is made by the Board of Public Works, the State Board of Education may determine a priority of need for school buildings as between any county in the State and the City of Baltimore. This determination should be included in the Board's written finding of fact under Section 5 (2) (b) addressed to the Board of Public Works in the form of a recommendation and advising the Board of Public Works which of the requests for financial assistance should be allowed and which denied. The particular grant recommended by the Board cannot be allowed

until it is finally ratified and approved by the Board of Public Works. The decision of the Board of Public Works, under Section 5 (2) (b) is "final and conclusive upon all parties concerned".

The State Board of Education in making any determination of priority of need for school buildings for any particular county or for the City of Baltimore in its recommendation to the Board of Public Works and in advising the Board of Public Works which requests for financial assistance should be allowed is limited as to any county or Baltimore City by the provisions of Section 5 (2) (c).

In summary, within these limits on the amounts of financial assistance for any county or for the City of Baltimore, we believe that there is no legal bar to a reallocation of entitlements by the State Board of Education in making its determination of priority provided that such determination is requested by the Board of Public Works and further provided that any particular grant recommended by the State Board of Education be ratified and approved by the Board of Public Works.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS

ELECTIONS—PRIMARIES—CANDIDATE MAY FILE FOR BOTH PUBLIC AND PARTY OFFICE IN SAME ELECTION.

March 5, 1958.

Mr. Louis E. Carliner,
Board of Supervisors of Elections of Baltimore City.

You have asked us whether the same person may file as a candidate for nomination for a party office, such as ward executive, delegate to a state convention, or state central committeeman and in the same primary election also file as a candidate for a public office, such as a member of the House of Delegates or as State Senator.

Article 33, Section 54(f) of the Annotated Code of Maryland (1957 Ed.) provides as follows:

> "No person shall be a candidate for more than one office in any one election."

Article 33, Section 48 (1951 Code) prior to the amendment of the election laws by Chapter 739 of the 1957 Acts, provided in part as follows:

> "* * * and no person shall accept a nomination to more than one office."

Section 48 was originally enacted in the identical language by Chapter 202, Section 40, of the 1896 Acts.

A similar problem was presented to this office some years ago under the former law when the Attorney General was asked whether the same person might be a candidate for the State Central Committee of the party to which he belonged and at the same time be a candidate for the office of County Commissioner. Pointing out that membership upon a party committee was a party office as distinguished from a public office and that there was nothing in the statute prohibiting a candidate for nomination for public office from seeking election as a member of the party committee at the same primary election, this office ruled that the same

person might be a candidate for the State Central Committee and also for nomination to public office in the same primary election. 19 Opinions of the Attorney General 251.

In reaching his decision, the Attorney General further pointed out that the party committees and the state conventions of the respective parties were authorized to establish rules and regulations not inconsistent with law for the determination of questions arising within the party. He observed that this power probably carried with it the right to establish qualifications for membership upon the party State Central Committee, including the right to adopt a regulation to prohibit a candidate for nomination to public office from seeking election as a member of the State Central Committee at the same primary election. It should be noted that Sections 81 and 82 of Article 33 (1957 Code) contain similar, although expanded, provisions relating to party-governing bodies. Consequently, we feel that the same reasoning is applicable to the matter which has been presented for our consideration. See also 11 Opinions of the Attorney General 116; 15 Opinions of the Attorney General 120; cf. 4 Opinions of the Attorney General 55.

We accordingly advise you that, in our opinion, the prohibition in Section 54(f) refers to public office alone and that, in the absence of a rule or regulation of the party-governing body to the contrary, the same person may file in the same primary election as a candidate for both party office and public office.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—REGISTRATION LISTS—CANDIDATE MAY PURCHASE SEPARATE PRECINCT LISTS IN BALTIMORE CITY —NOT REQUIRED TO PURCHASE CITY-WIDE OR DISTRICT LISTS.

March 26, 1958.

Mr. Charles A. Dorsey, President,
Board of Supervisors of Elections
of Baltimore City.

You advise us that a candidate for office has notified you that he wishes to purchase an official registration list for one of the wards of a legislative district of Baltimore City and also wishes to purchase the official registration lists for certain precincts in another ward of the same legislative district. You have asked whether he is entitled to purchase the lists of separate wards and precincts, or whether you are only required to furnish him with a city-wide list or a list of not less than a legislative district.

Article 33, Section 50, Annotated Code of Maryland (1957 Ed.), provides as follows:

> "In Baltimore City, at least twenty-seven days before every general election, the Board of Supervisors of Elections shall cause to be prepared from the registration cards a complete and official registration list *for each precinct*, containing the names, party affiliations and addresses of all qualified and duly registered voters *in the precinct*. The Board shall cause a copy of *each precinct list* to be conspicuously posted and displayed at the polling place in each such precinct not later than twenty-six days before such election; and may provide a sufficient number of such lists not to exceed fifty lists of *each precinct*, for distribution to such candidates or political parties as shall apply therefor in the general election and shall furnish such lists to any candidate for any office which pays a compensation, either in the primary or general elections at the rate of one-half a cent for each regis-

tered voters name on the list furnished." (Emphasis supplied.)

Since the lists are printed in accordance with Section 50 only before the general election and not before the primary election, the lists to which the candidate would be entitled at this time, before the primary, would be registration lists for 1956, the year of the last general election.

Section 50 specifically requires the Board of Supervisors of Elections of Baltimore City to cause to be prepared from the registration cards "a complete and official registration list for each precinct . . .". It permits the Board to provide a sufficient number of such lists, not to exceed 50 lists of each precinct, for distribution to such candidates or political parties as shall apply therefor in the general election. It requires the Board to furnish "such lists" to any candidate for any office which pays a compensation, either in the primary or general elections, at the rate of one-half cent for each registered voter's name on the lists furnished. Since Section 50 refers throughout to precinct lists, it appears that, by the words "such lists", which may be purchased by candidates before a primary or general election, the Legislature meant to authorize the precinct lists. We therefore advise you that the candidate is entitled to purchase separate precinct lists under the provisions of Section 50 and is not required to purchase either a city-wide or a legislative district list.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—HATCH ACT—SECRETARY OF STATE SHOULD ACCEPT CERTIFICATE OF CANDIDACY OF ALLEGED FEDERAL EMPLOYEE.

March 26, 1958.

Hon. Claude B. Hellmann,
Secretary of State.

In answer to your letter of March 17, 1958, we herewith advise you that you were correct in accepting, as Secretary of State, the certificate of candidacy of a candidate for nomination for Representative in the United States Congress, even though he is allegedly an employee of the Executive Branch of the United States Government or of an agency or department thereof.

We find nothing in the law of Maryland which would prohibit you from accepting the certificate of candidacy. The Hatch Act, 5 U.S.C.A., Section 118(i) provides:

> "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. . . ."

The penalty for violation is as follows:

> "Any person violating the provisions of this section shall be removed immediately from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person: . . ."

Since there is nothing in the Maryland law to prevent a candidate from filing, or you from accepting, a certificate of candidacy, it is our opinion that you acted properly in accepting the certificate, although the candidate may subject himself personally to the penalties of the Hatch Act.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS — CANDIDATES — CERTIFICATE OF WITHDRAWAL FILED IN ERROR MAY BE WITHDRAWN.

March 26, 1958.

Mr. Charles A. Dorsey,
Board of Supervisors of Elections
of Baltimore City.

You have asked us whether Mr. Fernando Bertalo should be listed on the ballot for the primary election as a candidate for the nomination of the Democratic party for State Senator from the First Legislative District of Baltimore City. There is no question that Mr. Bertalo duly and timely filed his certificate of candidacy on March 10, 1958. There is also no question that Mr. Bertalo on March 15, 1958, duly and timely executed a certificate of withdrawal. The question which has arisen is whether the certificate of withdrawal was filed by mistake and error and should not have been accepted by the Board.

According to the facts which have been presented to us by the Chief Clerk of the Board at the Board's request, by letter dated March 22, 1958, Mr. Bertalo executed his certificate of withdrawal at 9:00 A.M. on March 15, 1958. He did not deliver it personally to the Board. At approximately 1:00 P.M. the same day, Mr. Bertalo personally came to the office of the Board and through a spokesman advised the Board that he did not wish to withdraw his certificate of candidacy and that, if his certificate of withdrawal were delivered to the Board, it should not be accepted. At that time, the Chief Clerk examined the files and determined that the certificate of withdrawal had not been received. The Assistant Chief Clerk informed the office personnel to advise the Board if and when the withdrawal certificate was received.

At approximately 4:45 P.M. the same day, the Chief Clerk was told that Mr. Bertalo's certificate of withdrawal had been received some time previously. Mr. Bertalo's spokesman was so advised. At 5:00 P.M. Mr. Bertalo filed with the Board a statement, duly acknowledged before a

notary public, setting forth the facts that he had advised the Chief Clerk and the Assistant Chief Clerk that he had no intention of withdrawing, that, if a certificate of withdrawal were filed with the Board, it would be done over his protest, and that he wished to reaffirm his candidacy for nomination. Mr. Bertalo concluded his statement as follows:

> "In error, inadvertently and by mistake I signed a paper which I now believe to be a withdrawal certificate of my candidacy for the State Senate."

The procedure for withdrawal of a certificate of candidacy for nomination in a primary election is set forth in Article 33, Section 73(b) of the Annotated Code of Maryland (1957 Ed.) as follows:

> "(b) *Primary election.*—Whenever any person who has filed a certificate of candidacy for nomination in any primary election (shall), in a writing signed by him or her, and acknowledged before a justice of the peace or notary public, notify the officer or board with whom the certificate of candidacy is required to be filed by this article, at least 65 days before the said primary that he or she desires to withdraw as a candidate for such nomination, such certificate of candidacy shall thereupon be and become void; and the name of any person so withdrawing shall not be printed upon the ballots to be used at such primary election and the filing fee shall be refunded."

This office was asked to rule on a similar question many years ago when a candidate in a primary election on one day had filed a paper purporting to be a certificate of withdrawal and on the following day filed another paper stating that the first paper had been left with the Board by mistake and error. The candidate directed the Board to disregard the contents of the first paper and to place his name upon the ballot. Attorney General Robinson ruled that it was plain that the candidate was not attempting to file a certificate of candidacy after the time allowed by law had

elapsed. "On the contrary, he was endeavoring to correct a mistake and error which had been made." 11 Opinions of the Attorney General 125 at 126. Attorney General Robinson noted also that the purported certificate of withdrawal had been acknowledged before a notary public instead of before a justice of the peace and that it therefore did not comply strictly with the requirements of Section 58 of the election laws then in effect. He ruled that the candidate was entitled to have his name printed upon the ballots.

Section 73(a) of Article 33 (1957 Code) is substantially the same as Section 58 (Bagby's 1924 Code). Section 73(a) provides for withdrawal of nominees for public office in a general election. There was no provision at the time of Attorney General Robinson's opinion which specifically set forth the procedure for withdrawal of a certificate of candidacy for nomination in a primary election. In reaching his decision, the Attorney General pointed out that Section 193 of the then election laws made the provisions of Section 58 applicable to primary elections. Section 73(b) now specifically provides for withdrawals in primary elections in substantially the same language as Section 73(a) provides for withdrawals in general elections. We accordingly believe that Attorney General Robinson's opinion should control the matter here under consideration.

It appears from Mr. Bertalo's statement filed with your Board that his certificate of withdrawal had been filed "in error, inadvertently and by mistake". He was thus, like the candidate whose certificate of withdrawal was considered by Attorney General Robinson, "endeavoring to correct a mistake and error which had been made". 11 Opinions of the Attorney General 125 at 126. It is therefore our opinion that Mr. Bertalo's name should be listed on the ballots for the primary election.

We point out that although the Attorney General in the above cited opinion noted "also" that the purported certificate of withdrawal did not strictly comply with the requirements of Section 58, his opinion appears to us not to be based solely or even essentially upon that point, but

rather on the fact that the candidate's certificate of withdrawal was left with the Board "by mistake and error". We further point out that we have found it unnecessary to decide whether Mr. Bertalo effectively revoked his certificate of withdrawal by notifying the Board not to accept it before it had been officially received, according to the information given us by the Chief Clerk.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—CANDIDATE FOR STATE CENTRAL COMMITTEE SHOULD NOT CONTINUE TO SERVE AS MEMBER OF BOARD OF SUPERVISORS OF ELECTIONS—FOUR CANDIDATES FOR THREE POSITIONS.

March 31, 1958.

Board of Supervisors of Elections
for Howard County.

In your letter of March 29, 1958, you have asked whether a member of your Board who is a candidate for membership on the State Central Committee may also continue as a member of the Board of Supervisors of Elections. According to the facts which you have given to us, there are three available positions on the State Central Committee of the party in question. Four candidates have filed for these positions.

This office was presented with a similar question when it was asked whether a member of a county Board of Supervisors of Elections could continue to act as such even though he became a candidate for the office of County Commissioner. In an opinion written by Governor Ritchie, then Attorney General, it was ruled that the same person could not become a candidate and continue to act as a member of the Board. In reaching his decision Governor Ritchie stated as follows:

> "In my opinion, the law does not contemplate that a candidate should occupy such a dual position, and I, therefore, think that a Supervisor of Elections cannot be a candidate at a primary election which he himself is charged with the duty of conducting and canvassing, and also, in case of a contest, of recounting and recanvassing."

2 Opinions of the Attorney General 180 at 181. See also 4 Opinions of the Attorney General 63 and 11 Opinions of the Attorney General 128.

We believe that the same reasoning is applicable in the instant situation even though the member of the Board is a

candidate for a party office and not a public office. In the words of Governor Ritchie, the candidate should not occupy a dual position. There are four candidates for the three positions on the State Central Committee, and the candidate should not be charged with the duty of conducting and canvassing his own votes and, in case of a contest, of recounting and recanvassing. We accordingly advise you that, since the date for his withdrawal of candidacy has passed, he should submit his resignation as a member of the Board to the Governor.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—NAMES OF CANDIDATES FOR DELEGATES TO CONVENTION AND FOR MEMBERS OF STATE AND LOCAL CENTRAL COMMITTEES SHOULD APPEAR ON PRIMARY BALLOT, EVEN IF UNOPPOSED, SO THAT THEY MAY BE PROPERLY ELECTED.

April 9, 1958.

Board of Supervisors of Elections
of Baltimore City.

Confirming our recent telephone conversations, we herewith advise you that the ballots for the primary election of May 20, 1958, should contain the names of all delegates to local and State conventions and all members of the State and local Central Committees who are nominated under the provisions of Article 33, Section 61, Annotated Code of Maryland (1957 Ed.). Even though some of these candidates may be unopposed, their names should appear on the ballot so that they may be properly elected, as required by the election laws. See Article 33, Sections 79(a) and 82(b); Cf. 11 Opinions of the Attorney General 139; 7 Opinions of the Attorney General 125.

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

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—CANDIDATES NOMINATED BY STATE CENTRAL COMMITTEE NOT REQUIRED TO PAY FILING FEE.

April 14, 1958.

Hon. Claude B. Hellmann,
Secretary of State.

You have asked us to advise you whether candidates nominated by a State Central Committee in accordance with the provisions of Article 33, Section 56(c) (1957 Code) are required to pay a filing fee. Article 33, Section 57(d) (1957 Code) now provides as follows:

> "Candidates nominated by primary convention, meeting and petition must pay the fee in accordance with the foregoing conditions."

This office has ruled in the past, before the 1957 revision of the election laws, that candidates of a party nominated by convention were not required to pay the fee. 36 Opinions of the Attorney General 159. We have also previously ruled, under earlier election laws, that candidates who were nominated by petition were not required to pay a filing fee. 15 Opinions of the Attorney General 146. See also 4 Opinions of the Attorney General 62. It has apparently been the practice of the Board of Supervisors of Elections of Baltimore City not to require a filing fee from candidates nominated by State Central Committees. 27 Opinions of the Attorney General 155. Congressional candidates nominated by State Central Committees to run at a special election are not required to pay filing fees. 33 Opinions of the Attorney General 193.

Although Section 57(d) now requires filing fees of candidates nominated by primary convention, meeting and petition, it still does not specifically require filing fees of candidates nominated by State Central Committees. Therefore, we advise you that a candidate nominated by a State Central Committee should not be required to pay a filing fee.

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

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—REGISTRATION—STUDENTS RESIDING IN DORMITORIES MAY BE QUALIFIED—DEPENDS ON FACTS IN EACH CASE.

May 1, 1958.

Mr. Eugene A. Sekulow, Chief Clerk,
Board of Supervisors of Elections
of Baltimore City.

You have asked whether your Board may register students who reside in dormitories of educational institutions located within Baltimore City. You specifically ask whether such occupancy constitutes residence in the State of Maryland sufficient to comply with the requirements of registration.

We believe that a student who occupies a dormitory may actually establish residence in this State so as to make him eligible to vote. Students have been so registered in the past. See 9 Opinions of the Attorney General 82. Cf. 35 Opinions of the Attorney General 173. However, each case must of necessity be decided on its own facts and your Board must therefore examine each application for registration individually and make a factual determination.

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

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—FIVE YEAR NON-VOTING CANCELLATION OF REGISTRATION NOT MADE APPLICABLE TO BALTIMORE CITY BY 1957 ACT—STILL APPLIES ONLY TO COUNTIES —REDUNDANT PHRASE EXPUNGED.

June 9, 1958.

Mr. Charles A. Dorsey, President,
Board of Supervisors of Elections.

In your letter of June 3, 1958, you asked whether the provisions in the 1957 recodification and revision of the election laws providing for cancellation of registration of persons who have not voted at least once at an election during the five preceding calendar years applies to Baltimore City. We herewith advise you that it is our opinion that the Legislature did not intend to change the previous law so as to make this section apply to Baltimore City. We reach this conclusion despite a recent *obiter dictum* by three of the five judges of the Court of Appeals, which might suggest a contrary interpretation.

Article 33, Section 45 (a) of the Annotated Code of Maryland (1957 Edition), which contains the provision under consideration, reads as follows:

> "If a registered voter in any county has not voted at least once at a primary, general or special election within the five preceding calendar years, it shall be the duty of the board of election supervisors of each county or the board of permanent registry in counties having a system of permanent registration unless cause to the contrary be shown, to cause the registration of such voter to be cancelled by erasing his name from the registry as provided in Section 33 of this article, or, in counties having a system of permanent registration by removing the registration cards or forms of said voter from the original and duplicate files and placing the same in a transfer file; a notice of such action and the reason therefor shall be sent to the last known address of such voter; provided, however, before erasing the name of such voter, notice shall be mailed to such voter addressed to the address given in the registry of such voter,

> notifying such voter to appear before such board at a date specified in such notice, not earlier than one week or later than two weeks from the date of mailing of such notice, and to show cause why his name should not be erased from the registry."

The Court of Appeals in a recent decision, *Board of Supervisors of Elections of Baltimore City v. Weiss*, 217 Md. 133, discussed at some length the report of the Legislative Council to the 1957 General Assembly. This report explained the Council's proposed draft of the recodification and revision of the election laws. Noting that the Council report was by no means exhaustive of the substantive changes recommended by the Legislative Council, the Court in the *Weiss* case stated:

> "* * * For example, the committee report contains no mention of the fact that Section 45 of Article 33 of the Code of 1957 no longer declares that the cancellation of registration by reason of not voting for five years shall not be applicable to Baltimore City as was provided in the Acts of 1953, Ch. 273, and last codified as Section 40 of Article 33 of the 1956 Supplement to the Code of 1951. * * *". *Supra.*

The corresponding section in the previous code, Article 33, Section 40 (b) (1956 Suppl.) had concluded with the express proviso "and further provided that this subsection shall not be applicable to Baltimore City". As noted by the Court of Appeals in its dictum, the above quoted language was omitted in the 1957 Act.

After studying the legislative history of this section, we do not believe that the Legislature merely by deleting this redundant language and leaving the section referring on its face only to the counties, intended to make the section apply to Baltimore City. It should be noted that the Legislative Council in its report expressly stated:

> ". . . The old confusing sections of Article 33 have been re-written with the intent of *improving its sense and readability rather than changing its content* . . .
>
> "The intent of the Committee was not to make substantive changes but rather to clarify and make

more understandable the present confusing language."

Legislative Council Report to the General Assembly of 1957, page 346. (Emphasis supplied.)

The following is a brief outline of the legislative history of present Section 45.

A system of permanent registration was first enacted for Baltimore City by Chapter 77 of the Acts of 1937. It included a two year non-voting cancellation procedure in Section 29-R. The 1939 Legislature, by Section 29-R of Chapter 639, subsequently codified as Article 33, Section 59 (1939 Code), provided for a five year non-voting cancellation of registration. This was to begin with the close of the year 1944. Some of the counties had similar provisions, eg. Harford County, 6 years (Article 22, Section 61—1939 Code); St. Mary's County, 6 years (Article 33, Section 62B —1943 Supp.).

The General Assembly in 1945 enacted a sweeping revision and recodification of the election laws, comparable in scope to that which was enacted in 1957. In the 1945 Act the provision for five year non-voting cancellation of registration was made uniform and statewide by Section 29 (b). It was made applicable to registered voters "in any county or in Baltimore City".

In 1953, the last year in which the pertinent section was revised prior to the 1957 Act, the General Assembly, by the enactment of Chapter 273 of the 1953 Acts, amended then Section 40 (b) by deleting all references to Baltimore City and adding the words at the end of the Section "and further provided that this sub-section shall not be applicable to Baltimore City". Since all references to Baltimore City were stricken and the section was thus made to apply on its face only to the counties, the language which was added at the end of the section, specifically excluding Baltimore City, was surplusage.

This redundant language was expunged by the 1957 Act. Otherwise, Section 40 (b) was recodified as Section 45 by the 1957 Act in substantially the same form. Although the language specifically excluding Baltimore City from the operation of this provision for cancellation of registration

was deleted, it is clear on the face of Section 45 that it still refers only to "county" or "counties". Nowhere does the section make any reference to Baltimore City as such. Thus the law, as it presently stands, is on its face "clear and unambiguous" and any other attempted interpretation of it based on the 1957 deletion of redundant language would "play havoc with consistency and certainty". *Board of Supervisors of Election v. Weiss, Supra.*

Furthermore, you will note that in the preceding Sections 43 and 44, under this same sub-heading of "Cancellation of Registration" there are a number of specific references to Baltimore City as such. Thus it appears that when the Legislature intended to include Baltimore City as well as the counties under any provision it expressly so stated. This also appears to be the form generally followed throughout Article 33. In addition there is no mention in Section 205, the definitions section of Article 33, that the word county or counties is to include Baltimore City as well. Furthermore, Baltimore City appears to have been given safeguards for its own registration lists corresponding to the five-year non-voting cancellation. Section 51 provides for a discretionary precinct check at any time by the Board, and Section 53 provides for a house-to-house canvass commencing in 1960 and taking place every four years thereafter.

Finally, if the Legislature had intended Section 45 to be applicable to Baltimore City after the enactment of the 1957 Act, there is nothing in the Section to indicate when the five year period would take effect. The 1939 Act specifically provided that the provisions would take effect at the close of the calendar year 1944.

In view of the foregoing and despite the suggestion of a possible contrary interpretation in the recent dictum of the Court of Appeals in the Weiss case, *supra,* it is our opinion that the 1957 Legislature intended to expunge only a redundant phrase at the end of Section 45 and did not intend to make a substantive change by making that section applicable to Baltimore City as well as to the counties.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ELECTIONS—JUDGES OF ELECTIONS—SOCIAL SECURITY—JUDGES OF ELECTIONS COMPENSATED ON FEE BASIS—NOT SUBJECT TO SOCIAL SECURITY COVERAGE.

December 12, 1958.

Mr. Charles A. Dorsey, President,
Board of Supervisors of Elections of
Baltimore City.

Following up our recent conversations and correspondence concerning Social Security coverage for judges of elections, we herewith advise you that, since these persons have been held by the United States Treasury Department to be compensated on a fee basis, it is our opinion that, by an extension of the reasoning of that ruling, they are excluded from Social Security coverage under the terms of the agreement executed by the State of Maryland and the Secretary of the Department of Health, Education and Welfare.

As set forth in our opinion to the Comptroller of the Treasury and reported in 43 Opinions of the Attorney General 304, a copy of which we recently sent you, the State of Maryland, when it executed the agreement with the Department of Health, Education and Welfare, elected to exclude from coverage (1) services of an emergency nature, and (2) services in any class or classes of positions the compensation for which is on a fee basis. The criteria for determination of what constitutes compensation on a fee basis are fully set forth in that opinion, and we see no reason to repeat them here. As set forth in that opinion, these standards must be applied to a particular situation—in this case, the services performed by the judges of elections in the precincts.

The United States Treasury Department, in an opinion given March 4, 1954, by J. S. Rieff, Acting Chief, Employment Tax Branch, to the Central Payroll Bureau, Department of Finance of Baltimore City, ruled, under Section 406.212, "Fees Paid a Public Official", of Regulations 120, Internal Revenue Code, and also under I.T. 3628, C.B. 1943, 942, that amounts paid to the clerks and judges of elections

performing services in primary and general elections in the City of Baltimore are not wages within the meaning of the Internal Revenue Code, but are fees and, therefore, not subject to income tax withholding. The standards for distinguishing between wages and fees appear to be the same for both the United States Treasury Department and the Department of Health, Education and Welfare. As set forth in our opinion to the Comptroller of the Treasury, above referred to, these criteria are similar to those applied by the Court of Appeals of Maryland in determining the existence of the common law relationship of employer and employee. In view of this, we see no reason to question the ruling given the City of Baltimore by the United States Treasury Department concerning the judges of elections. We, accordingly, advise you that this ruling by a department of the United States Government on the question of the nature of remuneration of judges of elections should be accorded great respect. In the light of this ruling, it is our opinion that, for purposes of Social Security coverage, judges of elections are compensated on a fee basis. They are consequently excluded from coverage by the terms of the agreement executed between the State of Maryland and the Secretary of the Department of Health, Education and Welfare. The letter addressed to us under date of November 3, 1958, by the regional representative of the Bureau of Old Age and Survivors' Insurance dealt only with the exclusion for part-time positions, which was not incorporated in the Maryland agreement, and did not deal with the fee basis exclusion. It is, consequently, in our view not controlling.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

EMPLOYEES' RETIREMENT SYSTEM

EMPLOYEES' RETIREMENT SYSTEM—SUPERINTENDENT OF MARYLAND STATE POLICE IS APPOINTED OFFICIAL ENTITLED TO CREDIT FOR PRIOR SERVICE AS ALDERMAN OF FREDERICK, WHICH IS AN ELECTED OFFICE.

PUBLIC OFFICERS—SUPERINTENDENT OF MARYLAND STATE POLICE IS AN APPOINTED OFFICER AND ALDERMAN OF FREDERICK IS AN ELECTED OFFICER.

June 23, 1958.

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

The Superintendent of the Maryland State Police has requested credit in the Employees' Retirement System for service as an Alderman of Frederick, Maryland, from June 15, 1925, to June 15, 1931.

An appointed official of the State who is a member of the Employees' Retirement System shall receive prior service credit for previous time spent as an elected or appointed official of a municipal corporation. When a claim for such prior service credit has been verified, the Board of Trustees of the Employees' Retirement System shall charge the municipal corporation for the amount due from it for such prior service credit. The computation shall be "based upon the compensation actually received by such elected or appointed official from the . . . municipal corporation during the period for which prior service is to be credited". Article 73B, Section 9(7), Annotated Code of Maryland (1957 Ed.).

The Superintendent of the Maryland State Police is an appointed official of the State. His position possesses those characteristics which the Court of Appeals has often said distinguish a public office from mere employment. He exercises a portion of the sovereignty of the State, he is appointed for a definite term, his duties are continuous and not intermittent, and he takes the constitutional oath of office. *Buchholtz v. Hill*, 178 Md. 280, 283-284 (1940); *Pressman v. D'Alesandro*, 211 Md. 50, 55 (1956).

The Superintendent is appointed by the Governor with the advice and consent of the Senate for a term of four years. Article 88B, Section 3, of the Code. The Superintendent is charged with the responsibility and granted the authority to organize and administer the Department of Maryland State Police. Article 88B of the Code. He is required to take the oath of office prescribed by Section 6 of Article I of the Constitution of Maryland and Section 7 of Article 70 of the Code.

Because the Superintendent of the Maryland State Police is an appointed official of the State, he may obtain credit in the Employees' Retirement System for the previous service as an Alderman of Frederick if in that former position he was an elected or appointed official. Article 73B, Section 9(7) of the Code.

The statutes which created and empowered the Aldermen of Frederick when the Superintendent served in that position are codified as Sections 208-215, inclusive, of Article 11 of the Code of Public Local Laws of Maryland (1930 Ed.). The Aldermen of Frederick are the legislators of that municipality and are elected officials.

You have directed our attention to the fact that although the Public Local Laws of Frederick County did not determine the compensation of the Aldermen during the period that the Superintendent served, you have been informed that an ordinance of the City of Frederick provided for the payment of One Dollar ($1.00) for each meeting attended. The Board met at the call of the Mayor of Frederick whenever and as often as he thought the interests of the City required that they should convene. Article 11, Section 210, Code of Public Local Laws (1930 Ed.). We have not found authority in Maryland or elsewhere which suggests that the amount of compensation is a factor in determining whether a person is an officer of a State or local government. Emolument is not a necessary element to constitute a public office, though it may be an usual ingredient. 3 McQuillin, *Municipal Corporations,* Sec. 1229; *La Rocca v. Flynn,* 257 N. Y. 5, 177 N.E. 290 (1931).

Substantial compensation is not a requirement for prior service credit in the statutes governing the Employees' Retirement System.

In our opinion, the Superintendent of the Maryland State Police is entitled to credit in the Employees' Retirement System for previous service as an Alderman of Frederick, Maryland, from June 15, 1925, to June 15, 1931, upon verification of such service and payment of its obligation by the municipality.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

EMPLOYEES' RETIREMENT SYSTEM—MANAGER OF CITY OF ROCKVILLE IS AN APPOINTED OFFICIAL ENTITLED TO RETIRE IF NOT CONTINUED IN OFFICE AFTER TWENTY YEARS OF CREDITABLE SERVICE.

December 9, 1958.

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

You have asked whether a member of the State Employees' Retirement System who served as Manager of the City of Rockville from his appointment in November, 1954 until the Mayor and Council of Rockville resolved not to continue him in office, by resolution adopted on May 6. 1958, is entitled to a pension. The employees of the City of Rockville are members of the Retirement System.

A member of the Employees' Retirement System who holds an elective or appointive State office for either a fixed or an indefinite term and is not continued in office, reappointed or re-elected, may retire and receive a pension if he has completed twenty years of creditable service. Article 73B, Section 11 (12) Annotated Code of Maryland (1957 Ed.). Elected or appointed officials of municipal corporations which participate in the State Employees' Retirement System are entitled to all the benefits and obligations of the retirement system as though they were elected or appointed officials of the State. Article 73B, Section 27, of the Code.

The Manager of the City of Rockville was not continued in office or reappointed. If he has completed twenty years of creditable service and is an elected or appointed official of the municipality, he is entitled to the retirement and pension benefits of Section 11 (12) of Article 73B of the Code.

This office has repeatedly defined "office" or "official" as used in the law of the Retirement System, as synonymous with "public office" and "public official" as defined by the Court of Appeals. The Court has stated that a position is a public office where it has been created by law and casts

upon the incumbent duties which are continuing in their nature and not occasional and which call for the exercise of some portion of the sovereignty of the State. *Pressman v. D'Alesandro*, 211 Md. 50, 55 (1956). The most important characteristic of a public office, as distinguished from any other employment, is the fact that the incumbent is entrusted with a part of sovereign power to execute some of the functions of government for the benefit of the people. The necessity of taking an oath of office is also a very important test in determining whether the position in question is a public office. *Buchholtz v. Hill*, 178 Md. 280, 283-284 (1940). These criteria have been applied by the Court of Appeals to determine whether persons are officers of counties and municipalities. *Baltimore City v. Lyman*, 92 Md. 591, 611 (1900), *Truitt v. Collins*, 122 Md. 526, 531-532 (1914), *Calvert County Commissioners v. Monnett*, 164 Md. 101, 104 (1933). See also *Carter v. Mayor and City Council of Baltimore*, Circuit Court of Baltimore City, Daily Record, April 13, 1957.

The Manager of the City of Rockville is appointed by a majority vote of the Mayor and Council for an indefinite term and may be removed by them. He is the executive officer and head of the administrative branch of the City responsible to the Mayor and Council for the proper administration of all affairs of the City. He is empowered to appoint, suspend or remove all employees of the City and is responsible for the administration of the City's budget. He may be the head of one or more departments of the municipality. The Manager is charged with the duty of seeing that all laws and ordinances are enforced and that all franchises, permits and privileges granted by the City are faithfully observed. He must devote his entire time to the discharge of his duties. His compensation is fixed from time to time by ordinances or resolutions of the Mayor and Council. Chapter 2, Laws of Rockville. The City Manager must take an oath to diligently and faithfully discharge the duties of his office without prejudice. Section 49-30, Code of Public Local Laws of Montgomery County (1955 Edition).

The position of City Manager is a relatively new one in our scheme of government. In the only analogous instance which has come to our attention, the Attorney General held that the clerk and treasurer of the town of Hampstead held an office of profit or trust. 23 Opinions of the Attorney General 382 (1938).

In our opinion, the Manager of the City of Rockville is an appointed official as that term is used in the State Employees' Retirement System statutes and is entitled to the retirement and pension privileges provided by Sections 11 (12) and 27 of Article 73B of the Code if he is not continued in office, reappointed or re-elected after twenty years of creditable service.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

GAME AND INLAND FISH COMMISSION

GAME AND INLAND FISH COMMISSION—NATURAL RESOURCES —CRIMINAL LAW—IT IS UNLAWFUL FOR NON-RESIDENTS TO TAKE BAIT FISH BY USE OF A NET OF ANY KIND WHATSOEVER.

September 4, 1958.

Mr. William J. Brannan, Jr.,
Assistant State's Attorney for
Montgomery County.

In your recent letter you have asked whether or not it is legal for non-residents of the State of Maryland to use a net to take bait fish.

Article 66C, Section 211(c), Annotated Code of Maryland (1957 Ed.) reads as follows:

> "(c) *Certain nets permitted for taking bait fish.*—It shall be lawful to use a dip or landing net or seine not over six feet in length nor greater than three feet in depth for the taking of bait fish only."

Section 211(d) reads as follows:

> "(d) *Use of nets by non-residents prohibited.*— It shall be unlawful for any person who is not a bona fide resident of Maryland to fish in the non-tidal waters of this State with nets of any description."

It is a general canon of statutory construction that all statutes on the same subject must be harmonized as far as possible (*Kelly v. Consolidated Gas,* 153 Md. 523) and considered as *pari materia, Applestein v. Osborne,* 156 Md. 40. Where two statutes relating to the same subject are not irreconcilable, they should be construed together in harmony with the objects of legislation and all their provisions should be given effect so far as reasonably possible. *Welsh v. Kuntz,* 196 Md. 86. Wherever possible, statutes dealing with the same subject matter should be construed as supplementary

to each other, *State v. Fisher,* 204 Md. 307. When there are two acts on the same subject, the rule is to give effect to both, if possible. *State v. Yewell,* 63 Md. 121.

Applying these canons of construction to Sections 211(c) and (d), cited, we find that the provisions of the two statutes are not inconsistent with each other, and that both can be given effect. Section 211(d) simply modifies Section 211(c) to the extent that it limits or restricts the taking of bait fish by the use of a net to residents of the State. The words "to take" are defined by Webster's New International Dictionary, 2d Ed., to mean "to catch or capture". The words "taking of bait fish", as used in Section 211(c), simply mean to get possession or control of bait fish. Webster's New International Dictionary, 2d Ed., defines the words "to fish" to mean "to be employed in the taking of fish by any means whatsoever as by angling or drawing a net". The cardinal rule to be followed in the construction of statutes is to ascertain the intention of the Legislature and to see that that intention is carried out.

It is clear from the language of the statutes, reading them together, that the Legislature intended to make it unlawful for any non-resident of the State of Maryland to take or catch fish of any kind, whether they be bait fish or other fish, from the non-tidal waters of this State by use of nets of any description whatsoever. Since the taking of bait fish with any kind of a net would constitute fishing with a net, it is my opinion that it is unlawful for a non-resident to use a net to take bait fish from the non-tidal waters of this State.

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

GAME AND INLAND FISH COMMISSION—DUCKS—STATE REGULATIONS WHICH CONFLICT WITH MIGRATORY BIRD REGULATIONS OF FEDERAL GOVERNMENT ARE INVALID.

September 30, 1958.

Mr. Ernest A. Vaughn, Director,
Department of Game and Inland Fish.

You ask whether or not State Regulations governing migratory birds, which conflict with Federal Laws and Regulations on the same subject, are valid.

The Federal Government obtained its control over migratory birds under the treaty for the protection of migratory birds entered into between the United States and Great Britain on August 16, 1916. Congress under the authority granted to it by Article I, Section 8, Clause 18 of the United States Constitution, enacted Section 703 through 711 of Title 16, U.S.C.A. to carry out the provisions of the treaty. Article I, Section 8, Clause 18, of the Constitution provides that the Congress shall have power to make all laws which shall be necessary to carry into execution all powers vested by the Constitution in the Government of the United States or any Department or Officer thereof.

Under the provisions of Article VI, Clause 2, of the United States Constitution, the terms of that treaty and the laws and regulations passed to carry it into execution became the supreme law of the land.

Title 16, U.S.C.A. Section 708 reads as follows:

> "Nothing in sections 703-711 of this title shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of said sections, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with Section 704 of this title."

This Section only gives the States the right to pass laws and regulations which do not conflict with the existing treaty and Federal laws and regulations passed in connection therewith. Since the treaty and the Federal laws and regulations are the Supreme law of the land, it is my opinion that any laws or regulations of the State of Maryland which do conflict with them are invalid and of no effect whatsoever.

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

GENERAL CONSTRUCTION LOAN FUNDS

GENERAL CONSTRUCTION LOAN FUNDS—FUNDS UNDER ACT MAY ONLY BE USED FOR PURPOSE DESIGNATED BY TERMS OF THE ACT.

December 10, 1958.

Mr. James J. O'Donnell, Director,
Department of Public Improvements.

In your recent letter you ask whether or not Item 130, amounting to $60,000, of the General Construction Loan of 1957, which was allocated to Salisbury State Teachers College to convert Old Library Building to Student Activities Building may properly be used to purchase furniture and furnishings for the building upon completion of the conversion.

Section 5, Chapter 532, Acts of 1957, provides that the proceeds of the certificates of indebtedness issued thereunder shall be used exclusively for the purpose specified in the Act. Section 6 of Chapter 532 provides that all unexpended funds remaining from completed projects authorized under the Act shall be transferred to the Annuity Bond Fund and applied to the debt service requirements of the State. We are well aware that Section 3, Article 15A, Code, reads as follows:

> "Any unexpended balance of an appropriation for the acquisition of land, buildings, equipment, new construction, or other capital expenditure, whether made through a budget bill, supplementary appropriation bill or bond issue bill, shall not revert to the general treasury, but may be expended, for capital purposes only subsequent to the fiscal year for which the same was appropriated, with the approval of the Board of Public Works, and shall be carried in a capital account until so expended or until reappropriated to the same or some other purpose by subsequent legislative action."

We are of the opinion that Section 3, Article 15A, does not apply in this case because of the language used in Section 6 of the Act.

Under the circumstances, we are of the opinion that any unexpended funds, after completion of the conversion of the building must be transferred to the Annuity Bond Fund, and that they may not be used for the purchase of furniture and furnishings.

C. FERDINAND SYBERT, *Attorney General.*

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

HEALTH

HEALTH—CREATION OF SANITARY DISTRICTS—SANITARY DISTRICT MAY INCORPORATE UNDER THE STATE-WIDE ACT (CHAPTER 782, ACTS OF 1957), OR PUBLIC LOCAL LAWS PROVIDING FOR SANITARY DISTRICTS.

March 27, 1958.

Dr. Perry F. Prather, Chairman,
State Board of Health.

We have your request for an opinion as to the proper manner in which the Charles County Sanitary District should be incorporated and should operate. The problem has been created by the passage of two separate Acts by the General Assembly at the 1957 Session: the first, Chapter 749, Acts of 1957 (hereinafter referred to as the "Charles County Act") is a complete, comprehensive public local law providing for the establishment, maintenance and operation of sanitary districts in Charles County; the second, Chapter 782, Acts of 1957 (hereinafter referred to as "State-wide Act") is a public general law, adding 28 new sections to Article 43 of the Code, enabling the counties of this State to appoint and incorporate sanitary districts to operate in one or more of the counties of the State. While these Acts are not identical, their purposes are the same and in many respects the Acts have similar terms. However, there are some major differences, principally in regard to the issuance of bonds for projects of the respective sanitary districts.

Section 204E of the Charles County Act authorizes the County Commissioners to provide funds for facilities of a sanitary district by issuing bonds upon the full faith and credit of Charles County in such amounts as the Commissioners may deem necessary, but never to exceed 15% of the total value of the property assessed for county taxation purposes within the sanitary district, and all such bonds must mature within thirty years from the date of issuance, with interest not to exceed 6% per annum.

Section 586 of the State-wide Act permits the duly created sanitary commission in any particular district to issue bonds

in order to provide funds for proper projects, which bonds are to be issued upon the full faith and credit of the county or counties in which the district lies. The total amount of the bonds is limited to 25% of the total value of the property assessed for county taxation purposes within the said sanitary district. Interest on these bonds is not to exceed 5% per annum and they must mature within forty years from the date of issuance.

You state in your request for an opinion that it is the belief of the State Board of Health that the State-wide Act offers the best means of providing sanitary districts in the several counties of the State. You specifically request an opinion as to whether (1) the Charles County Act or the State-wide Act takes legal precedence when enacted for the same purpose, and (2) whether there is any local discretion as to which Act shall be used in achieving the public health objective.

The Charles County Act was introduced as Senate Bill No. 558 and, after approval by the General Assembly, was signed by the Governor on April 15, 1957, at which time it was designated as Chapter 749. The State-wide Act was introduced as House Bill No. 558 and, after being duly passed by the General Assembly, was approved by the Governor also on April 15, 1957, and was designated as Chapter 782. Both Acts, by their terms, became effective on June 1, 1957. We have been presented no facts which would indicate which Act the Governor did in fact first sign and approve, and in the absence of such factual evidence, the presumption is that they were signed and approved by the Governor in the numerical order of their Chapter numbers. *Strauss v. Heiss,* 48 Md. 292; *Musgrove v. B. & O. R. R. Co.,* 111 Md. 629-638. The rule has been stated in *Elgin v. Capitol Greyhound Lines,* 192 Md. 303, 317, as follows:

> "As pointed out by the appellees, where two or more acts of the Legislature are approved by the Governor on the same day, the latter act in numerical order of chapters is considered the last expression of the legislative will. *State v. Davis,* 70 Md.

237, 240, 16 A. 529; *Musgrove v. Baltimore & O. R. Co.*, 111 Md. 629, 75 A. 245. We agree that as between Chapter 326 and Chapter 560, of the Acts of 1947 the latter is the more recent.

> "If there is any inconsistency between these two acts, Chapter 326 must yield to Chapter 560. This Court has stated on many occasions that the act passed last must prevail. *Davis v. State,* 7 Md. 151, 159, 61 Am. Dec. 331; *Albert v. White,* 33 Md. 297, 305; *Appeal Tax Court v. Western Maryland R. Co.*, 50 Md. 274, 296; *Yunger v. State,* 78 Md. 574, 577, 28 A. 404; *Musgrove v. Baltimore & O. R. Co., supra; Beall v. Southern Maryland Agr. Ass'n,* 136 Md. 305, 312, 110 A. 502. The appellees here admit that Chapter 560 is the more recent law of the two acts. We must therefore hold, to the extent of the conflict between Chapter 326 and Chapter 560, that Chapter 560 prevails and the prohibition of Chapter 326, of the Acts of 1947, cannot apply to the taxes imposed by Chapter 560, of the Acts of 1947."

We therefore conclude that the State-wide Act was the last approved and would supersede the earlier Act where inconsistent.

Where the language of a general law clearly indicates that its purpose is to supersede or be in substitution of a local law, a local law may yield to that intention. See *Kirkwood v. Provident Savings Bank,* 205 Md. 48. An inspection of the State-wide Act shows that the General Assembly, by its express language, has indicated an intention to provide an additional and alternative method for the accomplishment of the creation and operation of sanitary districts. Section 603(b) of the State-wide Act reads as follows:

> "(b) The foregoing sections of this sub-title shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other

> laws, and shall not be regarded as in derogation of any powers now existing."

The General Assembly, by virtue of this language, has made it clear that this Act is intended to be an additional or alternate method for the accomplishment of the purposes provided in the Act, and is to be treated as supplemental to the powers conferred by other laws and not to be taken in derogation of those laws. We are therefore of the opinion that, by the adoption of the State-wide law with the express provision that it is intended to be supplemental and an additional method of appointing sanitary districts, the General Assembly has granted to the local authorities, namely, the County Commissioners, an option as to whether to proceed under the State-wide Act, or a local law, and we are therefore of the opinion that the County Commissioners of Charles County may legally proceed under either of the Acts herein referred to.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

HEALTH—REGULATIONS OF STATE BOARD OF HEALTH REGARDING SANITARY CONTROL OF SUBDIVISIONS ARE BINDING ON POLITICAL SUBDIVISIONS OF THE STATE AND NO POLITICAL SUBDIVISION MAY ISSUE RULES AND REGULATIONS IN CONFLICT WITH BOARD OF HEALTH REGULATIONS.

September 8, 1958.

Dr. Perry F. Prather, Director,
State Department of Health.

This will acknowledge receipt of your letter of August 14, 1958, calling our attention to the fact that the County Commissioners of Cecil County have considered and adopted subdivision regulations which conflict with the rules and regulations of the State Department of Health governing the subdivision of land in the counties of Maryland. You specifically request an opinion as to whether Cecil County or any other county can adopt local regulations involving sanitary control of subdivisions in which the local requirements conflict with those of the State Department of Health governing the same situation.

Article 43, Sections 387 through 406 of the Annotated Code of Maryland (1957 Ed.), grants unto the State Board of Health general supervision and control over the waters of the State insofar as their sanitary and physical condition affect the public health and comfort. The State Board of Health is authorized to make and enforce rules and regulations and to order work to be executed in order to correct or prevent water pollution. Within the regulations, there is a provision contained in Section 396 which requires all owners of land to file with the State Board of Health a plat of any subdivision, together with a statement as to the methods proposed for supplying such subdivision with water and sewerage systems, or such other information as may be required by the Board. The State Board of Health is further given broad discretion to order the installation of water supply and sewerage systems for such subdivisions as the public health may require.

In addition, the State Board of Health is authorized to enforce orders upon not only private individuals and corporations, but also upon counties, water, sewerage or sanitary districts, municipalities and other political subdivisions. It is therefore intended by the Legislature that the State Board of Health shall have the responsibility of supervising and establishing rules and regulations throughout the entire State, which rules and regulations shall be binding upon all counties.

In *Cityco Realty Co. v. Annapolis*, 159 Md. 148, it was held that the statutes before mentioned were sufficient to authorize the State Department of Health to assent to the discharge of sewage by the City of Annapolis. It is well recognized by the Court of Appeals that the preservation of the health and physical safety of the people of the State is one of the prime functions of the General Assembly in the exercise of police power. See *Welch v. Coglan*, 126 Md. 1. In its wisdom, the General Assembly has established the State Board of Health to administer and supervise the details of the policies established by the Legislature. In administering such policies and acts, the Board of Health functions as an arm or instrumentality of the Legislature (*Dal Maso v. County Commissioners*, 182 Md. 200, 205), and orders or regulations issued in the exercise of its statutory powers have the same force and effect as acts of the Legislature. (*Bosley v. Dorsey*, 191 Md. 229, 238).

The rules and regulations of the State Board of Health which have been duly promulgated are to be followed by all political subdivisions of the State, and no political subdivision may issue its own rules and regulations which conflict with the policies set forth in the regulations and rules of the State Board of Health. The counties, however, supplement the rules and regulations of the State Board deemed to meet local conditions.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

INSURANCE

INSURANCE—SECTION 82A OF ARTICLE 48A WHICH REQUIRES INSURER ISSUING CONTRACT OF INSURANCE COVERING PLEDGED PROPERTY TO GIVE CERTIFICATE TO BORROWER DOES NOT APPLY TO INSURANCE OF TITLE TO REAL PROPERTY.

January 7, 1958.

Mr. John H. Coppage,
Deputy Insurance Commissioner.

Chapter 736 of the Laws of Maryland of 1957 enacted Section 82A of Article 48A of the Annotated Code of Maryland (1957 Supp.), which provides that an insurer issuing a contract of insurance covering the pledged property of a borrower and supplying such contract to the lending institution shall simultaneously issue to the owner of the pledged property a certificate of insurance setting forth the coverages provided in the contract, the exact amount of premium charged for each coverage, and the effective and expiration dates of the contract.

You ask whether this statute applies to contracts insuring title to real property, whether it applies to policies of title insurance which afford coverage only for the interest of the mortgagee, and whether it applies to other policies of insurance which insure only the interest of the lender.

There may be some doubt as to whether a policy of title insurance, particularly a contract which guarantees only the lender's security interest, covers "the pledged property of a borrower". The ambiguity may be resolved by considering the intent of the Legislature and the evil for which a cure was sought.

I understand that this statute was considered by the General Assembly at the request of the Insurance Department. The Department had been informed that in some instances lending institutions were purchasing policies to insure property in which the institutions had a security interest and the borrower was not told of the cost, coverage or term of

the policy though he was charged with periodic payments for the premium. Because the borrower is not told the expiration date of the policy, the lender procures a renewal before the borrower knows of the necessity for a renewal. Obviously, this practice restricts competition between insurers and deprives the insured of an opportunity to procure the coverage from an agency or company of his choice. It is obvious from reading the statute that the Insurance Department and the General Assembly intended to remedy this situation.

Policies of title insurance are generally not renewable from time to time. Such policies are effective as long as the insured retains the title guaranteed. The premium is paid but once at the inception of the policy. There is no necessity for renewal and hence not an occasion for the practice meant to be prohibited by the statute.

In my opinion, Section 82A of Article 48A of the Code (1957 Supp.) does not apply to policies of insurance which insure the title to real property. The statute may be applicable to other types of insurance on real property, but it is not applicable to policies of real property title insurance.

In my opinion, in other instances in which the statute is applicable, the fact that the policy affords coverage only for the single interest of the lender does not make the statute inapplicable. For example, the statute applies to a policy of fire insurance covering only the lender's interest in a chattel or improvements to real property which are security for a debt. Such policies "cover the pledged property of a borrower". If the property is destroyed by a hazard against which insurance is provided and the proceeds of the policy are paid to the lender, the debt is absolved to the extent of that payment. Such policies are renewable from time to time and the purpose of the legislation may be fulfilled in these particular instances.

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—NON-PROFIT HEALTH SERVICE CORPORATION MAY BE REQUIRED TO PAY AS "COST OF EXAMINATION" EXPENSE OF EXTRA PERSONNEL EMPLOYED TO ASSIST INSURANCE DEPARTMENT IN FIELD OF SPECIALIZED KNOWLEDGE.

February 19, 1958.

Mr. Charles S. Jackson,
State Insurance Commissioner.

Section 328 of Article 48A of the Annotated Code of Maryland (1957 Ed.) requires corporations maintaining and operating non-profit health service plans to obtain your approval of changes of rates charged to subscribers and of contracts with participating hospitals. Maryland Hospital Service, Inc., such a corporation, has requested approval of changes of its rate structure and of its contracts with participating hospitals.

Obviously, intelligent consideration of this request requires examination and evaluation of certain practices of the participating hospitals which affect the cost of services rendered, and of the relationship between these hospitals and Maryland Hospital Service, Inc. You must give particular consideration to the present and proposed methods by which the hospitals determine and report their costs to Maryland Hospital Service, Inc., and the present and proposed arrangement by which Maryland Hospital Service, Inc., reimburses the hospitals for services rendered to subscribers. You have concluded that specialized knowledge is required and that the regular personnel of the Insurance Department have not had sufficient experience and do not have the requisite knowledge to properly evaluate the factors which determine whether the present and proposed arrangements between Maryland Hospital Service, Inc., and the participating hospitals are equitable and in the best interests of Maryland Hospital Service, Inc., the hospitals, the subscribers and the community at large. Having reached this conclusion, you employed the management consultant firm of Booz, Allen and Hamilton, who have had consider-

able experience in the field of hospital management and financing, to assist the regular personnel of your Department in examination and consideration of the request by Maryland Hospital Service, Inc., for changes in its contracts with its member hospitals. Section 57 of Article 48A of the Code authorizes you to employ special examiners to supplement the personnel of your Department.

You have asked whether you may properly charge Maryland Hospital Service, Inc., for the cost of the services rendered by Booz, Allen and Hamilton.

Section 330 of Article 48A of the Code provides that a non-profit health service corporation, whose affairs are examined by the Insurance Department pursuant to the power that you have to make such an examination in connection with the regulation of such a corporation, "shall pay to the Insurance Commissioner the traveling and other expenses of examination * * *".

In our opinion, the cost of the examination and services by Booz, Allen and Hamilton may properly be charged to Maryland Hospital Service, Inc., and this corporation must pay such charges to the Insurance Department as a part of the cost of the examination necessitated by the corporation's request for a rate increase and contract amendments.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—BROKERS FOR LIFE INSURANCE—A PERSON MAY BE LICENSED TO ACT AS A BROKER OF LIFE INSURANCE WITHOUT ACQUIRING A LICENSE TO ACT AS A LIFE INSURANCE AGENT IF HE IS NOT AN AUTHORIZED OR ACKNOWLEDGED AGENT OF AN INSURER.

February 28, 1958.

Mr. John H. Coppage,
Deputy Commissioner,
State Insurance Department.

Section 122 of Article 48A of the Annotated Code of Maryland (1957 Ed.), which was enacted by the General Assembly as Chapter 515 of the Laws of Maryland of 1957, provides for the examination and licensure of life insurance agents.

You ask whether a person who is not licensed as a life insurance agent may be licensed to act as a broker of life insurance.

No person may be a broker for insurance until he has been licensed as such by the Insurance Commissioner. Article 48A, Section 117 of the Code. To be licensed as a broker, except for life insurance only or life insurance in conjunction with accident or health insurance written by a life insurance company, the applicant must satisfy the Commissioner that he has had sufficient education or experience and must pass an examination. Article 48A, Section 121 of the Code. No examination is required to be licensed as a broker of life insurance.

Unless defined by statute, an insurance broker is one engaged in the writing of insurance who is not attached to any particular company but procures the business and then places it wherever he is able. *Hankins v. Public Service Mutual Insurance Co.*, 192 Md. 68, 79-80 (1949). The broker is generally hired by the insured and is his agent and not the agent of the insurer. *American Casualty Co. v. Ricas*, 179 Md. 627, 631 (1941). The insurance laws of Maryland define an insurance broker as a person who, "for compensa-

tion, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself, and not being a duly appointed solicitor, agent or officer of the company in which such insurance or reinsurance is effected, and not being a duly licensed or qualified broker's solicitor as defined in (Section 118 of Article 48A) * * *". Article 48A, Section 115 of the Code.

A "life insurance agent" who must meet the requirements of Chapter 515 of the Laws of Maryland of 1957 is, "(A)ny authorized or acknowledged agent of an insurer, and any sub-agent of such agent, who acts as such in the solicitation of, negotiation for, or procurement or making of a life insurance or annuity contract; * * *". Article 48A, Section 122(a)(1) of the Code. A "sub-agent" is any person who acts "for or on behalf of a licensed life insurance agent in the solicitation of, negotiation for, or procurement or making of a life insurance or annuity contract, whether or not he is designated as a sub-agent or a solicitor or by any other title". Article 48A, Section 122(a)(2) of the Code. A person who solicits, negotiates for, procures or makes a contract of life insurance is either a life insurance agent or a broker of life insurance. If he is an "authorized or acknowledged agent of an insurer", he is a "life insurance agent" and must qualify and be licensed as provided in Section 122 of Article 48A of the Code. If he acts for compensation but is not an "authorized or acknowledged agent of an insurer", he is not a "life insurance agent" (as defined by Article 48A, Section 122 (a) of the Code), but is a broker of life insurance and may be licensed to act as such without being licensed as a "life insurance agent". Article 48A, Section 115 of the Code. If a life insurance broker is *authorized* as or *acknowledged* by a life insurer as an agent of the insurer, he is a "life insurance agent" and must procure a license to act as such under Section 122, Article 48A of the Code.

In our opinion, a person may be licensed to act as a broker of life insurance without satisfying the life insurance

agent's licensing laws (Article 48A, Section 122 of the Code), if he is not an "authorized or acknowledged agent of an insurer".

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—GROUP LIFE INSURANCE—POLICIES ISSUED TO TRUSTEES OF ASSOCIATION MAY NOT CONDITION ELIGIBILITY UPON AGE BUT MAY CONDITION ELIGIBILITY UPON EMPLOYMENT.

April 9, 1958.

Mr. Charles S. Jackson,
State Insurance Commissioner.

You have requested our advice upon two problems which have arisen under Section 190 of Article 48A of the Annotated Code of Maryland (1957 Ed.), which is the group life insurance law.

First, you ask whether eligibility for life insurance under a group policy issued to the trustees of an association of medical doctors may be restricted to a class of members of the association determined by age. Doctors over the age of seventy-five years would not be eligible for the group life insurance under a policy submitted for approval by the Insurance Department.

Section 190 of Article 48A of the Code was amended in 1957 to permit the issuance of policies of group life insurance "to the trustees of a fund established by * * * an association of persons licensed by the State of Maryland or authorized by law to engage in a recognized profession, * * * ". Subsection 4(a) of Section 190 states that the persons eligible for the group life insurance shall be all of the members of such an association or all of any class or classes of members of such an association determined by conditions pertaining to their employment, or to membership in the association.

We agree with the holding of the Appellate Division of the Supreme Court of New York that age is not a condition pertaining to employment but is a condition pertaining to the employee, or member of the association, himself. *Dudrey v. Equitable Life Assurance Society*, 10 N. Y. Supp. 2d 639 (1939). In our opinion, if age is not a condition of membership in the association, it may not be a condition of

eligibility for the group life insurance policy. A policy of group life insurance issued to the trustees of an association of professional persons may not provide that only those members of the association who are under a certain age shall be eligible for the life insurance coverage.

Secondly, you have asked whether a policy of group life insurance issued to the trustees of a fund established by an association of teachers may provide that only those members of the association who are employed as teachers shall be eligible for the insurance afforded by the policy. In our opinion, a policy of group life insurance issued to an association of professional persons may require employment in an actual employer-employee relationship as a condition of eligibility. Subsection 4(a) of Section 190 of Article 48A of the Code specifically provides that the persons eligible for the group insurance may be a class or classes of members of the association determined by conditions pertaining to their employment. We have not considered whether self-employment by professional persons may be a valid determinant of the class of an association eligible for coverage under a policy of group life insurance.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—SECURITY DEPOSITED WITH TREASURER OF STATE BY DOMESTIC INSURANCE COMPANY ENGAGED IN THE BUSINESS OF WRITING CASUALTY INSURANCE OR FIDELITY BONDS MAY NOT BE SURRENDERED BY THE TREASURER AS LONG AS INSURANCE POLICIES OR FIDELITY BONDS ISSUED BY THE COMPANY ARE OUTSTANDING, EVEN THOUGH THE COMPANY MERGES WITH ANOTHER DOMESTIC INSURANCE COMPANY AND THE LATTER COMPANY ASSUMES THE OBLIGATIONS OF THE FORMER COMPANY.

August 14, 1958.

Mr. Charles S. Jackson,
State Insurance Commissioner.

Every company incorporated in Maryland to write casualty insurance or fidelity bonds must assign to and deposit with the Treasurer of the State "in trust, as security for all the holders of policies of said company, . . ." securities having a market value of not less than One Hundred Thousand Dollars ($100,000). Article 48A, Section 22, Annotated Code of Maryland (1957 Ed.). The deposit is a trust fund for the benefit of the holders of policies issued by the company. *American Casualty Insurance Company's Case,* 82 Md. 535, 560-563 (1896). See also 18 Appleman, *Insurance Law and Practice* (1945), Sections 10488-10494.

The American Bonding Company of Baltimore (referred to herein as ABC) was incorporated in Maryland in 1894. ABC engaged in the business of writing casualty insurance and fidelity bonds. It has assigned to and deposited with the Treasurer bonds issued by the United States Government valued at Four Hundred Thousand Dollars ($400,000). The bonds are registered as to principal and interest in the name of the "Treasurer of the State of Maryland in trust for policy holders of the American Bonding Company of Baltimore, Maryland". The Treasurer has certified at the request of ABC that the bonds are held by him "on deposit in trust, as security for the holders of policies of American Bonding Company of Baltimore". The value of the bonds is greater than the amount required by the Maryland law because

ABC engaged in business in other states which required a deposit of the greater value.

Fidelity and Deposit Company of Maryland (referred to herein as F & D) was incorporated in Maryland in 1890. F & D is engaged in the business of writing casualty insurance and fidelity bonds. It has assigned to and deposited with the Treasurer securities in compliance with the requirement of Section 22 of Article 48A of the Code.

ABC and F & D merged in accordance with the applicable provisions of Articles 23 and 48A of the Code by an agreement executed on November 25, 1957, and effective on December 31, 1957. F & D then owned all of the outstanding shares of capital stock of ABC. When the Articles of Merger became effective, the separate existence of ABC ceased and the existence of F & D continued as the surviving corporation. Policies of insurance or surety bonds issued by ABC are still in effect and outstanding. The Articles of Merger provide that:

> "F & D shall be liable for all the debts and obligations of ABC; any claim existing or action or proceeding pending by or against ABC may be prosecuted to judgment or decree as if such merger had not taken place, or F & D, upon its own motion or the motion of any party, may be substituted as a party in place of ABC and such judgment or decree against ABC shall constitute a lien upon the property of F & D. Such merger shall not in any way impair the rights of creditors or any liens upon the property of ABC or F & D."

This is the effect of the merger even if not recited in the Articles. Article 23, Section 71(4) of the Code; Maryland Rule 222.

If ABC "has surrendered its charter or ceased to do business in this State and . . . has discharged all of its obligations . . .", the Treasurer may surrender the deposit of bonds upon the joint written request of the company and the Insurance Commissioner. Article 48A, Section 26 of the

Code. A written request has been submitted for the surrender of the bonds assigned to and deposited with the Treasurer by ABC. You have asked whether you may concur in this request.

ABC has ceased to do business in Maryland and elsewhere. If ABC has discharged all of its obligations, you should join in the request and the Treasurer should surrender the deposit.

In 9 Opinions of the Attorney General 127 (1924) this office advised the Insurance Commissioner that such a deposit could not be surrendered to a foreign insurance company which had purchased all of the capital stock and assumed all of the liabilities of a domestic insurance company by which the deposit had been made. The Attorney General stated that the assumption of the domestic company's liabilities by the foreign company did not discharge these obligations. He stated that as long as the domestic company had a policy outstanding, it had an undischarged obligation and cited the decision of the Supreme Court of the United States in *Lovell v. St. Louis Mutual Life Ins. Co.*, 111 U.S. 264 (1884) in support of these propositions. That was a suit upon a policy issued by an insurance company which had assigned all of its assets to another company. The assignee company had assumed the liabilities of the assignor company. The assignor company had deposited with the treasurer of the state in which it was incorporated bonds as indemnity against losses on policies to citizens of the state of incorporation. The Supreme Court observed that if the policyholder did not have recourse to the deposit with the state treasurer, the policyholder would be relegated to fruitlessly prosecuting the defunct assignor company or accepting insurance in the assignee company although he was not bound by the assignment and might not desire insurance in the assignee company. The Court held that the object of the requirement of the deposit was to protect the citizens of the state against such a dilemma and that the assignment of assets and assumption of liabilities could not deprive policyholders of the right to look to the deposit for indemnification.

The Insurance Commissioner subsequently requested the Attorney General to reconsider his opinion because "legal steps were taken to merge the two companies". The Attorney General expressed the view that an effective merger of these companies was prohibited by law and that the purported merger could not terminate the trust upon which the deposit was held for the benefit and security of the company's policyholders. 9 Opinions of the Attorney General 130 (1924).

When a foreign insurance company transferred its assets to another foreign insurance company and the latter company assumed the obligations and reinsured the policies of the former company, the Attorney General advised that the deposit by the former company could not be relinquished as long as it continued to do business in Maryland although the new business was also reinsured by the other company. 18 Opinions of the Attorney General 306 (1933). The deposit was not required by the law of Maryland for that type of company but was a condition precedent to doing business in this State under the retaliatory law which exacted of foreign companies the same prerequisites that the foreign company's state of incorporation imposed upon Maryland companies which did business in the other state. See also 27 Opinions of the Attorney General 209 (1942) and 30 Opinions of the Attorney General 59 (1945).

These opinions of the Attorney General were confirmed in 1937 in 22 Opinions of the Attorney General 358 and in 1940 in 25 Opinions of the Attorney General 274. In the latter opinion a Maryland company had ceased the conduct of business and had sold its assets to a New York company which assumed the liabilities of the Maryland company. The assumption did not discharge the liabilities of the Maryland company. The Attorney General stated that the deposit could not be surrendered as long as there was a policy of the Maryland company outstanding.

We have not found a decision of the Court of Appeals of Maryland in which this question has been considered.

There are appellate decisions under similar statutes in other states which aid us to resolve this problem. When a domestic company reinsured all of its policies with a foreign company and the policyholders of the domestic company consented to the substitution of the foreign company there were no outstanding policies or obligations of the domestic company and the deposit was refunded. *Prewitt v. Illinois Life Ins. Co.*, 123 Ky. 36, 93 S.W. 633 (1906). An Ohio statute allowed the return of the deposit when "all obligations and liabilities which the deposit was made to secure have been paid or extinguished." The deposit of an Iowa company which did business in Ohio could not be refunded when it sold its assets to a New York company which assumed the obligations of the Iowa company. Both companies ceased the conduct of business in Ohio. *State ex rel. Van Schaick v. Bowen*, 131 Ohio St. 310, 2 N.E. 2d 824 (1936); *certiorari denied*, 299 U.S. 597 (1936). When a domestic company reinsured its policies with and transferred its assets to another domestic company which agreed to pay and discharge the debts and liabilities of the former company, the deposit could not be refunded although the latter company maintained a deposit exceeding the statutory requirement. The opinion concluded that the holders of policies issued by the former company had a vested right to the deposit which had to be preserved as long as policies issued by the company were in force. *Cochrane v. Pacific States Life Ins. Co.*, 93 Colo. 462, 27 Pac. 2d 196 (1933).

The case most similar to the situation we are considering is *American Bonding & Casualty Co. v. Chicago*, 226 Ill. App. 475 (1922). An Illinois company and an Iowa company consolidated and merged. The Iowa corporation survived. The corporate existence of the Illinois company ceased except that it continued in being for two years for the purpose of settling claims against it and disposing of its existing contracts and obligations. Some, but not all, of the policy holders of the defunct Illinois corporation recognized the surviving corporation as obligor after the consolidation. The surviving corporation became insolvent and its receiver sought the deposit made by the defunct Illinois company.

The court held that the corporation which survived the merger had never become entitled to the deposit.

Counsel for F & D suggest that the decision in *State ex rel. Union Indemnity Co. v. Knott,* 105 Fla. 569, 143 So. 221 (1932) supports the request for a refund. A foreign company reinsured and assumed the liabilities of another foreign company which had written surety bonds and one policy of automobile liability insurance in Florida. All claims arising from the surety business of the reinsured company were settled and all of its surety bonds were released. There was no proof that claims arising under the automobile liability policy had been settled. The court held that in the absence of such proof, the deposit was not returnable. Upon rehearing, the court stated that if the reinsuring company proved that it had legally assumed the liability of the reinsured company under the liability policy "and has done all other things alleged by it in the alternative writ to have been on its part performed", it was entitled to the deposit. We do not think that the logic of the previous opinions of this office and of the decisions of other courts is weakened by this gratuitous intimation of a possible result by the Florida court.

The obligations of ABC were not discharged by the merger. The assumption by F & D added an obligor but did not extinguish the obligations. The corporation law was not intended to deprive holders of policies in merged insurance companies of security afforded by the insurance law. The opposite intent is expressed. The rights of creditors of merged companies shall not be impaired by a merger. Article 23, Section 71(4) of the Code. The deposit is a trust fund for the benefit of holders of policies issued by ABC upon which they were entitled to rely when they contracted with ABC. As long as there is an undischarged obligation to holders of policies issued by ABC, the deposit to secure such obligations may not be surrendered.

In our opinion, the securities deposited by ABC with the Treasurer may not be refunded as long as policies of insur-

ance or surety bonds issued by ABC are outstanding and you should not join in requesting the Treasurer to refund the deposit.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—TEMPORARY LIFE INSURANCE AGENT'S LICENSE ISSUED UNDER SECTION 122 (J) OF ARTICLE 48A IS GOOD FOR NINETY DAYS AND DOES NOT EXPIRE ON NEXT JUNE 30TH.

December 9, 1958.

Mr. John H. Coppage, Deputy Commissioner,
State Insurance Department.

Section 122 of Article 48A of the Annotated Code of Maryland (1957 Ed.) establishes the procedure for the licensing of life insurance agents. Subsection (i) of the statute provides that each license issued to a life insurance agent shall expire on June 30th following the date of issuance of the license. Licenses may be renewed from year to year. Subsection (j) of the statute allows the Commissioner to issue in certain instances temporary licenses which shall be effective for ninety days and may be renewed for good cause. Section 41 of Article 48A of the Code also provides that insurance agents' licenses shall expire on June 30th following the date of issuance.

You ask whether a temporary license issued under Subsection (j) of Section 122 must expire on the succeeding June 30th even though it has not yet been effective for ninety days.

The statute does not prescribe the effective period of a regular life insurance agent's license except to say that all licenses shall expire on June 30th succeeding the date of issuance. Thus, a life insurance agent's license may be effective for a period as long as a year or as short as a day. However, a temporary license issued under Subsection (j) will be effective for only ninety days, unless renewed, even if issued on July 1st.

In our opinion, a temporary life insurance agent's license issued under Subsection (j) of Section 122 of Article 48A of the Code is effective for ninety days and does not expire on the next June 30th if that date occurs within the effective period of ninety days.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

INSURANCE—GROUP LIFE INSURANCE—POLICIES OF GROUP INSURANCE UPON LIVES OF PURCHASERS OF STOCK IN A SAVINGS AND LOAN ASSOCIATION AND UPON LIVES OF INVESTORS IN A MUTUAL INVESTMENT FUND MAY NOT BE ISSUED FOR DELIVERY OR DELIVERED IN MARYLAND AS POLICIES ISSUED TO A CREDITOR TO INSURE LIVES OF DEBTORS OF THE CREDITOR.

December 9, 1958.

Mr. Charles S. Jackson,
State Insurance Commissioner.

A policy of group life insurance may not be delivered, or issued for delivery, in Maryland unless it is (1) a policy issued to an employer or the trustees of a fund established by an employer to insure employees of the employer; (2) a policy issued to a creditor to insure debtors of the creditor; (3) a policy issued to a labor union to insure the members of the union; (4) a policy issued to the trustees of a fund established by two or more employers, by one or more labor unions, by one or more employers and one or more labor unions, by an association of persons licensed by the State of Maryland or authorized by law to engage in a recognized profession, or by an association of employees of a political subdivision to insure employees of the employers or members of the unions or of the associations. Article 48A, Section 190 of the Annotated Code of Maryland (1957 Ed.).

All of the debtors of a creditor or all of a class of debtors, determined by conditions pertaining to their indebtedness or to the purchase which created the indebtedness, must be eligible for the insurance afforded by a group policy issued to a creditor. If part or all of the premium is derived from identifiable charges collected from the insured debtors, the policy may not insure debtors whose obligations are outstanding when the policy is issued without evidence of individual insurability unless at least seventy-five per cent (75%) of such debtors are insured. All debtors must be insured if no part of the premium is derived from identifiable charges collected from the debtors. The group of eligible debtors must be receiving new entrants at the rate

of at least one hundred persons annually when the policy is issued or must reasonably be expected to receive at least one hundred new entrants during the first policy year. The policy must reserve to the insurer the right to require evidence of individual insurability if less than seventy-five per cent of new debtors become insured. The amount of the insurance on the life of a debtor may not exceed the amount of his obligation to the creditor or Ten Thousand Dollars, whichever is the lesser. The insurance shall be payable to the creditor and shall reduce or extinguish the debt. Article 48A, Section 190(2) of the Code.

I.

An insurer proposes to issue a policy of group life insurance to a savings and loan association to insure the lives of persons who agree to purchase shares of stock of the association. The stock is issued and sold at its par value of One Dollar a share. Subscribers execute a promissory note to the savings and loan association for the full price of the stock which they agree to purchase. The note is payable in equal monthly installments of principal and interest. Actually, the promisor does not pay interest because the rate of interest on the note is equal to the rate of dividend on the stock. The entire amount of stock issued to the subscriber for which he has not yet paid in full is pledged as security for the unpaid purchase price evidenced by the note. If the note is in default for failure to pay a monthly installment, the entire principal amount of the indebtedness becomes due and payable. If the note is not paid, the savings and loan association purchases the pledged stock at One Dollar for each share. The proceeds of the sale are applied to payment of the indebtedness and the subscriber receives one share of stock for each One Dollar paid by him to the savings and loan association prior to the default on the note.

The life of the subscriber to the stock would be insured under the group policy for the amount of the unpaid purchase price of the stock. If the subscriber dies, the insurance

proceeds would pay for the stock. The savings and loan association will redeem the stock upon demand for One Dollar a share. The savings and loan association would pay the premium for the insurance. It is not clear whether the subscribers would pay an identifiable contribution for all or part of the premium.

II.

An insurer proposes to issue a policy of group life insurance to a mutual investment fund to insure the lives of investors in shares of the fund. The investor chooses to purchase an aggregate worth of shares of the fund over a period of years by equal monthly or quarterly payments. The investor's life is insured for an amount equal to the difference between his total payments and the aggregate worth of the shares he has indicated he will purchase. The investor pays all of the cost of the insurance. The investor is in default if he fails to make a periodic payment for the shares on or before the date due. The insurance upon the investor's life terminates when he has been in default for thirty-one days or longer. If the investor dies without a default in his periodic payments, the agreement is binding upon his estate "and all payments not made at the day of (his) death shall become immediately due and payable by (his) estate". The life insurance purchases the balance of shares which he chose to purchase and for which his estate is obligated. The investor may terminate the agreement in whole or in part at any time during his life. The agreement will be terminated whenever the investor is in default in a periodic payment for thirty-one days or more. Upon termination, the investor receives certificates for the full shares for which he has paid and cash for fractional shares to his credit, less a termination charge of One Dollar. Acceptance of the investor's application by the fund "does not create an option or warrant to purchase shares of the fund, and no penalty is incurred by any party if the intention declared is not fulfilled". The "intention declared" includes the investor's intent to purchase an aggregate worth of shares over a period of years.

You ask whether such policies of group insurance may be delivered, or issued for delivery, in Maryland as policies issued to a creditor to insure the lives of debtors of the creditor.

The purchasers of shares of stock of the savings and loan association are never in fact indebted or obligated to the association. The association may not compel the subscribers to purchase additional shares. If a subscriber is in default because he failed to pay an installment payment, he receives the shares of stock for which he has paid and has no additional obligation to the association.

The investor in the mutual investment fund is never obligated to purchase shares of the fund. Whenever he ceases to make the periodic payments, he has title to the shares which he has purchased and he has no additional obligation to the fund.

In our opinion, there is not a creditor-debtor relationship between either the savings and loan association and the purchaser of its shares of stock or between the mutual investment fund and the investor. See *Guarantee Trust and Banking Co. v. Flannery,* 124 Md. 586 (1915). The policies of group insurance upon the lives of the purchasers of stock in the savings and loan association and upon the lives of the investors in the mutual investment fund may not be delivered or issued for delivery in Maryland as policies issued to a creditor to insure the lives of debtors of the creditor.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

JUDGES

JUDGES—CONSTITUTIONAL LAW—OCCURRENCE OF VACANCY —COMPUTATION OF PERIOD OF ONE YEAR AFTER OCCURRENCE OF VACANCY—JUDGE APPOINTED TO FILL VACANCY ENTITLED TO SERVE AT LEAST ONE YEAR BEFORE STANDING FOR ELECTION.

February 11, 1958.

Mr. William A. Gresham,
Administrative Assistant,
Executive Department.

You ask whether Judge Keating, who was appointed to fill the vacancy in the Second Judicial Circuit created by the elevation of Judge Horney to the Court of Appeals, will serve until the general election in November, 1958, or whether he will serve until the general election in November, 1960.

The chain of events which have prompted your inquiry may be summarized as follows: Judge Horney, whose term as Chief Judge of the Second Judicial Circuit expired on November 3, 1957, was reappointed to, and qualified for this office on October 14, 1957. Thereafter, Judge Collins, whose term as Associate Judge of the Court of Appeals also expired on November 3, 1957, declined reappointment, and the Governor elevated Judge Horney to the vacancy thus created. Judge Horney's commission was dated November 4, 1957, and he was sworn in as an Associate Judge on November 5, 1957. The vacancy in the Second Judicial Circuit was filled by the appointment of Judge Keating, whose commission was dated November 15, 1957, and who qualified for office November 20, 1957. Judge Keating's commission provides that he shall serve "until the next general election of November, 1958", which, as you note, falls on November 4, 1958.

Section 5, Article 4 of the Maryland Constitution provides in part as follows:

> "Upon every occurrence or recurrence of a vacancy through death, resignation, removal, disqualification by reason of age or otherwise, or expiration of the term of fifteen years of any judge, or creation of the office of any judge, or in any other way, the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor; . . . His successor shall be elected at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years (if the vacancy occurred in that way) or the first such general election after one year after the occurrence of the vacancy in any other way than through expiration of such term. . . ."

The initial question is the date upon which the vacancy to which Judge Keating was appointed occurred. Since it is our understanding that Judge Horney did not resign his reappointment to the circuit court judgeship, we are of the opinion that the vacancy occurred when he was sworn in and assumed his duties as an Associate Judge of the Court of Appeals on November 5, 1958. The provisions of Article 35, Maryland Declaration of Rights, forbid anyone from holding more than one office of profit at the same time, and we are of the view that Judge Horney's assumption of duties on the appellate court operated to vacate the office he had theretofore held.

The second sentence of Section 5, above quoted, and particularly the last clause thereof (since the vacancy did not occur by reason of the expiration of a fifteen year term) sets forth the language which is determinative of the question here presented. In *Hillman v. Boone,* 190 Md. 606 (1948), which affirmed the views of this office in 33 Opinions of the Attorney General 231, the Court of Appeals summarized with emphasis the meaning of Section 5 at page 610 as follows:

> ". . . The two sentences are co-extensive. Shortly stated, the first provides that upon *every* occur-

rence of a vacancy in any way, a judge shall be appointed, to hold office until the election and qualification of *his* successor; the second provides, that *his* successor shall be elected *after one year* after the occurrence of the vacancy.

"The effect and purpose of the amendment is also clear. By making the provision for appointments to fill vacancies all-inclusive and providing for biennial, instead of quadrennial elections, but only after one year after the latest vacancy, the electorate at every election are given, approximately, at least one year and less than three of experience with an appointed sitting judge, instead of none at all or any period less than four years. This purpose is not impaired by making the occurrence of the vacancy the point of time and ignoring such accidents as delays in appointment or qualification and the variation in the date of election day."

Under Section 5, Judge Keating's term continues until his successor is elected at the first biennial election *after one year after the occurrence of the vacancy* on November 5, 1957. Counting from this date, it is seen that the one year period expires, at the earliest, as of midnight on November 4, 1958. The first biennial election *after* the expiration of a full year's cycle falls in November, 1960, which means that Judge Keating is entitled to hold office until the election and qualification of his successor at that time. Under this construction of Section 5, it is unnecessary to resort to the provisions of Section 2, Article 95 of the Code (1957 Ed.), which declare that in computing any period of time prescribed or allowed by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included; and the last day of the period so computed is, subject to certain exceptions not applicable here, to be included. We may add, however, that the one year period as computed under Section 2 would not commence to run until November 6, 1957, and would expire on November 5, 1958.

The views expressed herein are in accord with the manifest purpose of Section 5 to assure a uniform minimum of approximately one year of service to an appointed judge before he stands for election. *Hillman v. Boone, supra.* See also *Judicial Administration in Maryland,* 16 M.L.R. 93, 117-119. You are advised that Judge Keating is entitled to serve until the general election in November, 1960, and his commission should be revised in accordance with this opinion.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

JUSTICES OF THE PEACE

JUSTICES OF THE PEACE—MENTAL HYGIENE—LUNATICS—COMMITTING MAGISTRATES MAY NOT COMMIT PERSONS BELIEVED TO BE SUFFERING FROM MENTAL ILLNESS TO INSTITUTIONS—JUSTICES OF THE PEACE AND PEOPLE'S COURT JUDGES MAY ONLY COMMIT MENTALLY ILL TO STATE INSTITUTIONS.

September 10, 1958.

Dr. William J. Peeples,
County Health Officer
for Montgomery County.

In your recent letter you have asked whether or not it is proper for a Justice of the Peace to commit an individual to Cedarcroft Sanitarium, when it is suspected that such individual is suffering from mental illness, in lieu of being placed in jail.

Section 11, Article 59, Annotated Code of Maryland (1957 Ed.) reads as follows:

> "Whenever any person shall be arrested and brought before a judge of any court of this State or before any justice of the peace of this State, having criminal jurisdiction, charged with any offense, and such person shall appear to be or be alleged to be insane or lunatic, and shall be committed in default of bail to wait further proceedings in such court or before such justice or elsewhere, the said judge or justice shall commit him to the jail of the county or city where the charge is pending, or to such institution for the care of the insane as may from time to time be designated by the Department of Mental Hygiene. The said Department of Mental Hygiene shall be notified of such commitment, and shall thereupon examine such person, and as soon as said Department shall determine whether such person is insane or lunatic, and in every case within two weeks after said De-

partment shall have been so notified as aforesaid, said Department shall report its findings to the court or justice then having jurisdiction of the charge against such person. If said Department shall find such person insane, or lunatic, he shall remain in the institution to which he shall have been committed as aforesaid, or in some other institution to which he may be transferred on the recommendation of said Department, until he shall be tried or until the court shall in its discretion give the direction provided for in sec. 9 of this article. If, however, such person shall be found by said Department to be sane, the court or justice then having jurisdiction of the charge against such person shall order him transferred to the jail of the county or city in which such charge shall then be pending. In all cases not punishable by death or confinement in the penitentiary, the examination provided for in this section and in sections 7 and 9 of this article may be made by the superintendent of any institution for the care of the insane in which such person may be confined pending trial, instead of by the said Department of Mental Hygiene, and such superintendent shall within three weeks of the time when such person shall have been admitted to such institution make his report in writing to the court or justice of the peace before whom such charge shall then be pending at the time of such report, and such further proceedings shall then be had as if such report had been made by the said Department of Mental Hygiene.

"Nothing in this section shall apply to the duties of the department of welfare of the City of Baltimore."

It is my opinion that only Judges of the People's Court for Montgomery County have authority to commit persons to institutions for the care of the insane, and that the statute refers to State institutions and not to private institutions. I therefore advise that I do not believe it is proper

for the police or justices of the peace, acting as committing magistrates, of Montgomery County to place persons in Cedarcroft Sanitarium under the provisions of Section 11, Article 59 of the Code. You are further advised that it is my opinion that persons may only be committed to private institutions, such as Cedarcroft, after full compliance with the other legal requirements governing the commitment of insane persons to private licensed institutions, under the provisions of Sections 31, 32 and 37 of Article 59 of the Code.

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

LAND OFFICE

LAND OFFICE—PUBLIC OFFICER—APPLICATION TO COMMISSIONER OF LAND OFFICE FOR SPECIAL WARRANT OF SURVEY RECEIVED BY MAIL AT OFFICE IN ANNAPOLIS PREFERRED TO APPLICATION MADE BY PERSON ONE-HALF HOUR LATER AT COMMISSIONER'S HOME IN SALISBURY WHEN STATUTE PROVIDES THAT PERSON WHO FIRST APPLIES SHALL BE ENTITLED TO WARRANT—IN ABSENCE OF STATUTORY PROVISION, BUSINESS OF PUBLIC OFFICER SHOULD BE CONDUCTED AT OFFICE.

May 29, 1958.

Mr. Harry L. Harcum,
Commissioner of the Land Office.

At about 9:00 o'clock A. M. on Monday, March 31, 1958, a gentleman, to whom we shall refer as "Mr. A", called upon you at your home in Salisbury, Maryland, to apply for a special warrant of survey to take up vacant land by a patent. In order to be certain that the warrant might issue, you telephoned your office in Annapolis, Maryland, and were informed that the mail received on that same day at approximately 8:30 o'clock A. M. included a registered letter from another gentleman, to whom we shall refer as "Mr. B", with an application for a special warrant of survey to take up by patent the same vacant land. Mr. B's application was dated March 28, 1958.

You have asked which of these gentlemen is entitled to the warrant.

Section 35 of Article 54 of the Annotated Code of Maryland (1957 Ed.) provides that "The person who first applies to the Commissioner of the Land Office for a warrant during business hours shall be entitled to the same upon paying the usual fees and caution money".

The Supreme Court of the United States has stated that official proceedings are always, in the absence of express provision to the contrary, to be had at the office of the officer charged with the duties. *Merchants & Manufacturers*

National Bank v. Pennsylvania, 167 U. S. 461, 466-467 (1897). See also *Andes v. Ely*, 158 U. S. 312, 323 (1895); the annotation at 33 L.R.A. 85 (1897); and 43 *Am. Jur., Public Officer*, sec. 251.

We have concluded that the application of Mr. B received at your office should be regarded as having been first received. The application of Mr. B was dated prior to the day upon which Mr. A. applied to you, and Mr. B's application was received in the mail at your office in Annapolis before Mr. A applied to you personally at your home in Salisbury.

The business of the State of Maryland is conducted in the most orderly manner when it is done at the offices of the State. When there is a question of priority of application to a State official, confusion and disorder are avoided if the application received at the normal place of business of the officer is given priority, even though an application may be made simultaneously to the officer at a place other than his office. Because the statute gives priority to the application made "during business hours", an application made to you at your home in the evening would be subordinate to an application first received at your office at the commencement of the next following business day. The requirement that an application be made "during business hours" buttresses our conclusion that you should prefer the application received at your office where you may ordinarily be expected during business hours.

The argument might be advanced that Mr. B's application, which was received at 8:30 o'clock A. M., was not received during business hours, which are sometimes regarded as from 9:00 o'clock A. M. until 5:00 o'clock P.M. on weekdays. The proposition is rebutted by the custom of your office to be open for the transaction of business before 9:00 o'clock A.M. and the acknowledgement that business is commenced for the day when the mail to your office is received and read. Even if we consider that Mr. B's application at your office was simultaneous with Mr. A's application at your home at 9:00 o'clock A.M., we conclude that the ap-

plication made at the place reserved for the conduct of the State's business should be preferred.

In our opinion, Mr. B first applied for the warrant, and we advise you that he is entitled to the warrant upon paying the usual fees and caution money. In reaching this conclusion, we have assumed that the application of Mr. B complied with the requirements of the law and applicable rules and regulations.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

LICENSES

LICENSES—TRADERS' LICENSES—EXEMPTION—EXEMPTION FROM REQUIREMENT TO PRESENT RECEIPT OR CERTIFICATE SHOWING VALUE OF MERCHANDISE, FIXTURES AND STOCK IN TRADE, AND SHOWING THAT THERE ARE NO UNPAID TAXES DUE BEFORE LICENSE MAY BE ISSUED APPLIES ONLY TO DOMESTIC CORPORATIONS SUBJECT TO TAX UPON THEIR SHARES.

September 5, 1958.

Mr. Frank W. Hales, Clerk,
Circuit Court for Worcester County.

We have your recent letter requesting advice in respect to the proper construction of the exemption provision in Section 1, Article 56 (1957 Code).

This section constitutes the clerks of the circuit courts for the counties, and the clerk of the Court of Common Pleas of Baltimore City, the licensing authority for the sale of all goods and chattels, unless otherwise specifically provided. Section 1 declares that no such license shall be issued "except to domestic corporations the shares of which are subject to taxation under the laws of this State", unless there shall be presented to the issuing clerk a receipt or certificate from the office of the Supervisor of Assessments in the county in which the license is issued, or the bureau of assessments in Baltimore City, showing the values of the merchandise, fixtures and stock in trade for the business for which said license is applied, for the calendar year next preceding the year in which said license is applied for. This provision also requires that the receipt or certificate show that there are no unpaid taxes due the incorporated city or town or county in which the licensed activity is carried on or to the State of Maryland on the merchandise, fixtures and stock in trade involved.

You ask whether the above quoted exemption applies to all domestic corporations, or only to those whose shares are subject to tax. We are of the opinion that the language of

Section 1 clearly confines the exemption to those domestic corporations subject to tax upon their shares.

The exempted domestic corporations may be summarized as follows:

1. Public utilities and contract carriers which are assessed pursuant to the provisions of Section 16, Article 81 (1957 Code).

2. National banks and utilities which are assessed pursuant to the provisions of Section 20, Article 81 (1957 Code).

3. Domestic finance corporations which are assessed pursuant to the provisions of Section 21, Article 81 (1957 Code).

When a domestic corporation represents that it qualifies for the exemption under Section 1 by reason of the tax on its shares, it is suggested that you either obtain therefrom an affidavit to this effect, or require a letter of confirmation from the State Tax Commission before issuing the license.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

LICENSES—AGRICULTURAL AND MECHANICAL ASSOCIATION OF WASHINGTON COUNTY AND ITS CONCESSIONAIRES ARE EXEMPT FROM ORDINARY LICENSES AT THE HAGERSTOWN FAIR.

October 8, 1958.

Mr. Edward J. Dyas,
Chief Inspector State Licenses,
State License Bureau.

This will acknowledge receipt of your letter of September 30, 1958, requesting our opinion as to whether or not a concession conducted on the Hagerstown fairgrounds is exempt from all license laws.

Chapter 173 of the Acts of the General Assembly of 1900 expressly provides that the Agricultural and Mechanical Association of Washington County may hold exhibitions on its grounds as often as it may deem necessary without the payment of any license, fine, fee, forfeiture or penalty to the State of Maryland, to Washington County or to the City of Hagerstown and that any person, association or organization to whom the said Association shall grant the privilege to sell or conduct any business on the grounds of the fair shall, in a like manner during the time of the exhibition, be exempt for the payment of any state, county or municipal license.

The statutory exemption is quite clear and therefore this Association would be exempt from the payment of license fees as to the concessions authorized to do business at the fair by the Association during the exhibitions.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

MARKET AUTHORITY

MARKET AUTHORITY—GOVERNMENT MAY COMPETE WITH PRIVATE BUSINESS—ANCILLARY FACILITIES OF MARKET MAY BE RENTED—REVENUE BONDS—FULL FAITH AND CREDIT OF STATE PLEDGED TO PAY DEBT.

November 6, 1958.

Messrs. Weinberg & Green.

You have written to us on behalf of the New Marsh Wholesale Produce Market Authority asking whether or not it may validly lease part of its buildings to ancillary facilities such as a motor vehicle service station, a branch bank, a restaurant, an icing station, a food freezing plant or private business of a similar nature.

Chapter 662 of the Acts of 1955 provides for the establishment of the New Marsh Wholesale Produce Market Authority. In the preamble to the Act, the Legislature states that the purpose for setting up the Authority is to acquire land for and to erect and operate a modern wholesale produce market in cooperation with the State and City governments, including parking and such other ancillary facilities as may be deemed necessary or advisable. The bill itself, as amended by Chapter 845 of the Acts of 1957, provides that the Authority shall have power to establish, construct, erect, acquire, own, repair, remodel, add to, extend, improve, equip, operate and maintain a market, to relocate or replace Centre or Marsh Market in Baltimore City; to pay the cost of the market, including parking and other ancillary facilities appurtenant thereto; and to execute all instruments, including contracts and leases, necessary or convenient to the use of the facilities of the market, parking facilities, concessions, stalls, or other facilities on such terms and for such purposes as the Authority may deem advisable.

We interpret the words "ancillary facilities" to mean those which will aid in carrying out the principal purpose for which the Authority was established, namely, that of furnishing wholesale produce marketing facilities for the

public. The Legislature has left the determination of what facilities are necessary or advisable to the conduct of the market to the broad discretion of the members of the Market Authority. We are of the opinion that if the members of the Authority find that the proposed ancillary facilities are necessary and advisable to furnish proper and adequate services in the conduct of the business of the market, they may make provisions for them, since Chapter 662, Acts of 1955, grants them that authority.

The question then arises whether or not the Legislature may validly grant the power to the Market Authority to compete with private enterprise by erecting and renting such ancillary facilities to private persons. We have examined the Constitution of the State of Maryland and find no provisions contained therein which would prohibit such action on the part of the Legislature. The only two provisions of the State Constitution which might apply to the question at hand are Article 15 of the Declaration of Rights and Section 34 of Article III. Article 15 of the Declaration of Rights of the Maryland Constitution reads as follows:

> "That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government; that the General Assembly shall, by uniform rules, provide for separate assessment of land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

The Court of Appeals of Maryland, in *Baltimore & E. S. R. Co. v. Spring,* 80 Md. 510 at 517, has construed Article 15 of the Declaration of Rights to establish the principle that taxes can only be imposed to raise money for public purposes and not for private enterprise. The question then is whether or not the leasing of the ancillary facilities of the market is for a public purpose. In *Frostburg v. Jenkins,* 215 Md. 9, the Court decided that the issuance of revenue bonds for the purpose of buying land and erecting buildings to be used by private industry was for a public purpose and, therefore, did not violate the provisions of Article 15 of the Declaration of Rights, even though the bonds were to be repaid from tax monies. See also *Johns Hopkins University v. Williams,* 199 Md. 382; *Melvin v. Anne Arundel County,* 199 Md. 402; *Board of Education v. Wheat,* 174 Md. 314; *Finan v. Mayor & City Council of Cumberland,* 154 Md. 563. It is clear that the erection and leasing of buildings to private business by the Market Authority is for just as much of a public purpose as is the construction of a factory for private industry.

Section 34 of Article III of the Constitution of Maryland reads as follows:

> "The credit of the State shall not in any manner be given, or loaned to, or in aid of any individual association or corporation; nor shall the General Assembly have the power in any mode to involve the State in the construction of works of internal improvement, nor in granting any aid thereto which shall involve the faith or credit of the State; . . ."

The words "works of internal improvement" were construed in *Bonsall v. Yellott,* 100 Md. 481, to apply only to railroads, canals and turnpikes which were operated by private stock companies. Niles, Maryland Constitutional Law (1951 Ed.), page 188, states that a public market is not a work of internal improvement as intended by Section 34 of Article III of the Constitution.

In *Marchant v. Baltimore,* 146 Md. 513, the Court held that property could validly be condemned for the construction of wharves and piers, a part of which were intended to be leased to private persons or corporations. The Court said the use is a public one, while the property is thus leased, because it fills an undisputed necessity existing in regard to those private persons being able to carry out their obligations to the public. See also *Dyer v. Baltimore,* 140 Fed. 880; *Matter of Mayor, etc. of N. Y.,* 135 N. Y. 253; *Frostburg v. Jenkins,* 215 Md. 9. Similarly the leasing of the buildings of the Market Authority to private persons would be a public use in that those private persons would be rendering a service to the public. The whole use being a public one, then there is no violation of Article 15 of the Declaration of Rights or of Article III, Section 34 of the Maryland Constitution.

The United States Supreme Court has left no doubt that a State may enter into business in competition with private enterprise without violating the United States Constitution, for in *Puget Sound Power & Light Co. v. Seattle,* 291 U. S. 619, 78 L. Ed. 1025, it said:

> ". . . The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, Green v. Frazier, 253 U.S. 233, 64 L. ed. 878, 40 S. Ct. 499; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L.R.A. 1918C, 765, Ann Cas. 1918E, 660, and compete with private interests engaged in a like activity. Standard Oil Co. v. Lincoln, 114 Neb. 245, 207 N.W. 172, 208, N.W. 962, affirmed per curiam 275 U. S. 504, 72 L. ed. 395, 48 S. Ct. 155, supra; Madera Waterworks v. Madera, 228 U. S. 454, 57 L. ed. 915, 33 S. Ct. 571; Helena Waterworks Co. v. Helena, 195 U. S. 383, 47 L. ed. 246, 25 S. Ct. 40."

You are, therefore, advised that it is our opinion that the New Marsh Wholesale Produce Market Authority may lease

its buildings to such ancillary facilities as it may deem necessary and desirable to carry out the purpose for which it was established.

You also ask whether or not the full faith and credit of the State of Maryland is pledged to the payment of the bonds which the Market Authority is authorized to issue to pay the cost of the Market.

Chapter 662 of the Acts of 1955 empowered the Authority to issue negotiable revenue bonds in an amount not to exceed $2,000,000 to pay all or part of the cost of the Market. Section 7 of Chapter 662 reads as follows:

> "(Credit of State and Political Subdivisions Not Pledged.) Revenue bonds issued under the provisions of this Act shall not be deemed to constitute a debt of the State of Maryland or any of its political subdivisions, or a pledge of the faith and credit of the State of Maryland or any of its political subdivisions, but such bonds shall be payable solely from the funds of the Authority hereinafter provided therefor from revenues of the market. All such bonds shall contain a statement on their face to the effect that neither the State of Maryland nor any of its political subdivisions are obligated to pay such bonds or the interest thereon. The issuance of revenue bonds under the provisions of this Act shall not directly or indirectly or contingently obligate the State of Maryland or any of its political subdivisions to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment."

The Authority found it impossible to sell its bonds under the provisions of Chapter 662 of the Acts of 1955, because the principal and interest was to be payable solely from revenues of the Market and because the bonds did not constitute a debt of the State of Maryland.

The Legislature thereupon enacted Chapter 845 of the Acts of 1957, amending and adding new sections to Chapter

662 of the Acts of 1955, for the sole purpose of making the Market Authority bonds a debt of the State of Maryland, so they can be sold. Chapter 845 provides that the State of Maryland will levy a tax to the extent necessary to supplement Market revenues for the payment of the principal of and interest on Market Authority bonds, that the bonds of the Authority shall be signed by the State Treasurer and the State Comptroller, and that the bonds shall mature not later than 15 years from the date of issue. Section 15A of Chapter 845 reads in part as follows:

> "15A. Notwithstanding any provision of this Act to the effect that the principal of and interest on bonds issued by the New Marsh Wholesale Produce Market Authority shall be payable solely out of revenues of said Authority and that the bonds issued under the provisions of this Act shall be 'revenue bonds' and shall not be deemed to constitute a debt of the State of Maryland or any of its political subdivisions, or a pledge of the faith and credit of the State of Maryland, or any of its political subdivisions, or that the issuance of said bonds shall not obligate the State of Maryland or any of its political subdivisions to levy or to pledge any form of taxation therefor or to make any appropriation for their payment, until all of the interest on and principal of any bonds issued under this Act have been paid in full, there is hereby levied and imposed an annual State tax on each one hundred dollars of assessable property at a rate to be determined in the following manner: On or before December 1, 1957, and on or before December 1 in each calendar year thereafter, the Board of Public Works shall certify to the governing bodies of each of the counties and of Baltimore City the rate of State tax on each one hundred dollars of assessable property necessary to produce revenue to meet all interest and principal, if any, which will be payable to the close of the next ensuing calendar year on all bonds theretofore issued or theretofore

authorized by resolution of the Authority to be issued, and the governing bodies of each of the Counties and Baltimore City shall forthwith levy and collect such tax at such rate.

"All matters committed by this Act to the discretion of the Board of Public Works shall be determined by a majority of said Board.

"Provided, however, that the levy or levies provided for in this section shall not be made and the said tax or taxes shall not be collected in any year if before December 1 of the preceding year and before December 1 of every succeeding year thereafter the Board of Public Works shall ascertain as a fact upon a certificate rendered to such board by the Authority or the trustee under any trust indenture securing market revenues for payment of said bonds that all payments of principal and interest due and payable in that preceding year on the bonds issued pursuant to this Act have been paid, and that funds sufficient to meet all payments of principal and interest due and payable on such bonds in the said current year have been received and set aside in the sinking fund provided by Section 11 of this Act, by the Authority or trustee under any trust indenture securing market revenues for payment of said bonds. Upon the ascertainment of such facts by the Board of Public Works, the Governor shall by proclamation issued pursuant to resolution of the Board of Public Works publicly declare that the State taxes provided for in this section shall not be levied or collected for in said current year. Provided further, however, that the levy or levies provided shall be made only in part and the said tax or taxes shall be collected only in part if before December 1 of the preceding year and before December 1 of any succeeding year thereafter the Board of Public Works shall ascertain as a fact upon a certificate rendered to such board by the Authority or the

trustee under any trust indenture securing market revenues for payment of said bonds that part but not all of the payments of principal and interest due and payable in that preceding year on the bonds issued pursuant to this Act have been paid; or that part but not all of the funds required to meet all payments of principal and interest due on such bonds in the said current year have been received and set aside in the sinking fund by the Authority or the trustee under any trust indenture securing market revenues for payment of said bonds. In such event, and upon the ascertainment of such facts by the Board of Public Works the Governor shall by proclamation issued pursuant to a resolution of the Board of Public Works publicly declare that only so much of the State taxes provided for in this section shall be levied or collected for in said current year as shall be necessary to make up the remainder of the amount necessary to meet all payments of principal and interest due on the said bonds in that preceding year or in the said current year, or both, as the case may be.

"Any taxes collected to pay the principal of or interest on said bonds, as hereinabove provided, shall be paid over by the State Comptroller on or before the 15th day of January of the year following the year in which such taxes are collected, to or for the account of the Authority or the trustee under any trust indenture securing market revenues for payment of said bonds, upon a receipt of the Authority and said trustee, if any; and said taxes shall become a part of the sinking fund provided by Section 11 of this Act for the payment of the principal of and interest on the bonds."

Section 11 of Chapter 845 provides that all revenues from the Market after payment of operating and maintenance expenses shall be paid into a sinking fund for the payment of principal of and interest on the Market Authority Bonds.

Section 34 of Article III of the Constitution of Maryland reads in part as follows:

> "No debt shall be hereafter contracted by the General Assembly unless such debt shall be authorized by a law providing for the collection of an annual tax or taxes sufficient to pay the interest on such debt as it falls due, and also to discharge the principal thereof within fifteen years from the time of contracting the same; and the taxes laid for this purpose shall not be repealed or applied to any other object until the said debt and interest thereon shall be fully discharged. . . ."

The constitutional provision is mandatory. *Bickel v. Nice,* 173 Md. 1. The taxes provided in the statute must be levied by the State until the obligation of the bonds is paid in full. The bonds when issued will become the valid and binding obligation of the State of Maryland and the Board of Public Works is bound to determine the amount of tax to be levied and collected by the counties and the City of Baltimore to pay the principal and interest due thereon. The Legislature's whole purpose in changing Chapter 662 of the Acts of 1955 by the enactment of Chapter 845 of the Acts of 1957 was to pledge the full faith and credit of the State of Maryland to the payment of the bonds. We are of the opinion that Chapter 845 does pledge the full faith and credit of the State of Maryland to the payment of the principal of and the interest on the bonds issued by the Market Authority.

This office does not render opinions to private interests, but since you are bond counsel for the New Marsh Wholesale Produce Market Authority, which is a governmental agency eligible to receive funds from a State bond issue, we are giving this opinion to you in that capacity.

C. FERDINAND SYBERT, *Attorney General.*

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

MARRIAGE LICENSE

MARRIAGE LICENSE—CONSENT OF PARENTS NOT NECESSARY IF GIRL IS PREGNANT—CHIROPRACTOR NOT A "LICENSED PHYSICIAN" FOR PURPOSES OF CERTIFYING PREGNANCY.

April 28, 1958.

Mr. G. Merlin Snyder, Clerk,
Circuit Court for Washington County.

Attorney General Sybert has requested me to reply to your letter regarding the certificate presented to you by a chiropractor under Section 9 of Article 62 of the Annotated Code of Maryland (1957 Ed.). You ask whether a certificate of a licensed chiropractor certifying to a girl's pregnancy can be accepted by you in compliance with Section 9.

Section 9 of Article 62 reads, in part, as follows:

> "* * * Provided, however, that on the *certificate of a licensed physician*, presented with the application for a marriage license, to the effect that the girl is pregnant or has given birth to a child, a marriage license may be issued without the consent of her parent or guardian, and if the putative father of the child or prospective child of a girl under eighteen years of age is over sixteen years of age, a marriage license may be issued without the consent of his parents or guardian." (Emphasis supplied.)

The question is whether a licensed chiropractor is within the meaning of "licensed physician". In 39 Opinions of the Attorney General 146, it was held that the school authorities were justified, as an administrative measure, in refusing to accept the certificate of anyone but a licensed physician as an excuse for the non-attendance of a child because of illness. A similar opinion is contained in 31 Opinions of the Attorney General 65. In 24 Opinions of the Attorney General 172, it was held that a licensed chiropractor may not use the term "chiropractic physician" and that the

Board might revoke his license for such use if intended to deceive the public. Previously this office had ruled in 15 Opinions of the Attorney General 62 that a chiropractor could not issue death certificates; and in 16 Opinions of the Attorney General 73 it was ruled that the term "physician", as used in our statutes, means one who is authorized to practice medicine and surgery, and that in view of the various provisions of law, a chiropractor is not a "physician".

In light of these previous opinions, I must advise you that a certificate from a chiropractor would not be sufficient under the provisions of Section 9 of Article 62, and, therefore, you should accept certificates as required under this section only from persons validly licensed to practice medicine and surgery.

You ask further if a certificate from a chiropractor is not sufficient, what would be the effect on the license already issued. A presumption of the valid issuance of a marriage license arises from its issuance, and it is presumed to be validly issued. 35 Am. Jur., *Marriage*, Sections 23 and 194. However, I do not pass upon this question in this opinion. I believe it would be to the best interest of the parties involved that a new certificate be obtained from a "licensed physician" certifying to the fact that the girl involved was pregnant at the time the license was issued.

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

MARYLAND PORT AUTHORITY

MARYLAND PORT AUTHORITY—SICK AND VACATION LEAVE OF UNCLASSIFIED EMPLOYEES.

August 1, 1958.

Mr. Russell S. Davis,
Commissioner of Personnel.

You have forwarded to us copies of the correspondence between your office and the Maryland Port Authority concerning the question whether or not unclassified personnel of the Maryland Port Authority are subject to the general provisions of vacation and sick leave, as contained in Merit System Rule 42.

The Maryland Port Authority was created by the provisions of Chapter 2, Special Session of the Legislature of 1956, and was amended by Chapter 377, Laws of 1957, codified in Article 62B, Annotated Code of Maryland (1957 Ed.). Section 5 deals generally with the powers of the Maryland Port Authority and more specifically subsection (o) thereof gives the Authority the right to employ such persons as it deems necessary in its judgment, and provides that said employees shall be subject generally to the provisions and restrictions of Article 64A, Annotated Code of Maryland (1957 Ed.), title "Merit System", and also, provides that full time employees together with the Executive Director, traveling representatives, and other key personnel shall be subject to the rights and benefits of Article 73B of the Code, relating to pensions. However, there is a proviso to the effect that the power to set salaries and compensation of all employees not governed by the provisions of Article 64A shall be vested solely in the Maryland Port Authority, and shall be subject to the jurisdiction and control of the Standard Salary Board.

It appears that all personnel of the Maryland Port Authority are subject generally to the provisions of Article 64A, except the right to set the salaries and compensation of employees not covered by said Article. Pursuant to the pro-

visions of Article 64A, the Merit System rules have been adopted and have the force of law. It is our opinion that the provisions of the Merit System law do apply to employees of the Maryland Port Authority with the exception of salaries and compensation of employees not covered by the provisions thereof. Since the question before us is vacation and sick leave, we are of the opinion that the Merit System rules apply to employees of the Maryland Port Authority.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

MARYLAND PORT AUTHORITY—GENERAL STATUTORY REQUIREMENT OF APPROVAL BY BOARD OF PUBLIC WORKS OF IMPROVEMENTS CONSTRUCTED OVER STATE-OWNED NAVIGABLE WATERS DOES NOT APPLY TO IMPROVEMENTS CONSTRUCTED BY MARYLAND PORT AUTHORITY OVER NAVIGABLE WATERS BORDERING LAND OWNED BY THAT AUTHORITY.

December 30, 1958.

Mr. John L. Kronau,
Maryland Port Authority.

You have requested our opinion as to whether the Maryland Port Authority, the owner of a tract of land bounding on a navigable body of water at Hawkins Point in Baltimore City, must obtain the approval of the Board of Public Works for the construction or operation of a pier extending from such land into the navigable waters in front thereof. You have advised us that the pier will not extend beyond the pierhead line.

Section 46 of Article 54 of the Annotated Code of Maryland (1957 Ed.) provides:

> "The proprietor of land bounding on any of the navigable waters of this State shall be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements and other accretions as above provided for shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made."

It is our opinion that the approval of the Board of Public Works to the construction or operation of said pier is not required and that Section 21(d) of Article 62B of the Annotated Code of Maryland (1957 Ed.) is not applicable,

since Maryland Port Authority is the owner of the land from which the pier will extend and since the pier will not interfere with navigation as it will not extend beyond the pierhead line.

C. FERDINAND SYBERT, *Attorney General.*

WILLIAM L. MARBURY, *Special Attorney for Maryland Port Authority.*

MARYLAND STATE FAIR BOARD

MARYLAND STATE FAIR BOARD—MAY REQUIRE ORGANIZATIONS RECEIVING FINANCIAL GRANTS FROM THE BOARD TO SUBMIT A LIST OF THEIR STOCKHOLDERS.

May 27, 1958.

Mr. Granville H. Hibbard, Chairman,
Maryland State Fair Board.

This will acknowledge receipt of your recent request for an opinion whether or not the Maryland State Fair Board has authority to require organizations receiving financial grants to submit a list of their stockholders to the Board.

The Maryland State Fair Board is created by the provisions of Article 66C, Sections 61 through 63, Annotated Code of Maryland (1957 Ed.). The function of the Board is expressed to be the encouragement and fostering of agriculture in this State, through the promotion and assistance of agricultural fairs, exhibits and other activities. For these purposes the Board has the sole and complete control of the distribution and expenditure of funds allocated to it, and for the payment of premium awards, promotional and educational activities. The Board is granted power and authority to promulgate rules and regulations to govern "the conduct, qualifications and requirements of agricultural fairs, exhibits or activities to which allocations or distributions may be made . . . and no such agricultural fair, exhibit or activity shall be entitled to receive any financial assistance from the Board, unless it has met all of the qualifications and requirements as set forth in such rules and regulations". The language aforementioned gives the Board a broad discretion in establishing conditions and requirements for the acceptance of financial grants from the Board by the various organizations of this State which are organized and operated to encourage and foster agriculture.

The Racing Commission of Maryland, under the provisions of Article 78B, Section 11 of the Code is similarly given broad control over the conduct of racing within the

State and, in subsection (d) of Section 11, *supra*, the Commission has been granted the power to require that the books and financial or other statements of any licensee shall be open to investigation by the Commission or its duly authorized representatives. Pursuant to the power granted the Racing Commission in promulgating rules and regulations and, in line with its construction of Section 11(d) aforementioned, the Racing Commission, by Rule No. 97 of the Rules of Racing, requires the secretary of each association conducting racing in Maryland to inform the Commission of any change of stockholders, or in the holdings of any individual stockholder of the Association for which he is reporting. It has been long recognized by the Racing Commission that, under the provisions aforementioned, it has the authority to require the submission of a list of stockholders of its licensees under the power and authority of the Commission to investigate the financial condition of the licensed associations.

It has been a rule of statutory construction in this State that long-standing administrative interpretation is entitled to great weight. *Comptroller v. Rockhill, Inc.*, 205 Md. 226, 233.

Since the Maryland State Fair Board has the right to determine the qualifications of an organization which receives funds and other financial assistance from the Board, it is our opinion that the Board may require, in its rules and regulations, that the recipient organizations submit a list of their stockholders to the Board.

The submission of a list of stockholders and other financial data to the Maryland State Fair Board, however, must always be treated as confidential and not as public information for divulgence to any unauthorized person.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

MENTAL HYGIENE

MENTAL HYGIENE—JUVENILE COURTS—ONCE A CHILD COMES UNDER THE JURISDICTION OF THE JUVENILE COURT FOR CARE OR TREATMENT IN A STATE INSTITUTION, HE REMAINS A WARD OF THE COURT UNTIL HE REACHES 21 YEARS OF AGE.

November 12, 1958.

Dr. Rudolph J. Depner,
Assistant Commissioner,
State Department of Mental Hygiene.

In your recent letter you have asked at what age persons who have been committed to State mental institutions by the Courts sitting for Juvenile Causes should be recommitted to those institutions as adults. You state that this office previously advised you in an informal opinion several years ago that when the condition of a child committed under an order of a court sitting for juvenile causes is such that he still requires hospitalization at the time he reaches his eighteenth birthday, he should be examined and recommitted as an adult.

We are of the opinion that a child committed by a court sitting for juvenile causes continues under the jurisdiction of that court until such time as he reaches the age of twenty-one years.

Article 26, Section 61, Annotated Code of Maryland (1957 Ed.) provides that in all cases in which the juvenile court judge determines that the child is within the jurisdiction of the court and is in need of care or treatment, the judge shall have the right to place the child in the custody of a public or private institution or agency for such period of time as the judge in his own discretion shall determine, but not beyond the minority of the child.

Article 26, Section 72(h) of the Code provides the same for the People's Court sitting for Juvenile Causes in Montgomery County, Maryland, and Section 249 of the Charter and Public Local Laws of Baltimore City (1949 Ed.) pro-

vides the same for Baltimore City. Section 289 of the Code of Public Local Laws for Allegany County (Everstine, 1955 Ed.) specifically provides that once a child under 18 years of age comes under the jurisdiction of the Magistrate for Juvenile Causes, he shall, for all necessary purposes, continue a ward of that court until such child attains the age of 21 years. Article 22, Section 558, of the Code of Public Local Laws for Washington County (1930 Ed.), as amended by Chapter 526 of the Laws of 1941, makes the same provision for that County.

At common law the period of minority extended to the age of 21 years in the case of both sexes, and in Maryland it still extends to the age of 21 years unless other provision is made by statute. *Sprecher v. Sprecher*, 206 Md. 108. There are no Maryland statutes which provide otherwise with reference to the continuing jurisdiction of Courts for Juvenile Causes over children. You are therefore, advised that in our opinion it is only necessary to have persons committed by a Juvenile Court recommitted to State mental institutions when they reach 21 years of age.

C. FERDINAND SYBERT, *Attorney General.*

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

MERIT SYSTEM

MERIT SYSTEM—VETERANS' PREFERENCE—PROVISIONS OF ARTICLE 96½ OF THE CODE RELATING TO VETERANS MUST BE CONSIDERED IN ESTABLISHING VETERANS' PREFERENCE.

January 16, 1958.

Mr. Russell S. Davis,
State Commissioner of Personnel.

We are in receipt of your letter of January 9, 1958, requesting an opinion as to whether you have properly denied an applicant Veteran's Preference under the applicable provisions of the Merit System Law. You advise that this veteran has served in the Armed Forces for about three years, commencing on September 9, 1953. You further state that you have been governed by Paragraph (c), Section 17, of Article 64A of the Code (1951 Ed.), which says in part:

> "* * * Veterans of the military and naval services of the United States who served sometime during the war with Spain (April 6, 1898, to July 2, 1902), or the First World War (April 6, 1917, to November 11, 1918) or in the Second World War (September 16, 1940,) the date on which the Selective Service Act became effective, to December 31, 1946, or between June 1, 1950, and June 1, 1953, who have either been honorably discharged or who have received a certificate of satisfactory completion of such service, and who have been bona fide residents of this State for five years or more immediately preceding the date on which such veteran takes any Merit System examination, shall be given special credit for such service; provided, such veterans served a minimum of ninety days in the service of the United States, as aforesaid, or were discharged by reason of a disability incurred in line of duty * * *".

It has been your opinion that since this man's service did not commence before June 1, 1953, as set forth in Section 17(c), *supra,* he was not entitled to Veterans' Preference.

However, Sections 1 and 2 of Article 96½ of the Code (1951 Ed. and 1957 Supp.) must also be applied in considering Veterans' Preference. Section 1 defines "Second World War Veteran" to include persons who have served honorably in the Armed Forces of the United States after June 1, 1950, and prior to June 1, 1959. This extension to June 1, 1959, was accomplished by the passage of Chapter 677 of the Laws of 1957. Section 2 of Article 96½ grants unto Second World War Veterans all preferences, benefits, rights and privileges allowed veterans of the First World War, including preferences under any Merit System Laws of the State.

It is our opinion that the Commissioner of Personnel, in determining Veterans' Preference, is bound by the provisions of Article 96½ of the Code and that therefore the veteran in question has been improperly denied this preference.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

MOTOR VEHICLES

MOTOR VEHICLES—UNSATISFIED CLAIMS AND JUDGMENT FUND FEES FOR THE CREATION AND MAINTENANCE OF THE FUND ARE TO BE COLLECTED ONCE FOR EACH SET OF REGISTRATION PLATES ISSUED TO AN INDIVIDUAL DURING THE LICENSE YEAR.

January 22, 1958.

Mr. James B. Monroe,
Commissioner of Motor Vehicles.

We have your recent letter in which you ask whether or not, under Section 145B, Article 66½, (1957 Supplement), the Unsatisfied Claims and Judgment Fund Act, the Department of Motor Vehicles is required to collect the fees provided for in sub-sections (a) and (b) when, during the license year, the owner of a registered vehicle transfers his registration plates to another vehicle which is being registered for the first time.

Section 145B (a) and (b) reads as follows:

> "For the purpose of creating and maintaining the fund—
>
> (a) Every person registering an uninsured motor vehicle in this State for the yearly period commencing April 1, 1958, or May 1, 1958, as the case may be shall pay at the time of registering the same, in addition to any other fee prescribed by any other law, a fee of eight ($8.00) dollars;
>
> (b) Every person registering any other motor vehicle in this State for the yearly period commencing April 1, 1958, or May 1, 1958, as the case may be shall pay at the time of registering the same, in addition to any other fee prescribed by any other law, a fee of one ($1.00) dollar. If any such motor vehicle becomes an uninsured motor vehicle at any time during such period such person shall immediately notify the Commissioner there-

of, and shall pay the difference between the fee prescribed in this paragraph and the fee prescribed in paragraph (a) or return his registration certificate and plates;"

The Maryland law was taken verbatim from the New Jersey statute dealing with the same subject which has been in effect in New Jersey for several years. We find in that State that the administrative interpretation of the law has been that the fees are only to be collected once during the yearly period set out in the statute, no matter how many vehicles the owner may register under one set of registration plates. They treat the matter at the time of registration of the new vehicle as simply a transfer of registration plates, and not as a new registration. While the language of the statute appears to be broad enough to require the payment of the fees upon the registration of every vehicle during the yearly period by an owner, even though there is a transfer of registration plates from one vehicle to another, we feel constrained to follow the administrative interpretation adopted in New Jersey. The Maryland Legislature knew of the administrative interpretation in New Jersey when it adopted and enacted the New Jersey Act as the law of this State, and we are of the opinion that it intended that the procedure to be followed in this State be the same as that followed in New Jersey.

You are therefore advised that the fees provided by Section 145B (a) and (b) are to be collected only once for each set of registration plates issued to an individual during the license year.

C. FERDINAND SYBERT, *Attorney General.*

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

MOTOR VEHICLES—UNIFORMED POLICE OFFICER MAY STOP THE OPERATOR OF A MOTOR VEHICLE FOR THE SOLE PURPOSE OF DETERMINING WHETHER OR NOT HE HAS AN OPERATOR'S LICENSE IN HIS POSSESSION.

March 11, 1958.

Judge Robert J. Romadka,
Essex, Baltimore County, Maryland.

In your recent letter you ask whether or not a police officer may legally stop the operator of a motor vehicle for the sole purpose of checking whether or not he has an operator's license in his possession as required by law.

Chapter 687, Laws of Maryland of 1916, codified as Article 56, Section 162, Annotated Code of Maryland (1939 Ed.) contained substantially the same provisions as does Article 66½, Section 97, Annotated Code of Maryland (1957 Ed.), except that it specifically provided that "No operator of a motor vehicle shall be stopped by any officer for the sole purpose of exhibiting his operator's license".

The Legislature repealed and re-enacted Chapter 687, Laws of 1916, Article 56, Section 162, by Chapter 1007, Laws of Maryland of 1943, which is now codified as Article 66½, Section 97 of the Code, and in doing so, omitted the provision that no operator shall be stopped by an officer for the sole purpose of exhibiting his operator's license. Article 66½, Section 97, reads as follows:

> "Operating licenses shall at all times be carried by the licensee when operating a motor vehicle upon the highways of this State, *and shall be subject to examination upon demand by an uniformed officer of the law,* and said licenses shall have endorsed thereon in the proper handwriting of the licensee the name of the said licensee and when requested by proper officer in the discharge of his duties under the law said licensee shall write his name in the presence of said officer to the end that the identity of said licensee may be determined.

> The maximum fine for violation of this section in the case of a person to whom a license to operate a motor vehicle has been duly issued, but who through inadvertence has not the same with him at the time of arrest shall be one ($1.00) dollar." (Emphasis supplied.)

The fact that the Legislature saw fit at the time of its enactment to omit from Article 66½, Section 97, that provision of Article 56, Section 162, which forbade an officer to stop a vehicle for the sole purpose of examining an operator's license, indicates to us that it intended to permit an officer to do so in the future. The language used in Section 97, "and (operating licenses) shall be subject to examination upon demand by an uniformed officer of the law" is broad enough to permit an officer in uniform to stop a vehicle for the sole purpose of determining whether or not the operator has an operator's license in his possession. The Court of Appeals has so held in *Bradley v. State,* 202 Md. 393 at 398.

We are therefore of the opinion that an officer may stop a vehicle for the sole purpose of determining whether or not the operator thereof has an operator's license in his possession.

C. FERDINAND SYBERT, *Attorney General.*

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

MOTOR VEHICLES—APPROPRIATION EXPIRES IF PROJECT NOT CONTRACTED FOR WITHIN TWO YEARS.

May 5, 1958.

Mr. James B. Monroe,
Commissioner of Motor Vehicles.

You have asked whether in view of Chapter 16 of the Acts of the Special Session of 1958, the provisions of Chapter 98 of the Acts of 1956, insofar as they relate to the purchase of a site for the erection of a new building for the Department of Motor Vehicles, are extended for a two-year period beyond June 1, 1958, your purpose being to ascertain whether the sum of $120,000 appropriated by the aforementioned Chapter 98 may be spent or contracted to be spent by June 1, 1960, instead of June 1, 1958.

Chapter 98 of the Acts of 1956 was approved by the Governor on March 26, 1956, and its effective date was June 1, 1956. That Act, in pertinent part, appropriated the sum of $120,000 "For the purchase of not more than twelve (12) acres of land as site for new headquarters (for the Department of Motor Vehicles Building), including off-street driving test course and parking areas"; and, by Section 8 of said Chapter 98 it was provided that if any project listed in that Act "shall not have been contracted for within two years from the effective date of this Act, then such project shall be deemed abandoned."

Chapter 16 of the Acts of the Special Session of 1958, introduced on March 13, 1958, and approved by the Governor on April 4, 1958, provided, in pertinent part, for an appropriation in the amount of $230,000 supplementary to the appropriation contained in Chapter 98 aforesaid, and Section 8, of said Chapter 16 contains a provision in identical language to that of Section 8 of Chapter 98 hereinbefore quoted.

In our opinion, Section 8 of Chapter 98 is controlling with respect to the appropriation in that year and unless the project is contracted for before June 1, 1958, the $120,000 provided for in that Act will not be available for the project.

A reading of both Acts and a consideration of their intent indicates that the purpose intended by the 1956 Act was to make possible the expenditure of a sum not exceeding $120,000 for the purchase of land for the construction of a new headquarters building for the Commissioner of Motor Vehicles, and the obvious purpose of the second Act was separate legislation to make possible the expenditure of additional or supplementary funds not in excess of $230,000, also for a similar purpose. However, attention is invited to the fact that there is no express language contained in Section 8 of the 1958 Act indicating any intent of the Legislature that both sums be added together and considered as one appropriation and the time for its expenditure extended, nor may any such intention reasonably be implied, for if that had been the intent of the Legislature, it would have been a very simple matter to have so stated, as was done in certain other cases involving appropriations of similar type and purpose.

Accordingly, we are constrained to the view that unless the $120,000 appropriated by Chapter 98 is contracted for by not later than June 1, 1958, its availability for expenditure ceases. However, we are of the view that the sum of $230,000 appropriated by Chapter 16 of the Acts of 1958 remains available for expenditure under Section 8 thereof until June 1, 1960, two years from the effective date of said Act.

You are advised accordingly.

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

ELI BAER, *Special Asst. Attorney General.*

MOTOR VEHICLES—RECORDS OF OFFICE MUST BE KEPT OPEN FOR PUBLIC INSPECTION—RULES AND REGULATIONS MAY NOT BE PASSED CONTRARY TO EXISTING STATUTE.

December 17, 1958.

Mr. James B. Monroe,
Commissioner of Motor Vehicles.

You have submitted the following proposed rule and regulation for our approval:

> "All reports and data prepared by the Investigation Section, Driver Improvement Section and Medical Advisory Board of the Department shall be deemed confidential for the use of the Department, as provided for in Section 14."

Section 14 (a), Article 66½, Annotated Code of Maryland (1957 Edition) reads as follows:

> "(a) Confidential.—The Commissioner of Motor Vehicles shall keep a record of all statements filed with him and all certificates issued by him, *and all records of the Department, other than those declared by law to be confidential for the use of the Department, shall be open to public inspection during office hours.*" Emphasis supplied.

We have been unable to find any law which declares the reports and data which the regulation proposes to restrict to be confidential and we are, therefore, of the opinion that such reports and data, under the provisions of Section 14, Article 66½ of the Code, must be kept open for public inspection. Rules and regulations may not be validly passed which are contrary to statutes passed by the General Assembly since by our Constitution the General Assembly has exclusive power to make the laws. Since the regulation in question is contrary to the provisions of Section 14 we are unable to approve it.

This does not mean, however, that you must open your records for inspection by all persons who wish to satisfy

a whim or fancy or who wish to look at them out of mere curiosity. You may pass such rules and regulations governing the inspection of such records as you find it necessary to impose for the ordinary conduct of your office but you may not forbid the inspection of such records by a person who can show an actual interest therein. *Pressman v. Elgin*, 187 Md. 446.

C. FERDINAND SYBERT, *Attorney General.*

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

OFFICERS

OFFICERS—ORPHANS' COURT—JUDGE OF ORPHANS' COURT MUST RESIGN IF ACCEPTS APPOINTMENT AS TRIAL MAGISTRATE.

December 15, 1958.

Hon. Kathleen Henry Coll,
Orphans' Court of Dorchester County.

In your letter of December 12, 1958, you ask whether you must resign your office as Judge of the Orphans' Court for Dorchester County if you should be appointed a Trial Magistrate.

Article 35 of the Maryland Declaration of Rights prohibits a person from holding more than one office of profit created by the Constitution or the laws of the State of Maryland. We have ruled in the past that a person holding the office of Judge of the Orphans' Court may not hold a commission as a Notary Public. 15 Opinions of the Attorney General 237 and 24 Opinions of the Attorney General 616. The office of Trial Magistrate is an office of profit created by the laws of the State. See Article 52, Section 97, ff., Annotated Code of Maryland (1957 Ed.).

We accordingly herewith advise you that if you accept an appointment as Trial Magistrate, you must resign your office of Judge of the Orphans' Court of Dorchester County.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

ORPHANS' COURT

ORPHANS' COURT — WILLS — HOLOGRAPHIC CODICIL WITH ONLY ONE WITNESS SHOULD NOT BE ADMITTED TO PROBATE.

June 17, 1958.

Orphans' Court for Talbot County.

You have asked us whether you should admit to probate a holographic codicil to a validly executed last will and testament. The codicil is entirely in the handwriting of the testatrix. It is signed by her. It was witnessed by one person only. The assets which it would govern consist entirely of personal property. Based on these facts which you have given us, we herewith advise you that you should not admit this codicil to probate since it is not executed in accordance with the testamentary laws of Maryland.

In an opinion handed down in 1822, the Court of Appeals upheld the validity of a holographic codicil to a valid last will and testament where the codicil would pass only personal property. *Brown's Exec. v. Tilden,* 5 H & J 371. This decision was later limited to its particular facts. *Plater v. Groome,* 3 Md. 134 at 145-146. However, the *Brown* case, supra, was decided prior to the enactment of the Act of 1884, the pertinent part of which is now codified in substantially the same form as Article 93, Section 350 of the Annotated Code of Maryland (1957 Edition). The Act of 1884 placed all testamentary dispositions, whether of real or personal property, on an equal footing where formerly a holographic will of personalty may have been valid. See Sykes: *Probate Law and Practice,* Section 15 and notes thereto (1956 Edition).

Section 350 (a) provides as follows:

> "Except as provided in paragraph (b) of this section all devises and bequests of any lands, or tenements, or interest therein, and *all bequests* of any goods, chattels or personal property of any kind, as described in Sec. 346, shall be in writing

> and signed by the party so devising or bequesting (sic) the same, or by some other person for him, in his presence and by his express direction, and *shall be attested and subscribed* in the presence of the said devisor *by two or more credible witnesses, or else they shall be utterly void and of none (sic) effect.*" (Emphasis supplied.)

Article 93, Section 350 (b) of the Code permits under certain circumstances the probate of a holographic will of a devisor "made outside the area of the United States" and "while serving with any of the armed forces of the United States". However, from the facts which you have given us, this subsection would not be applicable to the codicil under consideration.

It is consequently our opinion that, although this codicil might have been valid under the holding in the *Brown* case, supra, prior to the 1884 Act, it is not valid under the present law since there is only one witness, "an obviously fatal defect". *Stuart v. Foutz*, 185 Md. 401 at 403. We therefore advise you that this codicil should not be admitted to probate.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

PAROLE & PROBATION

PAROLE & PROBATION—GOVERNOR MAY PARDON CORPORATION CONVICTED OF CRIMINAL OFFENSE.

November 28, 1958.

Mr. Wallace Reidt, Director,
Department of Parole & Probation.

You have requested this office to determine whether a Maryland corporation, convicted of the commission of a crime and sentenced to the payment of a fine, may be pardoned by the Chief Executive of this State.

The right to the granting of pardons is vested in the Governor by Section 20, Article II, Maryland Constitution, and provides as follows:

> "He (the Governor) shall have power to grant reprieves and pardons, except in cases of impeachment, and in cases, in which he is prohibited by other Articles of this Constitution; and to remit fines and forfeitures for offenses against the State; but shall not remit the principal or interest of any debt due the State, except, in cases of fines and forfeitures; and before granting a *nolle prosequi,* or pardon, he shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power, he shall report to either Branch of the Legislature, whenever required, the petitions, recommendations and reasons, which influenced his decision."

The only restriction contained in the broad grant of power contained in the Constitution is that no reprieve or pardon may be given in cases of impeachment and in cases which are prohibited elsewhere in the Constitution. Examination of the Constitution reveals that no other restriction is imposed upon the Governor and, therefore, with the ex-

ception above noted, the power is unlimited. See Niles, *Maryland Constitutional Law*, page 122.

The Legislature has implemented the constitutional power of the Governor by the provisions of Article 41, Sections 120-122, Annotated Code of Maryland (1957 Ed.), Section 120, *supra*, provides as follows:

> "The Governor upon giving the notice required by the Constitution may commute or change any sentence of death into confinement in the penitentiary or in the Maryland House of Correction or banishment, for such period as he shall think expedient; and on giving such notice, he may commute or change the sentence of any person from imprisonment in the Maryland Penitentiary to imprisonment for a like or for a less period in the Maryland House of Correction. And, on giving such a notice, he may pardon *any person*, convicted of crime, on such conditions as he may prescribe, or he may upon like notice remit any part of the time for which *any person* may be sentenced to imprisonment on such like conditions without such remission operating as a full pardon to any such person. (Emphasis supplied.)

The Legislature has not attempted to restrict the powers set forth in the Constitution, but rather has authorized the Governor to place conditions on the person to be pardoned and we do not believe that the pardoning power is thereby restricted.

The question of whether the Governor may pardon a corporation may depend on the words "any person" as used in Section 120, supra. Article 1, Section 15, Annotated Code of Maryland (1957 Ed.) provides as follows:

> "The word person shall include corporation, unless such a construction would be unreasonable."

Since the word "person" is used in Section 120, it would be broad enough to cover corporations which have been convicted of the commission of a crime.

In *Patterson v. Mayor and City Council of Baltimore*, 127 Md. 233, the Court of Appeals interpreted the provisions of Article III, Section 40, Maryland Constitution, relating to eminent domain. The Court there, interpreting a provision of the Baltimore City Charter which permitted any person dissatisfied with the award of a commission to appeal to the Baltimore City Court and to have the benefit of a jury trial, held that the term "person", as used in the Charter, included the Mayor and City Council, a municipal corporation, and found that the construction of the word "person" to include a municipal corporation was not at all unreasonable.

Since corporations are subject to the provisions of the criminal laws of this State to the same extent as an individual person, it is not unreasonable to conclude that they are likewise subject to the same power of the Governor to reprieve or pardon as in the case of a convicted individual. Also, it would be unreasonable to preclude a corporation convicted of a crime from petitioning for a pardon, the same as any individual defendant who had been convicted, particularly since the pardoning power is an act of executive clemency and should not be restricted in the absence of clear constitutional or statutory limitations.

It is important to be noted that the Governor, under the provisions of Section 51, Article 41 of the Code, may remit the whole or any part of any fine or forfeiture. However, under the provisions of Section 120, Article 41, *supra*, a pardon may be conditioned so that there will be no remission of a fine.

In conclusion, it is therefore our opinion, since there is no constitutional or statutory limitation upon the Chief Executive in this regard, that the Governor may pardon a corporation convicted of the commission of a crime.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

PATUXENT INSTITUTION

PATUXENT INSTITUTION—OUT-OF-STATE LEAVE OR PAROLE MUST BE UNDER SUPERVISION OF PAROLE AND PROBATION AGENCY OF RECEIVING STATE.

November 12, 1958.

Dr. Harold M. Boslow, Director,
Patuxent Institution,
Department of Correction.

Attorney General Sybert has referred to me for reply your letter of November 3, 1958. You advise that a defective delinquent, presently confined in the Patuxent Institution, has been authorized by the Institutional Board of Review to visit his home on holiday leaves. You also advise that the home of this young man is in Pennsylvania and that the leave granted would allow him to cross the State line into an adjoining State. You desire to know whether a preliminary arrangement is necessary to be made with the Pennsylvania Board of Parole and Probation in order to insure this man's return in the event he should fail to report back to the institution at the end of the holiday leave.

Article 31B, Section 13 (d) of the Annotated Code of Maryland (1957 Edition) authorizes the Institutional Board of Review, after review and re-examination, to grant a defective delinquent leave of absence or parole from the institution when the Board finds that it would be for the benefit of the person involved and for the benefit of society. It further provides "The board may attach to any such leave of absence or parole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole by his friends or relatives, by the institution for defective delinquents or by the Department of Parole and Probation . . .".

It appears that the Legislature intended that such persons who have been rehabilitated to the point of allowing leaves or paroles should be left in the care and supervision of some responsible person or agency to assure proper con-

duct of the defective delinquent while he is away from the Patuxent Institution. The Legislature has granted discretion to the Institutional Board of Review as to the manner in which this care and supervision shall be exercised.

Article 41, Section 129 (1957 Code) encompasses the uniform act for out-of-state parolee supervision and is, in effect, a compact enacted by the several states for the purpose of cooperative effort and mutual assistance in supervising parolees. It is our opinion that when a defective delinquent has been granted leave or parole and such leave necessitates the leaving of the State of Maryland by the person, it would be to the interest of the State as well as the individual defective delinquent that he be supervised pursuant to the provisions contained in Section 129 of Article 41.

Section 13 (d) of Article 31B gives the Institutional Board of Review the right to make conditions and terms for the defective delinquent on leave. We therefore, feel that it is proper to have as a condition that the defective delinquent on parole be supervised by the parole and probation agency of the State to which he is going. We believe this is necessary because the Board must find before it grants the leave that it is for the benefit of society that the leave be granted. Under such conditions society has the right to demand constant supervision and care by proper authorities.

If this procedure were not followed there would be extreme difficulty in having the defective delinquent returned in the event he failed to voluntarily return. There could be no charge under Section 139 of Article 27 since the individual has not escaped from a place of confinement but rather was given leave to be absent from the institution. Where no crime has been committed extradition is not possible. We, therefore, believe that it is imperative that any defective delinquent who is allowed to leave the State, either on leave or parole, must be under the supervision of the parole and probation department of the receiving State.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

PHARMACY

PHARMACY—INSPECTION OF PRESCRIPTIONS BY LAW ENFORCEMENT OFFICERS—PRESCRIPTIONS NOT TO BE RELEASED INDISCRIMINATELY.

January 15, 1958.

Mr. Francis S. Balassone, Chief,
Division of Drug Control,
State Department of Health.

We have your recent request for an opinion in reference to inspection and release of prescriptions which a pharmacist keeps on file. You advise that inquiries have been made by pharmacists seeking advice whether they must release original prescriptions to police officers seeking to enforce the narcotics law.

Article 27, Section 368 of the Annotated Code of Maryland (1951 Ed.), being part of the Uniform Narcotics Drug Act, provides that it is the duty of the State Department of Health and its agents, all peace officers of the State and all State's Attorneys to enforce the provisions of the law relating to narcotic drugs. In addition, Section 353 of the Uniform Narcotics Drug Act allows pharmacists under certain circumstances set forth therein to sell and dispense narcotic drugs, and provides that "The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this sub-title. * * *".

In addition to the above cited Section, the General Pharmacy Law, by Section 241 of Article 43, provides as follows:

> "There shall be kept in every pharmacy or drug store a suitable book or file, in which shall be preserved for a period of not less than five (5) years, every prescription compounded or dispensed at said pharmacy or drug store, and said book or file of prescriptions shall at all times *be open to inspection* of the members of the Maryland Board of

> Pharmacy and the duly authorized agents and employees of the Maryland State Department of Health. Any proprietor of a pharmacy or drug store violating the provisions of this section shall, upon conviction, be deemed guilty of a misdemeanor and fined not more than fifty ($50) dollars." (Emphasis supplied.)

You now ask whether a retail pharmacist must surrender possession of prescriptions, which the law requires him to file and preserve and have available for inspection, when requested to do so by police officers.

The General Assembly, by the legislation above recited, has clearly imposed an obligation and duty on every pharmacist to file and preserve every prescription compounded or dispensed, all of which shall be open to inspection by designated law enforcement officers. However, in imposing such an obligation, the General Assembly has designated that the pharmacy shall be the proper repository of these records and has not specifically made provision for the release of the same.

While it is the obligation of every pharmacist to cooperate to the fullest extent possible in the enforcement of the Uniform Narcotic Drug Act and the General Pharmacy Laws, such cooperation does not mean that he should surrender complete possession and control of prescriptions which he is bound to keep on file and have readily accessible.

In meeting this problem, it is our opinion that before a pharmacist surrenders possession and control of these prescription forms to a police officer, he should receive from the requesting police officer a full receipt for the same, which receipt should include the date of the taking of the prescription, the pharmacist's prescription number, the date for which the prescription was prescribed, the name and address of the patient for whom it was prescribed and the name and address of the physician or other authorized person who has prescribed the prescription. It should be distinctly understood that the original prescription must be promptly returned to the pharmacist's files, and that in

allowing the police officer to take possession of the same it is only for the purpose of photo-copying the prescription.

In the event that the original prescription is needed by the enforcement officers at the trial of a case or before the Grand Jury, the pharmacist can be duly subpoenaed to produce the original document. We believe that this will eliminate any possible confusion and will also eliminate excuses on the part of the pharmacist for not having a particular prescription. In this manner no pharmacist could be criticized or be held liable for violation of the duty imposed upon him, and it will also facilitate proper enforcement of the pharmacy and narcotic drug laws.

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

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

PLANNING COMMISSION

PLANNING COMMISSION—WHAT GOVERNMENTAL BODIES ENTITLED TO ENACT ZONING AND PLANNING ORDINANCES.

January 29, 1958.

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

You have asked us to advise you what areas and what jurisdictions within the State are empowered to enact planning and zoning ordinances and to establish planning and zoning authorities.

In the general grant of zoning power, Article 66B, Section 1, (1951 Code), the Mayor and City Council of Baltimore and the "legislative bodies of cities and incorporated towns of the State containing more than 10,000 inhabitants" are empowered to enact zoning regulations and restrictions. Article 66B, Section 21, confers zoning powers upon "the legislative body of counties, cities and other incorporated areas" without regard to population.

As this office pointed out some years ago, 25 Opinions of the Attorney General 717, Chapter 599, Acts of 1933, of which Article 66B, Section 21, is a part, is a general enabling act on the subject of planning and zoning, applicable to all municipalities, including counties, except as limited in Article 66B, Section 35, (1957 Supp.). That limitation now applies only to Montgomery and Prince George's Counties. As pointed out in the same opinion, the general zoning law adopted by Chapter 705, Acts of 1927, of which Article 66B, Section 1, is a part, is also still in effect. Thus, these two legislative enactments are concurrent.

We accordingly advise you that, under the provisions of Article 66B, Section 21, a legislative body of any county, city or other incorporated area (which presumably would also include a town not covered by Article 66B, Section 1)

may enact a planning and zoning ordinance and establish a planning and zoning authority without regard to the 10,000 population limit imposed by Article 66B, Section 1.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

POLICE COMMISSIONER

POLICE COMMISSIONER—INSURANCE COMMISSIONER—STARTER GUNS AND TEAR GAS INSTRUMENTS WHICH CAN PROPEL BULLETS ARE FIREARMS; OTHERS ARE FIREWORKS.

August 14, 1958.

Chief Inspector Oscar L. Lusby,
Police Department of Baltimore City.

You requested our opinion as to the legality of advertising, selling, possessing and using starter guns and tear gas pens and pencils in the City of Baltimore.

You advise us that the starter guns are manufactured both in the form of revolvers and automatic pistols, usually of .22 caliber, and that the revolvers are adaptable to the use of a live cartridge containing a projectile but that it would be impossible to use a live cartridge containing a projectile in the automatic pistols. You further advise us that the tear gas pens and pencils have barrels about 4-¾" long with an internal diameter in one of the standard pistol calibers and that these devices are capable of firing a live cartridge containing a projectile.

As you are aware, there are three statutes which would govern the use of firearms. The federal enactment is known as the Federal Firearms Act, 15 USCA, Sections 901 to 909, inclusive. The definition contained in Section 901 (3) is broad enough to encompass starter guns and tear gas instruments. Revenue Ruling 56-597, 26 CFR 179.20, Internal Revenue Bulletin 48, November 26, 1956. Section 902 (c) prohibits the shipment of firearms by manufacturers or dealers into States without complying with local licensing laws. The State enactments are contained in Article 27, Annotated Code of Maryland (1957 Ed.) The general prohibition against carrying deadly weapons is in Section 36; the requirement of sales records and the prohibition as to altering identification marks, to selling to criminals, and to selling stolen pistols are in Sections 441 to 448, inclusive. The municipal ordinance governing the City of Baltimore are

contained in Sections 43 to 60A, inclusive, Article 24, Baltimore City Code (1950 Ed.). In the City Code, there are similar requirements as to sales records, but in addition, the ordinances prohibit the discharge of any firearm or air gun within the City (Sections 57 and 58), prohibit the carrying of a pistol either in a vehicle or concealed on the person (Section 48) and prohibit both the transfer to minors and restrict the use of gas or air operated guns (Section 60A).

It is our opinion that a starter gun or a tear gas pen or pencil which is capable of firing a live cartridge containing a projectile is to be considered a firearm and is in the same category as any other pistol. The fact that the manufacturer may advertise and intend that such devices be used for starting races or discharging harmless gas is immaterial. The instrument must be categorized by its potential use and not by the intention or advertisement of its manufacturer or vendor. A starter gun or a tear gas pen or pencil loaded and capable of firing a projectile is a deadly weapon which endangers human life and the safety of the community as much as any other firearm. In our letter to the Police Commissioner, dated April 1, 1954, we advised him that tear gas pens or pencils, Zip guns and CO-2 guns capable of firing a projectile are deadly weapons and that instruments operated by gas or CO-2 are proscribed by Section 57, Article 24, Baltimore City Code (1950 Ed.).

It is our further opinion that a starter gun or a tear gas pen or pencil which fires an explosive cartridge without a projectile is a firework and is subject to the control and restrictions of Sections 101-106, Article 48A, Annotated Code of Maryland (1957 Ed.). There are similar provisions in Section 65, Article 9, Baltimore City Code (1950 Ed.). You will note that it is a misdemeanor to discharge, to sell or to possess with the intention of discharging or selling fireworks without permission from the Insurance Commissioner, under Section 103. A starter gun or a tear gas pen or pencil, loaded only with blank ammunition, can be used with terrifying effect by criminals. In *Hayes v. State*, 211

Md. 111, our Court of Appeals affirmed a conviction for attempted robbery with a dangerous and deadly weapon, although the hold-up gun was in fact unloaded at the time. The exception as to signal pistols, contained in Section 105, Article 48A extends only to the use of signal pistols in athletic contests or for similar purposes; there is no exception allowing the sale of such items without a permit. Compare 39 Opinions of the Attorney General 158, exempting toy cap pistols.

C. FERDINAND SYBERT, *Attorney General.*

CLAYTON A. DIETRICH, *Asst. Attorney General.*

RACING COMMISSION

RACING COMMISSION — LICENSED RACING ASSOCIATIONS HAVE NO POWER TO DENY REGISTRATION OF HORSES AND ENTRIES FROM LICENSED OWNERS AND TRAINERS.

May 19, 1958.

Mr. D. Eldred Rinehart, Chairman,
Maryland Racing Commission.

This will acknowledge receipt of your request for an opinion relating to the right of one of the licensed racing associations to deny registration of horses and entries of certain licensed owners and trainers from racing at their tracks.

Article 78B created the Maryland Racing Commission for the purpose of controlling and regulating horse racing within the State. It has been granted broad powers to exercise effective control over the various racing associations and is authorized to adopt, promulgate and enforce such rules and regulations incident to proper regulation and control of horse racing. See Article 78B, Section 11 of the Code; and *Racing Commission v. McGee,* 212 Md. 69.

Pursuant to the grant of authority, the Racing Commission has adopted "Rules of Racing" and therein has set standards for the licensing of owners, trainers, jockeys, grooms and other persons essential to the effective control of racing. In addition thereto, the Racing Commission, in the Rules of Racing, has extensive regulations concerning entries by horsemen who have been duly licensed by the Commission. In the aforementioned Rules, Rules 126 through 173 do not grant to the racing associations any right to refuse entries of horses except as therein specifically enumerated. Rule 139 allows some discretion with the association by stating that before a horse can compete, it must be eligible at the time of entry for a particular race. Then, if a horse does not meet the eligibility standards for a particular race, its entry may be denied by the racing association. Within this discretion, we believe also goes the right for the

association to determine whether a horse is physically sound to compete in a particular race. Therefore, if an examination by the veterinarian would reveal that the horse was not in proper physical shape, the racing association could deny the entry of that horse in a particular race.

This ruling should not, however, be construed to grant unto the racing associations any greater discretion than above recited. It is the responsibility of the Racing Commission to control and regulate racing within the State, and not the associations. If the associations were able to prevent duly licensed horsemen from participating at their tracks, it would in effect be a power to veto and override the discretion exercised by the Racing Commission in granting licenses to persons it believes duly qualified to participate in racing within the State.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

RACING COMMISSION—REDEMPTION OF WINNING TICKETS—MUST BE WITHIN STATUTORY PERIOD BEGINNING FROM DATE WHEN RACE BECOMES "OFFICIAL."

December 31, 1958.

Harford County Fair Association, Inc.,
Bel Air Race Track,
Bel Air, Maryland.

This will acknowledge receipt of your letter of December 23, 1958, requesting an interpretation of Section 23(a) of Article 78B, Annotated Code of Maryland (1957 Ed.). That section provides that if any winning ticket bought after June 1, 1951 and before June 1, 1957, is not redeemed for a period of three years, the amount necessary to redeem the ticket shall be paid to the General Funds of the State. You specifically ask at what time the liability for payment of such winning tickets to the owners thereof ceases, and the duty to pay the money to the State begins.

Although the statute preserving the right to redeem a winning ticket for three years is silent as to the actual date from which that period shall begin, we can find the answer by virtue of the provisions of Article 57, Section 1 of the Code, which is commonly known as the Statute of Limitations. Under that statute, all actions shall be commenced within three years from the time the cause of action accrued. As soon as the cause of action accrues, whether it is by virtue of a trust or otherwise, the rights of the parties are preserved for a period of time from that date.

In racing, the owner of a winning ticket has the right to collect the same as soon as the results of the race have been made official. It is therefore our opinion that the time for redemption of tickets is a period of three years from the date on which the ticket became payable, that is, after the race has become official. Accordingly, it is our opinion that your liability for the payment of such winning tickets to the owners thereof ceases three years after the date the race

has become official if purchased before June 1, 1957, and in the event they are purchased after June 1, 1957, the period of redemption is one year.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

REAL ESTATE

REAL ESTATE CONTRACTS—SUNDAY CONTRACTS UNENFORCEABLE—CONTRACTS MADE ON LEGAL HOLIDAYS ARE VALID.

January 13, 1958.

Mr. William J. Nicholson, Secretary,
Maryland Real Estate Commission.

In your recent inquiry you ask our opinion concerning the following questions:

1. Are contracts signed on Sunday where no subsequent action is taken to confirm the contract legally enforceable?

2. Are contracts signed on other legal holidays where no subsequent action is taken to confirm the contract legally enforceable?

The common law does not forbid the making of a real estate contract on Sunday. A contract so made is valid unless forbidden by statute. Section 578, Article 27, Annotated Code of Maryland (1951 Ed.) reads as follows:

> "No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit Five Dollars, to be applied to the use of the county."

The courts of this State have held that Section 578 changed the common law and that a contract made on Sunday is a contract prohibited by law. In *Rickards v. Rickards*, 98 Md. 136, the Court of Appeals said: "No executory con-

tract made on Sunday can be enforced". See also *Cook v. Pearce,* 160 Md. 434; and *Mundt v. Dubin,* 4 Baltimore Rep. 788.

In answer to the second question, any and all contracts made on legal holidays, other than on Sundays, are valid and enforceable unless they are specifically and positively forbidden by statute. 50 Am. Jur., *Sundays and Holidays,* Section 43, p. 439. We have been unable to find any Maryland statute which forbids the making of real estate contracts on legal holidays and are, therefore, of the opinion that such contracts are valid and enforceable.

C. FERDINAND SYBERT, *Attorney General.*

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

REAL ESTATE—REAL ESTATE BROKERS MAY NOT USE CONTESTS TO ADVERTISE THEIR BUSINESS.

March 3, 1958.

Mr. W. G. Nicholson,
Executive Secretary,
Real Estate Commission.

In your recent letter you ask whether or not a real estate broker may use a certain type of contest as a means of advertising his business. The proposed contest submitted to us with your letter consists of a cross word puzzle which will be published in the form of an advertisement in the local newspapers. The first ten persons to correctly complete and mail a copy of the cross word puzzle to the real estate broker will receive a prize of a box of chocolates. There is no obligation imposed upon any of the contestants to either buy or sell real estate through the broker conducting the contest. The particular advertisement submitted, in addition to advertising the contest and the name of the broker, also advertises a certain real estate subdivision in which the real estate broker is selling lots.

Section 224(o), Article 5, Annotated Code of Maryland (1957 Ed.) provides that the Real Estate Commission of Maryland may suspend or revoke any license issued by it under the provisions of Article 56 of the Code if the licensee is found by it to be guilty of offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property.

We think the only purpose the proposed cross word puzzle contest could possibly have is that of influencing prospective sellers and purchasers of real property to conduct their real estate business through the real estate broker doing the advertising. Every member of the public is a prospective purchaser of real estate. In the ad presented to us there is a positive attempt by the broker to attract prospective purchasers for the lots in a particular real estate subdivision. The statute makes it unlawful to influence a prospective purchaser *in any way* by offering a prize and

does not limit the violation to influencing a purchaser or prospective purchaser *to buy*.

The statute further provides that it shall be improper, (1) for a broker to solicit real property to sell by conducting a contest or (2) for a broker to offer real estate for sale by conducting a contest. The contest advertisement submitted by you certainly is designed to solicit business for the advertising broker, and to offer for sale to the public the lots in the particular real estate subdivision which the broker is handling. We are therefore of the opinion that the contest in question violates the letter as well as the spirit of the law and may not legally be used within this State by a real estate broker for the purpose of advertising his business.

C. FERDINAND SYBERT, *Attorney General.*

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

REAL ESTATE COMMISSION—MORTGAGE BROKER IS NOT REQUIRED TO HAVE A REAL ESTATE BROKER'S LICENSE.

March 3, 1958.

Mr. W. G. Nicholson,
Executive Secretary,
Real Estate Commission.

In your recent letter you ask whether or not a person who is engaged solely in the business of a mortgage lender or mortgage broker is required to have a real estate broker's license and post a bond as provided by Section 217, Article 56, Annotated Code of Maryland (1957 Ed.).

The definition of a real estate broker or salesman as given in Article 56, Section 212, Code (1957 Ed.), does not in our opinion include a person who is engaged solely in the business of making mortgage loans or acting as a mortgage broker.

You are therefore advised that such a person is not required to obtain a real estate broker's license or post bond under the provisions of Article 56, Section 217 of the Code.

C. FERDINAND SYBERT, *Attorney General.*

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

RETIREMENT SYSTEM

RETIREMENT SYSTEM—EMPLOYEES OF MARYLAND PORT AUTHORITY WHO WERE EMPLOYEES OF CITY OF BALTIMORE MAY TRANSFER TO STATE EMPLOYEES' RETIREMENT SYSTEM AT RATE FOR ATTAINED AGE AND ARE ENTITLED TO BENEFITS OF STATE SYSTEM ONLY—EMPLOYEES OF PORT AUTHORITY MAY RECEIVE RETIREMENT ALLOWANCES FROM CITY OF BALTIMORE TO WHICH STATE DOES NOT CONTRIBUTE.

August 7, 1958.

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

By Chapter 2 of the Special Session of 1956 the General Assembly created the Maryland Port Authority as an instrumentality of the State of Maryland to encourage and facilitate the further development of the ports and harbors of the State. The Authority is empowered to employ personnel who "shall be subject also to the rights and benefits of . . . " the State Employees' Retirement System laws. Article 62B, Section 5(o), Annotated Code of Maryland (1957 ed.). Provision is made for the transfer of certain officers and employees from the City of Baltimore to the Authority who "shall be and become eligible for membership in the Employees' Retirement System of the State of Maryland . . .". Article 62B, Section 22 (a) of the Code.

First, you ask whether those persons who are now officers and employees of the City of Baltimore and members of its retirement system will be entitled to benefits in the State Employees' Retirement System equivalent to the benefits provided by the City retirement system when they become employees of the Authority. In some particulars the retirement benefits of the City system are more favorable to the employee than the benefits of the State system. The transferred employees' rights under the retirement system of the City of Baltimore may be transferred to the Employees' Retirement System of the State "in accordance with existing law providing for transfers of credits between and among

the various retirement systems of the State and the municipalities of the State." Article 62B, Section 22 (a) of the Code. Transfers to the State Employees' Retirement System from the Baltimore City retirement system are allowed by Sections 31 to 34, inclusive, of Article 73B of the Code. When he transfers to the State retirement system from the City system, an employee shall pay the rate of contribution applicable to a new entrant to the State system at his attained age and be eligible for the pension and annuity provided by the State system. Article 73B, Section 33 of the Code. See also 33 Opinions of the Attorney General 308 (1948). He is entitled to credit in the State system for certain prior service and membership credited in the City system. Article 73B, Section 32 of the Code.

In our opinion, the employees of the Maryland Port Authority who were officers and employees of the City of Baltimore and members of its retirement system may transfer to the Employees' Retirement System of the State. They are entitled only to the benefits provided by the State system, which may in some instances be less favorable to them than the benefits of the City system. They must contribute to the State system at the rate for new entrants to the State system at their attained age.

Second, you ask whether officers and employees of the City of Baltimore who are to become employees of the Authority and who are eligible for retirement under the City system may receive retirement allowances from the City system and waive membership in the State Employees' Retirement System.

The employees of the Authority are employees of the State of Maryland. Membership in the State Employees' Retirement System is compulsory for State employees and is a condition precedent to employment by the State. An employee of the State must be a member of the Employees' Retirement System and is not entitled to receive any pension or retirement allowance from any other pension or retirement system supported wholly or in part by the State of Maryland, except Social Security. Article 73B, Sections

3(1) and 19 of the Code. However, a person who is receiving a pension or retirement allowance from the City of Baltimore, to which the State does not contribute, may be an employee of the State and a member of the State Employees' Retirement System. If an employee of the City of Baltimore who is to become an employee of the Maryland Port Authority receives a retirement allowance from the City system, he may not transfer any credit from the City system to the State system, but he must join the State Retirement System as a new member without accrued credit earned in the City system.

In our opinion, an officer or employee of the City of Baltimore who becomes an employee of the Maryland Port Authority may receive a retirement allowance from the City Retirement System. He must become a member of the State Employees' Retirement System but he will not be entitled to transfer any credits from the City Retirement System. He must join the State Retirement System as a new employee.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

RETIREMENT SYSTEM—JUDGES OF PEOPLE'S COURT OF MONTGOMERY COUNTY MAY BE MEMBERS OF STATE EMPLOYEES' RETIREMENT SYSTEM EVEN THOUGH ELIGIBLE FOR RETIREMENT ALLOWANCE PAID BY COUNTY, BUT MAY NOT RECEIVE RETIREMENT BENEFITS FROM THE COUNTY AND THE STATE RETIREMENT SYSTEM.

August 15, 1958.

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

You have asked whether the "full-time" judges of the People's Court of Montgomery County are eligible for membership in the Employees' Retirement System of the State of Maryland since the General Assembly provided in 1957 that they should be paid an annual pension by the county when they terminate active service. Chapter 344 of the Laws of Maryland of 1957; Article 52, Section 108(15), Annotated Code of Maryland (1957 Ed.).

When, in 1945, the General Assembly provided that a county could elect to allow its employees to join the Employees' Retirement System, the law required that all officers and employees of a participating county were to be eligible for membership in the Employees' Retirement System "except such officers and employees as are *now* eligible to participate in a retirement system wholly or partially maintained at the expense of . . ." the county (Emphasis supplied.). Chapter 969 of the Laws of Maryland of 1945; Article 73B, Section 22 of the Code. Chapter 969 was approved on May 4, 1945, and became effective on January 1, 1947. We have emphasized the word "now" in the quotation from the statute because it is crucial to this problem.

Membership in the Employees' Retirement System is optional for persons employed by a county at the time participation in the System is approved by the legislative body of the county. Membership in the System is compulsory for county employees, but optional for elected or appointed officials of a county, who enter the service of the county after

it has elected to participate in the Employees' Retirement System. Article 73B, Sections 23 and 27 of the Code.

Employees and officers of a county who were eligible to participate in a retirement system maintained at the expense of the county on January 1, 1947, when the Legislature first allowed counties to elect membership in the Employees' Retirement System for county officers and employees—the *now* to which the statute refers and the effective date of Chapter 969 of the Laws of Maryland of 1945—are not eligible for membership in the Employees' Retirement System. Article 73B, Section 22 of the Code. There is a logical reason for this exclusion. If a county had established a pension system for some but not all of its employees and officers prior to January 1, 1947, it would have to choose between providing two pensions for some employees or no pension for other employees since membership in the Employees' Retirement System is available for county officers and employees, unless the Legislature excluded the county officers and employees for whom a pension had already been provided. If, after January 1, 1947, a county which had not participated in the Employees' Retirement System considered providing a local pension system for some of its employees, it did so with the full knowledge of the fact that it could elect membership in the Employees' Retirement System for all of its employees and that it might at some future date be faced with the problem of providing membership in two pension systems for some employees.

If the judges of the People's Court of Montgomery County are considered to be officers of the county, they have been eligible for membership in the Employees' Retirement System since March 1, 1948, when Montgomery County chose to participate. Montgomery County did not maintain a pension system for these judges before 1957. When the county established the pension for these judges in 1957, it chose to do so even though the judges were already eligible to become members of the Employees' Retirement System. In our opinion, the law does not prohibit a county from providing a local pension for its officers who are also eligible to join the Employees' Retirement System.

It is not necessary for us to determine whether the judges of the People's Court of Montgomery County are officers of the county or of the State. The same result obtains in either instance. Thus far, we have assumed that they are officers of the county.

If the judges of the People's Court of Montgomery County are considered to be officers of the State, they are eligible for membership in the Employees' Retirement System of the State even though the county has provided additional retirement benefits for them. Officers and employees of the State who are members of a retirement system to which the State does not make any contribution may be members of the Employees' Retirement System. Officers or employees of the State who are members of the "Judges Retirement System" are not eligible for membership in the Employees' Retirement System. Article 73B, Section 1(3) of the Code. The Judges Retirement System to which this exclusion refers is that system established by Sections 49 and 50 of Article 26 of the Code for judges of the Circuit Courts of the counties, the Supreme Bench of Baltimore City and the Court of Appeals.

We have concluded that the judges of the People's Court of Montgomery County are eligible for *membership* in the State Employees' Retirement System. We will now consider whether they may be eligible to receive retirement *benefits* from both the State and the county.

The judges of the People's Court of Montgomery County are public officers. See *Kimble v. Bender*, 173 Md. 608, 613 and 621 (1938); 20 Opinions of the Attorney General 586 and 587 (1935). They are appointed by the County Council and may be removed by it for reasons set forth in the statute. Article 52, Section 98 of the Code. Their compensation is paid by the County Council. Article 52, Section 105 of the Code.

If they are officials of the State, membership in the Employees' Retirement System is optional for them. However, if an official of the State "is entitled to a pension under the provisions of any other law, such official shall be deemed

to have waived the benefits thereof by accepting the payment of benefits" from the State Employees' Retirement System. Article 73B, Section 3(5) of the Code. Officials of counties which participate in the Retirement System shall be entitled to all the "benefits and obligations" of the Retirement System "as though they were State elected or appointed officials". Article 73B, Section 27 of the Code. Membership in the Retirement System is optional for officers of participating counties, but if a county officer elects to join the State Retirement System, he does so with the same privileges and limitations as a State officer. Again, it is not necessary for us to determine whether the judges of the People's Court of Montgomery County are officers of the State or of the county. We reach the same result in either circumstance.

In our opinion, if a judge of the People's Court of Montgomery County receives benefits from the Employees' Retirement System of the State of Maryland, he waives the right to receive the benefits provided by Chapter 344 of the Laws of Maryland of 1957 (Article 15, Section 108(15) of the Code).

A judge of the People's Court of Montgomery County must compare the benefits for which he would be eligible upon retirement if he joins the State Retirement System with the benefits provided by the county in Chapter 344 of the Laws of Maryland of 1957. If the benefits under the State System would be greater than the county benefits, it is advantageous for such a judge to join the State System. If the reverse is true, it is disadvantageous for him to elect membership in the State System.

In our opinion, the "full-time" judges of the People's Court of Montgomery County are eligible to join and may continue membership in the Employees' Retirement System even though since 1957 they have been eligible for pensions paid by Montgomery County. However, they may not receive benefits from both the Employees' Retirement System of the State and from Montgomery County. If they receive

benefits from the Employees' Retirement System, they are not eligible for the retirement benefits provided by Chapter 344 of the Laws of Maryland of 1957.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

SHERIFF

SHERIFF—SERVICE OF PROCESS—DISCRETIONARY WITH SHERIFF WHETHER TO SERVE IN OTHER COUNTIES.

January 3, 1958.

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

You have requested our opinion regarding Rule 104 a(1) of the Maryland Rules of Procedure, which reads as follows:

> "a. In or outside County.
>
> (1) The sheriff of any county from the court of which any process for a party may be issued may serve such process on the party named therein, wherever he may find such party, whether in or out of the said county;"

You state that you have been requested to serve process in the counties under the above rule and you are in a quandary whether it is mandatory or discretionary that you do so.

The origin of the above rule is in Section 154 of Article 75 of the Annotated Code of Maryland (1951 Ed.). Both the rule and the statute contain the word "may" which ordinarily is a word of discretion.

Black's Law Dictionary defines the word "may" to be an auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency. See *U. S. v. Lexington Mill and E. Co.*, 232 U. S. 399, 58 L. Ed. 658, 34 S. Ct. 337, L.R.A. 1915B, 774.

It is the general rule that "may" in its grammatical sense is not mandatory and a mandatory construction is followed only where the sense of the entire statute or rule impels such a conclusion and the ordinary meaning of the language must be presumed to be intended unless it would defeat the object of the statute or rule. See *State v. Goyet,* 122 A. 2d 862, 865, 119 Vt. 167.

It is our opinion that the word "may" is used in Rule 104 a(1) in its usual sense indicating discretion. Prior to 1884 process could not be served by the sheriff beyond the county or city for which he was elected or appointed, but by Chapter 128 of the Acts of 1884 (Article 75, Section 154), now Rule 104 of the Maryland Rules of Procedure, his power was enlarged in this respect, thus allowing the sheriff to serve process in the other counties or Baltimore City.

The word "may", as used in this rule, means to have the power to serve process in other counties, but does not impose any mandatory duty upon the sheriffs which was not already imposed upon them.

You are therefore advised that the operation of Rule 104 a (1) is discretionary with you and that the main import of the rule or statute was to give you the authority or power to serve process in the counties which you would not otherwise possess.

C. FERDINAND SYBERT, *Attorney General.*

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

SHERIFFS—EXECUTIONS AND ATTACHMENTS—WHO IS LIABLE FOR SHERIFFS' FEES AND EXPENSES IN VARIOUS INSTANCES—WHEN MAY EXECUTE ON AUTOMOBILE REGISTERED IN THE NAME OF HUSBAND AND WIFE.

July 1, 1958.

Sheriff Luke J. Bennett, Jr.,
Rockville, Maryland.

In your recent letter you asked our advice on several problems which you have encountered in levying writs of attachment and execution. We will attempt to answer them in the order in which they were asked.

First: A plaintiff caused a writ of attachment to issue before judgment. On August 24, 1956, you made a levy upon and took into possession a motor vehicle belonging to the defendant which you placed in storage. Judgment was entered in the case and a writ of fi fa was issued on October 10, 1957. The plaintiff instructed you to sell the motor vehicle but the holder of a chattel mortgage on the vehicle informed you of his interest and advised you not to sell until his lien was satisfied. The plaintiff has failed to proceed further and the vehicle remains in storage. You ask how you can dispose of the vehicle and recover the costs and expenses incurred to date. You tell us that the expenses of keeping the vehicle are mounting each day and that it is doubtful that the vehicle will presently bring enough at sale to satisfy both the mortgagee's lien and your costs.

Ordinarily it is a sheriff's duty under a writ of fi fa to seize the property of the defendant and convert it as expeditiously as possible by a sale into money. The writ itself demands the sheriff to procure from the goods and chattels, lands and tenements levied upon, the amount of the damages, costs and charges found to be due by the judgment of the court. Poe, *Pleading and Practice*, Vol. 2, Section 670; *Jones v. Jones*, 1 Bland, 443 at 451. Sections 25 and 26 of Article 36, of the Annotated Code of Maryland, (1957 Edition) prescribe the sheriff's charges and poundage fees and at common law it has been held generally that a sheriff in making a levy and sale is entitled to recover, in addition to

the costs fixed by law, any reasonable expenses such as storage charges necessarily required in the performance of his official duties. *Farmers' Union Milling and Elevator Company v. Smith*, (Colo.) 245 Pac. 346; *Johnson v. Sunnymeade Farms*, 80 SW 2d. 904; *Hiatt v. Turner*, (Ga.) 172 S.E. 607.

When, however, a chattel is found to be subject to a lien or the claim of a mortgagee, the sheriff is not entitled to sell without an order from a court of equity to do so. It is the practice in such case in Maryland for the plaintiff to issue a writ of fi fa and cause it to be levied, and then to apply to a court of equity for permission to redeem the encumbrance or for a decree authorizing the sale of the property by the sheriff. The plaintiff in the case you present had a duty to promptly file a petition in equity to obtain such permission to pay off the mortgagee's lien or to authorize the sheriff to sell the property, pay off the encumbrance and any costs and expenses of sale and apply the balance to the plaintiff's judgment. *Rose v. Bevan*, 10 Md. 466, *Myers v. Amey*, 21 Md. 302, *Green v. Western National Bank*, 86 Md. 279, 14 Md. Law Review, 222.

Where a plaintiff authorizes a sheriff to incur expenses without using the methods available to him to keep those expenses down, the sheriff may recover from the attachment or execution plaintiff the amount necessarily expended to preserve the attached goods. *Southwestern Commercial Company v. Owesney*, (Ariz.) 85 Pac. 724. It is even doubtful whether a plaintiff, such as the one in this case, who has been the real cause of the expenses incurred, could ask that they be assessed against the defendant or the defendant's property. *Southwestern Commercial Company v. Owesney*, supra.

If the vehicle when sold does not bring enough to pay the costs and expenses necessarily incurred, it is our opinion that you may require the plaintiff to pay them. An officer, in the execution of a writ, insofar as he acts by the direction of the plaintiff, is to be treated as the plaintiff's agent and is entitled to the benefit of the general law that

a principal will indemnify his agent for any expenses or liabilities which the agent incurs in obeying the mandate of the principal. If execution does not bring enough to pay the costs and expenses, then the judgment creditor is liable to the officer for them. The officer is entitled to be paid for what he does in obedience to a writ. *Ehrhardt v. Kaplan Bros. & Co.*, 42 Lack. Jur. 7. In *Baldwin v. Shaw*, 35 Vt. 273, it was held that a sheriff could charge to the plaintiff the fees and expenses for levying an execution when the goods were taken from the sheriff by a replevin suit prior to the sale. If a creditor employs an officer to do a service and the officer is prevented from getting his pay from the proceeds of the sale on execution, without fault on his part, the creditor must pay him. *Templeton v. Capitol Savings Bank and Trust Company*, (Vermont) 57 Atl. 818; *Dempsey v. Lynch Company*, 25 N.Y. Supp. 2d. 166.

It is evident that in your case you have lost the opportunity to obtain your charges and expenses from a sale of the debtor's property without any fault on your part and that therefore the plaintiff should pay any expenses which you have incurred. A sheriff is bound to follow specific instructions of a plaintiff to serve a writ in a particular manner if reasonable and he can lawfully do so, and a promise will be implied in law from the plaintiff to the officer to hold him harmless from the natural results of doing so. *Arnold v. Fowler*, 94 Md. 497, at 501. See also *Maddox v. Cranch*, 4 H & J, 395, *Cape Sable Company* case, 3 Bland, 606.

You should have made an additional return to the court upon the writ of attachment before final judgment, showing the expenses of keeping and caring for the vehicle between the time of the entry of the writ of attachment and the judgment, so that the court could have taxed those expenses as a part of the costs of the suit and included them in the judgment. *Rogers v. Simmons*, Mass. 29 N.E. 580; Vol. 80 C.J.S., Sec. 247 B, *Sheriffs and Constables*.

You also could have demanded that the plaintiff post a bond of indemnity to cover costs and expenses and any other

liability that you might have incurred as a result of your holding the vehicle after you learned of the mortgagee's interest therein. The Court of Appeals of Maryland has held that a sheriff may demand a bond of indemnity from a plaintiff if the title to the goods to be executed upon is in doubt. *Jessop v. Brown,* 2 G & J. 404. *Robey v. State,* 94 Md. 51. *Poe, Pleading and Practice,* Vol. 2, Section 683. If the plaintiff refuses to indemnify you, you should make a return to the court setting out the facts fully and asking to have the time for the execution of the writ enlarged until indemnity is given. In the present case, since the writ had already been levied you should have applied to the court to extend the time for the return of the writ. The court will usually grant a rule enlarging the time for the return of the writ from term to term until the indemnity is received. If it is not received within a reasonable time you would be justified in refusing to hold the defendant's property, returning the writ unsatisfied and in looking to the plaintiff for your costs and expenses. *Freeman on Executions,* Third Edition, Section 275.

Second: You ask who is responsible for the costs and expenses incurred by the sheriff when, following execution and before sale, the defendant is declared bankrupt and the bankruptcy court passes an order forbidding the sheriff's sale and ordering the goods to be delivered to the trustee in bankruptcy.

Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process within four months of a petition in bankruptcy, is dissolved by the adjudication of the defendant as a bankrupt, if at the time the lien was obtained the person was, in fact, insolvent. Section 107 (a) Title 11, U.S.C.A. A sheriff should continue with an execution sale even though there has been an adjudication of bankruptcy unless the sale is stayed by an order of the bankruptcy court. In re: *Fraser,* 261 Fed. 558. He should be careful in turning over the property to the trustee in bankruptcy merely upon an order of the referee since the execution creditor has the right to re-

quire a plenary hearing before the court. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264, U.S. 426. *Cline v. Kaplan*, 323 U.S. 97, *Thompson v. Magnolia Products Company*, 309 U.S. 478; *In re: Club New Yorker*, 14 Fed. Supp. 694.

In Maryland, after execution, the sheriff has a lien on the execution debtor's goods as long as they are in his possession to the extent of his costs, poundage fees and other expenses. *Howard v. The Levy Court*, 1 H & J, 558, *Cape Sable Co.* Case, *supra.*

There are two well-divided lines of authority in the courts covering the sheriff's right to priority of lien in bankruptcy for his costs and expenses. One line of cases holds that the sheriff's lien for costs and expenses is nullified when the execution which is the basis of his lien is nullified and that he is relegated to the class of general creditor and may file his claim for his costs as such. In re: *Whitley*, 2 Fed. 2d. 889; In re: *Francis-Valentine Company*, 93 Fed. 953. The second line of cases holds that the lien granted to the sheriff by state law must be recognized as a lien upon the bankrupt's property by the bankruptcy court even though the execution creditor's lien is dissolved. In re: *Famous Furniture Company, Inc.* 42 Fed. Supp. 777. In re: *W. J. Schmidt & Company*, 165 Fed. 1006. *In re*: *Standard Wholesale Grocers, Inc.* 174 Fed. 2d. 595.

We do not know which line of decisions our bankruptcy court will follow. If the first line of decisions is followed, you will be entitled to recover from the execution plaintiff as stated in the answer to your first question. If the second line of decisions is followed, you will be paid by the trustee from the proceeds of any sale made by him before the bankrupt's other creditors are paid.

Third: You ask who is to pay the sheriff's costs and expenses when you have taken possession of the property of a tenant under a distraint for rent and the tenant goes into bankruptcy within four months. The lien obtained by a landlord by distraint prior to bankruptcy is not one "obtained through legal proceedings", and, therefore, is not

divested by 11 U.S.C.A. Section 107 (a) upon the happening of a tenant's bankruptcy within four months. *Henderson, Trustee v. Mayer,* 225, U.S. 631, *Bickel v. Polaris Investment Co.* 155 F. Supp. 411; In re: *Mount Holly Paper Company,* 110 Fed. 2d. 220; In re: *Goldstein,* 34 Fed. Supp. 876.

You are therefore advised that in such case you should not give up the goods to the trustee but should proceed to sell them, deduct your costs from the proceeds and apply the balance to the rents due the landlord. If there is any balance left after payment to the landlord, it should be paid to the trustee in bankruptcy.

Fourth: You also ask whether or not a motor vehicle which is registered in the name of a man and his wife can be sold at execution under a judgment rendered against the husband alone.

The conveyance of a motor vehicle to a man and his wife creates a tenancy by the entireties unless there are words used in the instrument of conveyance clearly expressing the intention that they be tenants in common or joint tenants. *Haid v. Haid,* 167 Md. 493; *Kolker v. Gorn,* 193 Md. 391; 40 Opinions of the Attorney General, 580. It is settled law in Maryland that the interest of a lone debtor in an estate by the entireties is not subject to sale under execution in satisfaction of his debts. *Masterman v. Masterman,* 129 Md. 167; *Annapolis Banking and Trust Company v. Smith,* 164 Md. 8; *Schwarz v. U. S.,* 191 Fed. 2d. 618. If the husband and wife hold other than as tenants by the entireties, then the motor vehicle may be seized and sold under a fi fa against the husband alone if in his possession. The purchaser's right in the vehicle would be complete to the extent of the interest that the husband had in the motor vehicle and the purchaser might hold possession. *M'Elderry v. Flannagan,* 1 H & G, 308; *Eder v. Rothamel,* 202 Md. 189.

Fifth: You tell us that you have executed upon a judgment debtor's goods under a writ of fi fa and made a sale. The sale did not bring enough to cover costs and storage

expenses. The plaintiff's attorney received sufficient money from the plaintiff to pay the costs and storage charges but refused to pay the storage charges due you because the storage company owed money to another client of the plaintiff's attorney.

You are obligated to the storage company for the storage charges incurred and the plaintiff is still obligated to you for them. If the attorney refuses to pay you, you should make demand directly upon the plaintiff for payment and upon his refusal to pay, you may bring court action to recover those costs. Plaintiff's attorney was acting as the plaintiff's agent and when he fails to carry out his duty to his client he is liable to the client for his actions. Certainly the attorney has no right to apply the monies of one client to satisfy the claim of another client who has no connection or privity with the first client. The attorney could not have levied upon funds in your hands which are owed to the storage company and should not be permitted to avoid paying you at this time. *Horsey Company v. Martin*, 142 Md. 52.

C. FERDINAND SYBERT, *Attorney General.*

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

SHERIFFS—PRISONERS—PRISONERS IN COUNTY JAILS NOT ENTITLED TO TIME OFF FOR GOOD BEHAVIOR.

July 25, 1958.

Mr. Nathan Kaplan,
Sheriff of Cecil County.

In your recent letter you tell us that in the past you have allowed all prisoners in the Cecil County jail five days time off for good behavior for each thirty days of sentence, except those prisoners convicted for violations of the motor vehicle laws under Article 66½, Annotated Code of Maryland (1957 Ed.). You ask if such violators of the motor vehicle laws are entitled to the same reduction in sentence.

Prisoners in the penal institutions of the State, which are under the supervision and control of the Board of Correction, are entitled to five days each month for good behavior, under the provisions of Section 688, Article 27, Annotated Code of Maryland (1957 Ed.). We have previously ruled that the provisions of Section 688 are limited to State institutions under the control of the Board of Correction and that, in the absence of some local law for a particular county (and we have been unable to find any such local law for Cecil County), prisoners committed to county jails are not entitled to any such reduction in sentence. See 16 Opinions of the Attorney General 104.

Section 725, Article 27 of the Code, provides that all prisoners working upon the roads or streets under Sections 719-726, Article 27, shall be entitled to the same deductions or allowances for good behavior, observance of discipline and rules, and for diligent and faithful labor, *as such prisoners are now entitled to or are subject to under the laws of this State.* Even though Section 719, Article 27 provides that all prisoners confined in all town or city jails shall be liable to labor upon State, county and city roads and streets, in accordance with the provisions of Sections 719-726, we are of the opinion that Section 725 only grants a reduction to prisoners in State institutions, since they are the only prisoners entitled to such reduction under the laws of this State.

Article 87, Section 45 of the Code, provides that the Sheriff shall safely keep all persons committed to his custody by lawful authority until such persons are discharged by due course of law, and it is our opinion that you are not entitled to grant any prisoners any reduction in sentence, regardless of what crime they have committed.

Section 100, Article 52, Code, provides that the Sheriff or other custodian of prisoners shall have no power or authority to release prisoners committed by a trial magistrate prior to the expiration of their terms as specified in the commitment papers, except upon written order of the magistrate, or upon order of a court of competent jurisdiction. In the case of a commitment of a person in default of the payment of a fine, he should only be released when he has served the time provided by Section 4, Article 38 of the Code, or upon an order of release from a magistrate whose duty it is to see that the full amount of the fine is paid, less $1.00 per day for any days served in jail, before he issues such an order of release.

Under the provisions of Article 2, Section 20, of the Maryland Constitution, the Governor has the power to grant pardons to prisoners and under Section 3, Article 41 of the Code, the Board of Parole and Probation has the exclusive power to parole persons sentenced under the laws of the State to any penal institution.

You are therefore advised that every prisoner committed to your custody by lawful authority should be held by you until he has served his full sentence, or in the case of a commitment in default of the payment of a fine, until he has served the full amount of time required by law. Prisoners may be released by you, however, before serving the full time upon receipt by you of an order of release from a magistrate, a court of competent jurisdiction, or from the Board of Parole and Probation, or upon receipt by you of a pardon duly executed by the Governor.

C. FERDINAND SYBERT, *Attorney General.*

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

SHERIFF—FINES—PARTIAL PAYMENTS ALLOWED BY ORDER OF COURT.

December 23, 1958.

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

We have received your letter of December 17th regarding the partial payment of fines and costs which have been collected by the Probation Department. The Probation Department has the duty of collecting the various fines and costs when assessed by the court. Many of these fines have been partially paid and the person fined has absconded. The Probation Department is unable to collect the remaining amount at the present time; however, it does not wish to write the cases off but desires to keep them open in case the persons return or are apprehended.

The practice has been that the Probation Department retains these partial payments. The amount has grown to such a proportion that it is believed necessary to send the money to the proper agencies.

Section 38 of Article 87 of the Code requires the Sheriff to collect "all fines, costs, fees and charges arising out of both criminal and civil cases to which he may be entitled by law * * *". You request our opinion as to whether you may receive these partial payments under the law and not be in violation of Section 38, which requires you to collect "all fines". We understand the procedure for the partial payment to you will be by order of court which will designate the proper application of the money. It is our opinion that this procedure would not be in contravention of Section 38, which requires you to collect "all fines", since the case will still be open and you still have the duty to collect the fines, but will be mostly a bookkeeping problem. It is also noted that partial payment will be received by you by order of court.

C. FERDINAND SYBERT, *Attorney General.*

JAMES H. NORRIS, JR., *Special Asst. Attorney General.*

SOCIAL SECURITY

SOCIAL SECURITY—FIREMEN—WHO OCCUPY "FIREMEN'S POSITIONS" ARE EXCLUDED FROM A REFERENDUM OF MUNICIPAL EMPLOYEES AND FROM COVERAGE UNDER THE FEDERAL OLD AGE AND SURVIVORS' INSURANCE ACT.

May 1, 1958.

Mr. Paul H. Fales, Chief,
Division of Social Security,
Employees' Retirement System.

Prior to 1954, State and local government employees in positions covered by retirement systems were excluded from eligibility for the insurance afforded by the Federal Old Age and Survivors' Insurance Act. In 1954 the Congress amended the law to include State and local government employees in positions covered by a retirement system if a majority of such employees voted in favor of inclusion. 42 U.S.C.A. 418(d). However, the exclusion is still applicable to such employees "in any policeman's or fireman's position", and they may not vote in the referendum or obtain the insurance coverage. 42 U.S.C.A. 418(d)(3) and 418(d)(5)(A). Since 1957, State and local government employees in "policeman's and fireman's positions" in Maryland may be included in Social Security if certain conditions, including sometimes a separate referendum among such persons, are met. 42 U.S.C.A. 418(p).

A referendum is being conducted among the members of the Employees' Retirement System of the City of Baltimore on the question of whether the members, except those "in any policeman's or fireman's position", should be included in coverage under the Federal Old Age and Survivors' Insurance Act. You have informed us that the United States Department of Health, Education and Welfare has requested an opinion of this office defining "fireman's position" to determine eligibility to vote in the referendum and to be covered by this insurance.

This phrase is not defined in the statutory law of the State of Maryland, the City of Baltimore or the Federal

Government, and the question has not been considered by the Court of Appeals of Maryland. In 40 Opinions of the Attorney General 420 (1955), we considered a definition of "policeman's position" in the same context and concluded that the term was not intended to embrace all employees of a police department, but "should include only State and local governmental employees regularly engaged in enforcing and preserving the public peace, with such law enforcement activities and powers as a primary function of his position and duties and not as a mere incident or supplement thereto". We concluded that in a referendum among the members of the State Employees' Retirement System the "civilian employees" of the Department of Maryland State Police should be included and that the "police employees" of that department with "duties to prevent and detect crime, to apprehend criminals, to enforce criminal laws" should be excluded because they were in a "policeman's position".

Within the Baltimore City Fire Department there are twelve divisions. Two of these are denominated Fire Fighting Force—Marine and Fire Fighting Force—Land. The titles of the remaining divisions are: Administrative, General Office, Department Infirmary, Fire School, Fire Prevention Bureau, Fire Incendiary Bureau, Municipal Ambulance Service, Repair Shop, High Pressure Pumping Station and Fire Alarm Telegraph. The 1,523 employees assigned to the Fire Fighting Force—Land are qualified and classified as fire fighters or fire officers, except 110 of them who are classified as pump operators. Of the 120 employees of the Fire Fighting Force—Marine, 65 are fire fighters or fire officers. There are approximately 109 fire fighters and fire officers assigned to various duties throughout the other ten divisions.

The exclusion of persons in a policeman's or fireman's position was enacted at the request of representatives of policemen and firemen because these employees generally enjoyed more liberal benefits in State and local government retirement systems which might be incompatible with or even adversely affected by inclusion in the coverage provided by the Federal Old Age and Survivors' Insurance Act.

The exclusion was explained to the Congress in the report of the Senate Committee in the following language:

> "The bill continues the present exclusion of policemen and firemen who are covered by a State or a local retirement system. Policemen and firemen, because of the special demands made by their work, usually have special provisions in their retirement systems (retirement at age 50 or 55, for example), and most of them believe that it would be unwise to attempt to coordinate these provisions with the provisions of the Old Age and Survivors' Insurance System." Senate Report No. 1987, 83rd Congress, 2d Session, U. S. Code, Congressional and Administrative Service, 1954, Vol. 3, page 3715.

The legislative history of the exclusion supports the inference that all persons employed in a police department or fire department are not embraced by the phrase "in any policeman's or fireman's position". 40 Opinions of the Attorney General 420, 422-423 (1955). In our opinion, the exclusion is applicable only to the employees of a fire department who are engaged primarily in the duty of extinguishing fires and protecting lives. These are firemen in common parlance.

The employees of the Baltimore City Fire Department assigned to the Land and Marine Fire Fighting Forces and the fire officers assigned to these and other divisions are obviously engaged in fighting fires and protecting lives. They are the personnel who combat the conflagration at its scene. In our opinion, all of the fire officers and the men assigned to the two fire fighting forces serve in a "fireman's position" and have been properly excluded from the referendum.

In the remaining ten divisions of the Baltimore City Fire Department there are men classified as "fire fighters" by the Fire Department and the personnel administrators of the City government. Every man so classified is qualified by training and examination to serve as a member of the fire

fighting forces, although he may now be engaged in clerical or administrative duties. Other men similarly engaged but not similarly classified are not qualified by training, experience or examination to serve in the fire fighting forces. In our opinion, the personnel of the Fire Department, who are trained, qualified and classified as fire fighters but not presently assigned to the fire fighting forces and are now assigned to other divisions of the Fire Department, have been properly excluded from the referendum.

We conclude that the complement of the Fire Department of Baltimore City who are classified as fire fighters or fire officers, or who are assigned to the divisions of Fire Fighting Force—Marine and Fire Fighting Force—Land are serving in a "fireman's position" and excluded from voting in the referendum.

Our conclusion is affirmed by the practice of the Employees' Retirement System of Baltimore City in grouping these personnel at the time of their enrollment in the Retirement System in a group which is assessed a lower rate of contribution to the Retirement System. Article 23, Section 3, Baltimore City Code (1950 Ed.). This grouping is based upon mortality experience and actuarial valuations which affirm a lower life expectancy for the particular men of the Fire Department so classified and employed.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

SOCIAL SECURITY—STATE EMPLOYEES—THOSE WHO MAY BE EXCLUDED BECAUSE SERVICES ARE OF AN EMERGENCY NATURE OR BECAUSE COMPENSATION IS ON A FEE BASIS —PART-TIME EMPLOYEES OF STATE MUST BE AFFORDED SOCIAL SECURITY COVERAGE—MEMBERS OF APPLE COMMISSION AND SECRETARY OF THAT COMMISSION, MEMBERS OF STATE BOARD OF CHIROPRACTIC EXAMINERS AND SECRETARY OF THAT BOARD, MEMBERS OF BOARD OF EXAMINERS OF NURSES AND OF THE BOARD OF MEDICAL EXAMINERS ALL MUST BE INCLUDED WITHIN COVERAGE OF SOCIAL SECURITY.

November 18, 1958.

Hon. J. Millard Tawes,
Comptroller of the Treasury.

You have directed our attention to the fact that deductions for Federal Old Age and Survivors' Insurance are not taken from compensation for some part-time positions in agencies and departments of the State government, when such compensation is not paid through the Central Payroll Bureau. If the persons thus paid are entitled to the coverage afforded by the Federal Old Age and Survivors' Insurance, their compensation should be processed by the Central Payroll Bureau so that the proper deductions will be made and transmitted to the Federal Government.

You have asked us to advise you whether these persons are entitled to Social Security coverage and whether deductions for Social Security should be made from their compensation.

The coverage afforded by the Federal Old Age and Survivors' Insurance may be extended to services performed by individuals as employees of a state or a political subdivision by an agreement between the state and the Secretary of Health, Education and Welfare of the Federal Government. 42 U.S.C.A. Sec. 418(a)(1). The "employment" to be covered may be defined in the agreement. 42 U.S.C.A. Sec. 418(a)(2). The "employees", whose services may be

covered, include officers of the state or political subdivisions. 42 U.S.C.A. Sec. 418(b)(3).

The agreement which the State of Maryland has executed with the Secretary of Health, Education and Welfare provides that the services covered are "all services performed by individuals who are employees of the State . . .", and that the term "employee" means an employee as defined in 42 U.S.C.A. Sec. 410(k). Article 73B, Section 36(b), Annotated Code of Maryland (1957 Edition). The portion of the definition of "employee" in the Federal statute which is applicable here states that an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; . . .". 42 U.S.C.A. Sec. 410(k)(2).

The regulations adopted to implement the Federal Act set forth criteria for determining the existence of the common law relationship of employer-employee, which are, (1) the right to control and direct the performance of the services not only as to result but also as to details and means, (2) the right to discharge, (3) the furnishing of tools and a place to work, and (4) physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers and auctioneers "engaged in the pursuit of an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees". 20 C.F.R. Sec. 404.1004(c)(2). These are the same criteria which have been applied by the Court of Appeals of Maryland in other situations to determine the existence of the common law relationship of employer and employee. *Globe Indemnity Co. v. Victill Corp.*, 208 Md. 573, 581 (1956); *Keitz v. National Paving Co.*, 214 Md. 479 (1957).

The State may request that the agreement with the Secretary of Health, Education and Welfare exclude from coverage services which are, (1) of an emergency nature, or (2) in an elected position, or (3) in a part-time position, or (4) in a position for which the compensation is on a fee basis, or (5) in a position to which a retirement system is applicable. 42 U.S.C.A. Sec. 418(c)(3). The State of Mary-

land has not elected all of these exclusions. Article 73B, Section 36(b) of the Code. The exclusions in the agreement which the State of Maryland has executed which are applicable to this discussion are, (1) service of an emergency nature and (2) service in any class or classes of positions the compensation for which is on a fee basis.

Persons who are employees of the State of Maryland, as that relationship is defined by the common law, must be included in the coverage afforded by the Federal Old Age and Survivors' Insurance which the agreement between the State and the Secretary of Health, Education and Welfare makes applicable to employees of the State, unless the services they perform are excluded from coverage by the law or the agreement. Services of an emergency nature and service in a position for which the compensation is on a fee basis are two of the kinds of services excluded from coverage. The General Assembly has not authorized the exclusion of service by an employee of the State on a part-time basis, and such part-time services are not excluded by the agreement. Article 73B, Section 36(b) of the Code.

The Federal Social Security Act and the enabling State legislation are remedial laws. The statutes and the agreement should be construed liberally to effect the remedies and to afford the protection which the Congress and the General Assembly intended. *Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins,* 189 F. 2d 865 (2nd Cir., 1951). Services of an emergency nature, which are excluded, are services required by an unforeseen occurrence or combination of circumstances which calls for an immediate remedy or action. See *Geisendaffer v. Mayor and City Council of Baltimore,* 176 Md. 150 (1939); *Mayor and City Council of Baltimore v. Hofrichter,* 178 Md. 91 (1940). It should not be difficult to determine what services may be excluded because the compensation is on a fee basis. A position may not be excluded merely because compensation ordinarily regarded as salary is called a fee. The facts will be decisive without regard to the name ascribed to the compensation.

These general standards should be applied in the situations which prompted your inquiry. The following conclu-

sions upon the particular situations which have been presented may serve as a further guide.

The Maryland State Apple Commission consists of seven members appointed by the Governor, who are reimbursed for actual expenses and paid ten dollars ($10.00) for each day they attend meetings of the Commission. Article 97, Section 72 of the Code. The Commission employs a secretary whose annual salary is fixed by the Commission at four hundred dollars ($400.00). Article 97, Section 73(d) of the Code. In our opinion, the members of this Commission and its secretary are included within the coverage of the Federal Old Age and Survivors' Insurance. Their compensation should be paid through the Central Payroll Bureau and the proper deductions should be made.

We have reached the same conclusion with regard to the members of the State Board of Chiropractic Examiners and the secretary of that Board, and as to the members of the State Board of Examiners of Nurses. The members of the Board of Chiropractic Examiners receive compensation at the rate of twenty-five dollars ($25.00) for each day they are engaged in the performance of their duties. Article 43, Section 509(c) of the Code. The secretary employed by the Board is compensated at the annual rate of nine hundred dollars ($900.00). The members of the Board of Examiners of Nurses receive ten dollars ($10.00) for each day actually engaged in the performance of their duties. Article 43, Section 291 of the Code. These salaries should also be paid through the Central Payroll Bureau and the deductions for Social Security should be made.

The Board of Medical Examiners licenses physicians to practice medicine and surgery in Maryland. When the Board conducts the examinations for such licenses, extra workers are engaged to process the applications and the examinations. In our opinion, the services of these extra workers are included within the coverage of Social Security. They should be paid through the Central Payroll Bureau so that the

necessary employees' contributions may be deducted. The necessity for these extra services is anticipated. They are not of an emergency nature.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

STATE ROADS COMMISSION

STATE ROADS COMMISSION—STATE ROADS COMMISSION HAS AUTHORITY TO ERECT COMMERCIAL FACILITIES ON LIMITED AND NON-ACCESS HIGHWAYS AND TO LEASE THEM TO PRIVATE ENTERPRISE.

April 7, 1958.

Hon. Louis L. Goldstein,
Chairman—Legislative Council.

In your recent letter you have asked whether or not the Maryland State Roads Commission has authority to erect commercial facilities on limited and non-access highways and lease them to third parties.

Section 8, Article 89B, Annotated Code of Maryland (1957 Ed.) provides that the State Roads Commission may acquire real property or any interest therein for highway construction purposes and any real property along such highways to provide parking and service areas; provided that any property acquired for service areas shall only be adjacent to controlled or denied access highways.

Section 7, Article 89B provides that the State Roads Commission may contract with any person or persons, company or corporation, either private or quasi-public, or municipal, in furtherance of its duties and the objects of Article 89B, and that it may employ all agents necessary for the promotion of any of the work with which it is charged and make and enter into all contracts, agreements or stipulations germaine to the scope of its duties and powers under Article 89B.

In *Anderson v. Taconic State Pkwy. Comm.*, New York 39 N.E. 2d 289, the plaintiff brought an action to restrain the Parkway Commissioners from constructing a gasoline station on a State Parkway with State funds and leasing it to private enterprise. The court found an implied authority in the Commissioners to build and lease such a gasoline station to private individuals even though there was no express statutory authority to do so. The court held that a gasoline

station was an essential incident of a modern public highway and that no express statutory authority was necessary to give the Commission the authority. The court said that the authority came fairly within the power of the control and management of the parkway by the Commissioners.

In this case, I do not find it necessary to find an implied power in the Maryland State Roads Commission as did the New York court, for the Maryland law, unlike that of New York, specifically grants to the Commission the authority to acquire lands for service areas and the authority to contract with private enterprise to carry out the purposes of the Act. Clearly there is express statutory authority for the Maryland State Roads Commission to construct commercial facilities along limited and non-access highways and to lease them to private enterprise.

My opinion is further strengthened by the fact that bills were introduced at sessions of the General Assembly in both the years 1957 and 1958 which by their express terms would have prohibited the Commission from constructing service areas on any highways in the State. Even though both bills failed to pass, it is obvious that the Legislature considered the State Roads Commission to presently have such authority.

Even in the absence of the express authority in the Commission, implied authority may be found for such action. An implied power is one that is necessary to the exercise of a power expressly conferred. The right to build highways and service areas has been expressly granted to the Commission and since it is necessary to the proper conduct of such service areas to lease them to private enterprise, it must be implied that the Commission has authority to do so, for what is necessary to carry out express powers granted must be implied.

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

TAXATION

TAXATION—INHERITANCE TAX—INHERITANCE TAX SHOULD BE PAID ON PROCEEDS OF SALE OF REAL PROPERTY SOLD IN PARTITION PROCEEDING WHERE FACTS INDICATED PARTITION PROCEEDING CONNECTED WITH ADMINISTRATION OF ESTATE OF DECEDENT.

January 16, 1958.

Miss Kathryn J. Corddry,
Register of Wills for Worcester County.

You have asked whether direct inheritance tax should be paid on the appraised value of real estate as shown in the inventory filed by executors of an estate, or whether the tax should be paid on the much higher amount realized approximately three weeks after the filing of the inventory in a partition proceeding brought by one of the heirs.

According to the facts which you have given us, the testatrix died March 21, 1957, and devised the fee simple property in question in equal shares to her six children and her one grandchild. Two of her sons were named executors under her will and duly qualified April 8, 1957. One week later another son filed a partition suit for the sale of all of the testatrix's real property. The executors, in the meantime, had the real property appraised and filed their inventory on June 21, 1957. The real property was sold under a decree in the partition suit on July 16, 1957 for a much higher amount.

The attorney for the estate has advised us that the real property in question comprised almost the entire estate and that it could not have been divided in kind among the devisees. He has also advised us that the cash in the estate amounted only to about $1,000, and that part of the real property would have had to be sold in any event in order to pay the debts and funeral expenses of the decedent. He has further advised us that it was the intention of the devisees to have the inheritance taxes due on the real property paid by the executors before distribution of the net proceeds to them.

Article 81, Section 155, Annotated Code of Maryland (1951 Ed.) provides in pertinent part that if "real estate is sold to pay debts of the decedent or to pay pecuniary legacies *or for any other reason connected with the administration of the estate of the decedent*", then the inheritance tax shall be paid on "so much of the net proceeds thereof included in the distributive shares of any heir, devisee, legatee or distributive (sic.) of the decedent." (Emphasis supplied.)

This office has ruled that a sale in a separate partition proceeding is not within this provision since the heirs were merely exercising their rights as co-owners to have a partition. 27 Opinions of the Attorney General 375. We have ruled also that where title to real estate had vested in devisees and the administration of an estate had been closed for nearly two years prior to the time of a partition sale, no additional inheritance tax would be due by reason of the sale of the property at a price in excess of its appraised value. 32 Opinions of the Attorney General 397. We reached the same conclusion where a final administration account had been filed and the taxes paid August 21, 1951, releases filed November 17, 1951, and then the property subsequently sold by the devisee in January, 1952, for a much higher amount. 37 Opinions of the Attorney General 415.

However, we have ruled that a partition proceeding comes within the meaning of "for any other reason connected with the administration of the estate of the decedent", where it was brought in order to accomplish distribution under an agreement in connection with a contested will. 30 Opinions of the Attorney General 149. We reached the same conclusion where cash in an estate was not sufficient to satisfy the debts and funeral expenses of a decedent and where partition proceedings were the medium through which administration of the decedent's estate was to be completed. 30 Opinions of the Attorney General 175. The facts which have been presented to us appear to be closest to those upon which the two rulings last cited above were based. See also 40 Opinions of the Attorney General 498. We therefore

believe that the partition proceeding was connected with the administration of the estate of the decedent, and that the inheritance taxes should be paid on the proceeds of the sale received by the devisees.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—NO ADMINISTRATION NECESSARY OR INHERITANCE TAXES DUE ON INTEREST OF CALIFORNIA DECEDENT AS MORTGAGEE OF REAL PROPERTY LOCATED IN MARYLAND—RECIPROCITY WITH CALIFORNIA AS TO INTANGIBLE PERSONAL PROPERTY.

January 27, 1958.

Mr. Thomas L. Adams,
Register of Wills for Harford County.

You have asked whether the estate of a decedent holding a mortgage on real property located in Maryland should be administered in Maryland and inheritance taxes paid to the State of Maryland, or whether the administrator appointed in California, where the decedent died, should administer and pay taxes to the State of California.

Article 81, Section 172, Annotated Code of Maryland (1951 Ed.) provides for reciprocal exemption from inheritance taxation of intangible personal property of non-resident decedents where the laws of decedent's domicile permit it. Article 66, Section 20, (1951 Code), provides that the interest and estate of a deceased mortgagee devolves on and vests in his executor or administrator. Cf. *Washington Fire Insurance Co. v. Kelly,* 32 Md. 421 at 440. Thus, it is clear that the interest of a mortgagee in Maryland is a chose in action, i.e., intangible personal property. See 27 Opinions of the Attorney General 310. It is not real property or tangible personal property located in this State.

Assuming from the facts which you have presented to us that the domicile of the decedent is California, and noting that the estate and inheritance tax laws of California provide for reciprocal exemption from taxation of intangible personal property of non-resident decedents, we herewith advise you that no administration is necessary in Maryland and that no inheritance taxes are due the State of Maryland. See 40 Opinions of the Attorney General 617, 35 Opinions of the Attorney General 340.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

TAXATION—ROAD TAX ON MOTOR CARRIERS—TRIAL MAGISTRATES—VIOLATIONS OF THE ROAD TAX ON MOTOR CARRIERS ARE TO BE TRIED IN MAGISTRATE'S COURT.

RECIPROCAL AGREEMENTS UNDER THE ROAD TAX LAW—FINES, PENALTIES AND THE DISPOSITION THEREOF.

February 26, 1958.

Judge Fanny B. Murphy,
Judge of the People's Court
for Wicomico County.

In your recent letter you ask whether or not violations of Chapter 842, Laws of 1957, now codified as Sections 412 through 430, Article 81, Annotated Code of Maryland (1957 Ed.), title "Revenue and Taxes," sub-title "Road Tax on Motor Carriers", are to be tried in the Magistrate's Traffic Court for Wicomico County.

Article 81, Section 425 (Annotated Code, 1957) reads as that it shall be illegal to operate or cause to be operated in this State any passenger vehicle that has seats for more than 9 passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles, except vehicles bearing valid registration plates issued by the State of Maryland, unless the vehicle bears a metal tag as provided by the Comptroller affixed to the vehicle in an easily visible spot.

Regulation No. 4, Regulations of the Comptroller Governing Operations of Motor Carriers, Gasoline Tax Division, reads as follows:

> "All motor carriers required to display the metal identification tag as provided by Chapter 842 of the Laws of Maryland (1957) shall display the tag in a prominent place on the front of each vehicle."

Regulation No. 5 reads as follows:

> "All motor carriers required to display the metal identification tag shall be issued a registration

card for each vehicle, which card shall be carried in the vehicle at all times."

Article 81, Section 425 (Annotated Code, 1957) reads as follows:

> "The Comptroller may impose a penalty, which shall be in addition to any other penalty imposed by this subtitle for the refusal or failure to file a report within the time prescribed pursuant to this subtitle, such penalty to be imposed under the provisions of Sec. 137(b) of Article 56 of this Code as amended from time to time. Failure to comply with any rule or regulation issued by the Comptroller pursuant to the provisions of this subtitle shall be deemed to be a violation thereof, each such failure or violation constituting a separate offense and being punishable by a fine of or not exceeding $500.00 for each such offense. The penalty shall be collectible by the process of the Comptroller as provided by law. In addition to imposing such penalty, or without imposing any penalty, the Comptroller may suspend or revoke any certificate, permit or other evidence of right issued by the Comptroller which the motor carrier so found in default holds."

Section 425 provides for both a civil and a criminal penalty for violations of the sub-title. It grants to the Comptroller the authority to impose and collect a civil penalty for failure to file a report within the time prescribed. It provides for a criminal penalty to be imposed by a proper court for failure to comply with any rule or regulation issued by the Comptroller pursuant to the provisions of the subtitle. Such criminal offense is in the nature of a misdemeanor and is punishable by a fine not exceeding the sum of $500.00. Failure to have a metal tag on a vehicle would constitute a violation of Regulations Nos. 4 and 5 of the Comptroller's Rules and Regulations, and would therefore be a criminal violation under Section 425, subject to the penalty imposed of a fine not exceeding $500.00.

Article 52, Section 108(22) of the Code provides that there shall be one Trial Magistrate for Wicomico County who shall be known as the Judge of the People's Court. Article 52, Section 13(a) vests jurisdiction in the Trial Magistrates throughout the State to hear, try and determine all cases involving the charge of any offense, crime or misdemeanor not punishable by confinement in the Penitentiary, and which does not involve a felonious intent. Since the crime committed under Section 425 is a misdemeanor, it may be tried by the Trial Magistrate of Wicomico County who is known as the Judge of the People's Court. Failure to display the required metal tag on a vehicle would not be a violation of the motor vehicle laws of the State, but would be a violation of the revenue and tax laws, and therefore should be tried by the Trial Magistrate known as the Judge of the People's Court under the statute granting him criminal jurisdiction and not as a traffic case.

You also ask what disposition is to be made of any fines collected under the provisions of Section 425, Article 81 of the Code.

Section 418, Article 81 reads as follows:

> "All taxes, fees, penalties and interest paid under the provisions of this subtitle shall be credited to the Gasoline Tax Fund."

The word "penalty" is used in law as including fines which are pecuniary penalties. While the word "penalty" has a broader meaning than the word "fine", a "fine" in the judicial sense is always a penalty. *The Strathairly*, 8 S. Ct. 609, 124 U. S. 558; *United States v. Nash*, 111 Fed. 525. We are of the opinion that the word "penalty" as used in Section 418 was intended to include fines collected for criminal violations committed under the sub-title and that such fines are to be paid over to the Comptroller to be credited to the Gasoline Tax Fund.

You also ask whether an operator whose own vehicles are licensed in the State of Delaware, who borrows a vehicle which is licensed in the State of Virginia, can operate that

vehicle from Virginia in this State without displaying the required metal tag. The State of Maryland and the State of Delaware have entered into a reciprocal agreement under the provisions of Section 430, Article 81, wherein vehicles licensed in the State of Delaware have been exempted from the provisions of the sub-title imposing the road tax on motor carriers. The statute and the rules and regulations of the Comptroller both require the metal tag to be on all vehicles which are not specifically exempted by the statute, by reciprocal agreement, or by the Comptroller. The only vehicles exempted by the reciprocal agreement with the State of Delaware are those which are actually licensed in the State of Delaware. The reciprocal agreement with the State of Delaware is not broad enough to exempt vehicles licensed in the State of Virginia. The State of Maryland, at the present time, has no reciprocal agreement with the State of Virginia whereby vehicles of that State are exempt from the requirements of the statute. It is therefore our opinion that it was a violation of the statute for the owner of vehicles licensed in Delaware to operate a vehicle licensed in Virginia in this State without displaying the required metal tag thereon. If we were to hold otherwise, it would be impossible to adequately police and enforce the provisions of the statute.

The Delaware owner could have applied for permission from the Comptroller to operate the borrowed Virginia vehicle without a tag under that part of Section 424 which provides that for a period not exceeding ten days as to any one motor carrier the Comptroller by letter or telegram may authorize the operation of a vehicle or vehicles without the required metal tag when enforcement of this Section for that period would cause undue delay and hardship in the operation of the said vehicle or vehicles. The operator having failed to take the necessary steps to protect himself under the provisions of Section 424 is, in our opinion, in violation of the law.

You also ask if, when a person having no knowledge of the law violates it, it would be proper for you (1) to give

him a warning on the first offense, or (2) impose a minimum fine, or (3) suspend sentence altogether.

Ignorance of the law is no excuse and does not give immunity from punishment for a crime committed. *Hopkins v. State*, 193 Md. 489; *Lambert v. State*, 193 Md. 551. You are at liberty to impose any fine below $500.00 that you see fit since the statute sets no minimum fine. Section 100 of Article 52 provides that Trial Magistrates may suspend sentence or costs, or both sentence and costs, in any case within their jurisdiction, provided that such suspension is made at the time of trial of the case and not after judgment has been pronounced. It is therefore our opinion that you may impose such sentence as you desire as long as you do not exceed the maximum penalty of $500.00, or that you may suspend sentence altogether in cases involving violations of the Road Tax statute.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—RECORDATION TAX—COMPUTATION OF TAX ON DEED OF CONVEYANCE UPON EXERCISE OF AN OPTION TO PURCHASE CONTAINED IN A LEASE UPON WHICH THE TAX PREVIOUSLY PAID.

March 3, 1958.

Mr. W. Andrew Seth,
Clerk of the Circuit Court
for Cecil County.

In your recent letter you request our opinion as to the proper calculation of the recordation taxes to be paid to record a deed in the following situation. The parties entered into a lease agreement whereby lessors agreed to lease certain real estate to the lessees for a term of five years at a monthly rental of $135.00. The agreement of lease also contained an option contract to purchase whereby the lessors in consideration of the payment of the sum of $1,500.00 by the lessees at the time of execution thereof, and in consideration of the payment of a further sum of $500.00 by the lessees within six months from the date of execution, granted to the lessees the option to purchase the leased premises at any time while the lease was in effect for the total purchase price of $14,000. If the lessees exercised the option to purchase under the agreement, the $2,000 paid for the option contract, and $100.00 from each of the monthly rental payments of $135.00, paid under the terms of the lease agreement, were to be credited as a part of the purchase price.

The lease agreement containing the option contract to purchase was duly recorded among the Land Records of Cecil County and the recordation tax was paid upon the value of the lease as determined by capitalizing at 10% the average annual rental, as provided in Section 277(g), Article 81, Annotated Code of Maryland (1957 Ed.). A recordation tax was paid at the time of recording based on the capitalized figure of $16,200. The lessee has since exercised the option to purchase and wants to know what recordation tax he must now pay to record the deed conveying the premises to him.

Section 277, Article 81, of the Annotated Code (1957) imposes a tax upon every instrument of writing conveying title to real property offered for record in this State with the Clerk of the Circuit Court for the Counties or the Clerk of the Superior Court of Baltimore City at the rate of 55c for each $500 or fractional part thereof of the actual consideration paid or to be paid. This office, in previous rulings construing the recordation tax statute, has held that the Legislature did not intend to impose a double tax upon the consideration for a single transaction, regardless of whether or not more than one instrument was recorded to complete that transaction. 22 Opinions of the Attorney General 727, 733 and 768; 23 Opinions of the Attorney General 573.

There were really two transactions involved in the agreement which you have presented to us: (1) the leasing transaction, and (2) the sales transaction. Each transaction involved a separate and distinct consideration for the most part. The recordation tax was paid as required by law upon the full consideration involved in the leasing transaction at the time of recording. No recordation tax has yet been paid, however, upon most of the consideration for the second transaction which involved the purchase of the land, even though there is no question that that transaction is subject to the recordation tax under the provisions of Section 277, Article 81. The only part of the consideration for the second transaction upon which a recordation tax has been previously paid is the $100 monthly of the rental payments for which the lessee has been allowed a credit against the purchase price of the property. The tax on that amount was paid at the time of the recording of the lease. Since the tax on that amount has been previously paid, and since it was never intended by the law to impose a double tax upon the same consideration, the amount of rental payments credited against the purchase price should be deducted from the total purchase price of $14,000 before calculating the tax upon the consideration for the deed. 26 Opinions of the Attorney General 399; 22 Opinions of the Attorney General 768.

No recordation tax has ever been paid on the balance of the $14,000 purchase price, including the $2,000 which was

paid for the option contract of purchase and for which the purchaser was given a credit against the purchase price, because an option contract for the purchase of land is not subject to the recordation tax. 26 Opinions of the Attorney General 425. You should therefore require the recordation tax to be paid on the balance of the $14,000 less the monthly rental payments credited against the purchase price, before accepting the deed for recording.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—ROAD TAX ON MOTOR CARRIERS—FINES AND COSTS IMPOSED FOR FAILURE TO DISPLAY METAL IDENTIFICATION TAG REQUIRED BY STATUTE ARE PAYABLE TO COMPTROLLER.

March 4, 1958.

Judge G. W. Eklof, Jr.,
Trial Magistrate for Howard County.

In your recent letter you ask what disposition is to be made of fines and costs collected for failure to display the metal identification tags, provided by the Comptroller, pursuant to the provisions of Article 81, Section 424, Annotated Code of Maryland (1957 Ed.). You tell us that you have been told that such fines are to be paid to the Commissioner of Motor Vehicles.

Section 424, Article 81, Code 1957, provides that it shall be illegal to operate or cause to be operated in this State any passenger vehicle that has seats for more than nine passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles, except vehicles bearing valid registration plates issued by the State of Maryland, unless the vehicle bears a metal tag as provided by the Comptroller, affixed to the vehicle in an easily visible spot.

Regulation No. 4, Regulations of the Comptroller Governing Operations of Motor Carriers, Gasoline Tax Division, enacted to carry out the provisions of Article 81, Section 424, provides for the display of a metal identification tag in a prominent place on the front of each vehicle covered by the Act. Regulation No. 5 provides for the carrying of a registration card issued by the Comptroller in each vehicle covered by the Act at all times.

Section 425, Article 81, of the Annotated Code (1957), provides for both a civil and criminal penalty for violations of the sub-title "Road Tax on Motor Carriers". The Comptroller is granted authority to impose a civil penalty for failure to file a report within the time prescribed. It also

provides a criminal penalty for failure to comply with any rule or regulation issued by the Comptroller pursuant to the provisions of the sub-title. Such a criminal offense is in the nature of a misdemeanor and is made punishable by a fine not exceeding the sum of $500.00.

Section 122, Article 52, Annotated Code (1957), provides for all fines, penalties, forfeitures, costs, etc., collected in the Trial Magistrate's Court, except those collected in motor vehicle cases, to be paid over to the County Commissioners for the County in which the Trial Magistrate is sitting. In construing Section 122, we have ruled that all fines, forfeitures, penalties and costs imposed by Trial Magistrates are to be remitted to the County Commissioners with the exception of such fines and costs as are directed to be otherwise disposed of in accordance with specific statutes. 24 Opinions of the Attorney General 442.

Section 418, Article 81, reads as follows:

> "All taxes, fees, penalties and interest paid under the provisions of this sub-title shall be credited to the Gasoline Tax Fund."

The word "penalty" is used in law as including fines which are pecuniary penalties. While the word "penalty" has a broader meaning than the word "fine", a fine, in the judicial sense is always a penalty. *The Strathairly,* 8 S. Ct. 609 124 U. S. 558; *United States v. Nash,* 111 Fed. 525. We are of the opinion that the word "penalty" as used in Section 418, Article 81, was intended to include fines collected by the courts for criminal violations committed under the sub-title as well as all civil penalties collected by the Comptroller. The failure to comply with the Comptroller's Regulations issued pursuant to the provisions of the sub-title is not a violation of the motor vehicle laws of the State, but is a violation of the Revenue and Tax Laws. Only those fines and costs which are collected under the provisions of Article 66½ are required by Section 341 of Article 66½ Annotated Code (1957) to be paid by the Trial Magistrates to the Commissioner of Motor Vehicles. Since Section 418 specifically

provides that all penalties collected for violations of the sub-title "Road Tax on Motor Carriers" in Article 81 are to be credited to the Gasoline Tax Fund, you should pay them to the Comptroller rather than the Commissioner of Motor Vehicles.

In addition to the fines imposed by the statute, you should impose as costs such fees as are provided for by Section 21, Article 36 Annotated Code (1957) just as in any other criminal action which comes before you. The word "fee" is used in Section 21, Article 36, to designate costs in the Trial Magistrates' Courts, and we believe the Legislature intended Section 418, Article 81, to require such costs (fees) collected under the sub-title to also be paid to the Comptroller to be credited to the Gasoline Tax Fund. It is our opinion that all fines (penalties) and costs (fees) collected by you for violations of Sections 412 through 430, Article 81, of the Annotated Code, title "Revenue and Taxes", sub-title "Road Taxes on Motor Carriers" are to be paid to the Comptroller to be credited to the Gasoline Tax Fund.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—CIGARETTE TAX—DISCOUNT RATE—CONFLICT BETWEEN STATE AND LOCAL TAXING PROVISIONS—PROVISION OF STATE-WIDE LAW CONTROL DISCOUNT RATE FOR PURCHASES OF STAMPS.

March 27, 1958.

Mr. Edward F. Engelbert,
Retail Sales Tax Division,
Comptroller of the Treasury.

Your recent letter asks whether purchasers of Cigarette tax stamps, pursuant to the provisions of Chapter 1, Acts of 1958, are entitled to the discount rate set forth in Section 417 thereof, or the discount rate provided for by public local law or ordinance, insofar as local cigarette taxation is concerned.

We had occasion to discuss the constitutional aspects, as well as the effective date of Chapter 1, Acts of 1958, at some length in two opinions appearing in 43 Opinions of the Attorney General, 130 and 136, and it is unnecessary to review the background of this measure here. Suffice it to say that it requires the Comptroller to collect local cigarette taxes heretofore imposed by certain political subdivisions, as well as the new revenues provided for by the Act. Section 417 provides that the tax shall be paid by purchasing stamps from the Comptroller, who is authorized to allow a discount of 5% of the purchase price thereof when purchased in quantities of not less than $100 face value.

You note that certain political subdivisions, by public local law or ordinance, authorize discounts in excess of that permitted by Section 417, ranging as high as 8% in some instances. The manifest conflict between Section 417 and the discount provisions of these local laws have occasioned your inquiry.

We are of the opinion that the discount rate set forth in Section 417 of Chapter 1, Acts of 1958 controls. This Section clearly imposes upon the Comptroller the duty of collecting cigarette taxes for both the State and the political

subdivisions, and places the obligation of purchasing such stamps from the Comptroller upon all persons required to affix same to cigarettes under the provisions of Sections 420 and 421. Section 417 emphatically states that "In the sale of such stamps, the Comptroller shall allow a discount of five (5) per centum of the purchase price thereof . . .", and we are of the view that this discount rate is applicable to all stamps so purchased.

Any doubt in this regard is resolved by the provisions of Section 6 of the Act, which declare that "all laws and parts of laws and all regulations, ordinances and resolutions adopted pursuant thereto, by the State or any political subdivision thereof, be and the same are hereby superseded to the extent of any inconsistency with the provisions of this Act".

We are accordingly of the opinion that the applicable discount rate to all stamp purchases in quantities of $100 face value or more is 5%.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—CIGARETTE TAX—STATE-WIDE TAX IS IN ADDITION TO AND NOT IN SUBSTITUTION OF LOCAL CIGARETTE TAXES, AND DOES NOT HAVE THE EFFECT OF IMPOSING A LOCAL USE TAX—EMPLOYMENT OF SALES AND USE TAX REVOLVING FUND TO DEFRAY INITIAL ADMINISTRATIVE EXPENSES PROPER, PROVIDED FUND IS REIMBURSED UPON RECEIPT OF REVENUES.

April 9, 1958.

Mr. Edward F. Engelbert,
Retail Sales Tax Division,
Comptroller of the Treasury.

Your recent letter raises certain questions in regard to the cigarette tax imposed by Chapter 1, Acts of 1958, to support teacher salary raises. We recently discussed the constitutional aspects, as well as the effective date of the measure in two opinions in 43 Opinions of the Attorney General 130 and 136.

As we previously noted, Chapter 1, Acts of 1958 requires the Comptroller to collect local cigarette taxes heretofore imposed by certain political subdivisions, together with the new revenues under the Act. The question raised by your letter may be illustrated as follows: A purchaser buys cigarettes in a political subdivision which imposes no local tax. He pays the State-wide tax thereon, and then uses the cigarettes in a political subdivision which imposes a local tax. You ask whether such use operates to impose the local tax.

A review of the applicable ordinances and resolutions of those subdivisions imposing local cigarette taxes persuades us that such use would not be taxable. Those measures uniformly tax cigarettes *possessed or held* in the several subdivisions *for sale,* and not for use. See Section 69 of Ordinance No. 900 of the Mayor and City Council of Baltimore City; Resolution of the County Council of Baltimore County passed December 1, 1957; Resolution of the County Commissioners of Carroll County passed October 25, 1955; Resolution of the County Commissioners of Frederick County passed July 30, 1957; Resolution of the County Commis-

sioners of Garrett County passed in May, 1955; Resolution of the County Commissioners of Harford County passed May 28, 1956; Ordinance No. 3-93 of the County Council of Montgomery County. If such use is taxable, authority therefor must be found in the provisions of Chapter 1, Acts of 1958.

The imposition section of the Act (Section 414) provides as follows:

> "(a) In addition to any and all other taxes which have been or may herafter be levied and imposed by the State of Maryland, there is hereby levied and imposed a tax to be paid and collected, as hereinafter provided, on all cigarettes used, possessed or held in the State of Maryland by any person for sale or use in the State of Maryland on or after July 1, 1957.
>
> "(b) The tax imposed by this sub-title shall be in addition to and not in substitution of any other tax or taxes heretofore or hereafter imposed by this State or any political subdivision thereof."

The first vendor or user having possession of cigarettes in Maryland for sale or use in this State is required to pay the tax, and affix stamps on the cigarettes evidencing such payment. Section 420. The vehicle of payment and collection of the tax is the purchase of stamps from the Comptroller. Section 417. Persons transporting unstamped cigarettes are required to have in their actual possession invoices or delivery tickets showing the true name and address of the consignor or seller, the consignee or purchaser, and the quantity and brands so transported. Section 438. Failure to comply with this latter provision subjects the cigarettes to confiscation, and renders the transporter liable to fine and imprisonment. Any consumer or user possessing unstamped cigarettes in Maryland is required, within seventy-two hours of such possession, to file a report with the Comptroller showing the amount thereof, accompanied by a remittance for the tax. You ask whether these provisions, and par-

ticularly those relating to unstamped cigarettes, combine to impose a local use tax in the illustration above set forth.

We are of the opinion that a proper construction of the Act does not authorize the imposition of such a tax. Under the imposition section, the State-wide tax is in addition to, and not in substitution of taxes imposed by the subdivisions. As we have noted, these political subdivisions have made possessing and holding cigarettes for sale the event which operates to impose the tax. By the terms of the Act, the Legislature has vested responsibility for collection of all cigarette taxes, both State and local, in a single agency; but it carefully refrained from substituting the State-wide measure for local cigarette taxation, insofar as levy and imposition is concerned.

While we are fully aware that this construction of the Act may lead to certain enforcement problems, we believe that this is a matter for legislative consideration at either the State or local level.

You also ask whether sales and use tax revenues currently carried in a revolving expense fund by the Retail Sales Tax Division of the Comptroller's office may be used to defray the expense of printing various license and application forms, as well as other preliminary expenses which you anticipate will be necessary in setting up the machinery to administer the tax prior to the receipt of revenues therefrom. You state that the sales and use tax revolving fund will be reimbursed for the monies so used as soon as the first revenues from the cigarette tax are received.

The Act makes no provision for initial administrative expenses, and of course no revenues will be collected until July, 1958. We notice, however, that Section 441 of the Act provides that the tax shall be administered and enforced by the Retail Sales Tax Division of the Comptroller's Office, the same Division charged with the responsibility of administering and enforcing the sales and use tax laws. In view of the practical necessity for the monies in question, we see no objection to the use of the revolving fund to meet these

expenses, pending receipt of cigarette tax revenues. As soon as these revenues are collected, the fund should be immediately reimbursed.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

RECORDATION TAX—MERGER OF CORPORATIONS—NO RECORDATION TAX STAMPS ARE REQUIRED ON DEED WHICH CONVEYS PROPERTY OF MERGING CORPORATION TO THE NEW OR SURVIVING CORPORATION.

April 9, 1958.

Mr. Joseph W. T. Smith, Clerk,
Circuit Court for Wicomico County.

You ask if the Maryland recordation tax must be paid when after the merger of two corporations a deed conveying real estate from one of the merging corporations to the new or surviving corporation is offered for record.

Article 23, Section 71(3), Annotated Code of Maryland (1957 Ed.) reads as follows:

> "Upon a consolidation or merger, in accordance with this sub-title: * * *
>
> "All the property, rights, privileges and franchises, of whatsoever nature and description, of each of the corporations party to the articles, including subscriptions for shares and other choses in action, shall be transferred to, vested in and devolved upon the new or the surviving corporation, without further act or deed. Notwithstanding this provision, confirmatory deeds, assignments or other like instruments, when deemed desirable to evidence such transfer, vesting or devolution of any property, right, privilege or franchise, may at any time, or from time to time, be made and delivered in the name of the corporation party to the articles by the last acting officers thereof or by the corresponding officers of the new or successor corporation."

This office has ruled on many occasions that no recordation tax is payable upon the recordation of a voluntary conveyance where there is no actual consideration paid or to be paid. 31 Opinions of the Attorney General 70; 30 Opinions of the Attorney General 193; 25 Opinions of the Attor-

ney General 597; 24 Opinions of the Attorney General 965, 973; 23 Opinions of the Attorney General 629; 22 Opinions of the Attorney General 649, 685, 700, 701, 712.

A change in title in the case of merger of corporations takes effect automatically upon compliance by the merging corporations with the merger provisions of Article 23 of the Code. The deed to the new or surviving corporation which has been offered for record will only transfer to it legal title to what is already its property. It is therefore my opinion that no recordation tax is payable under the circumstances.

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

TAXATION—EXEMPTION—SANITARY DISTRICT—PROPERTY COMPOSING PROJECT OF SANITARY DISTRICT IS EXEMPT FROM AD VALOREM TAXES—SANITARY DISTRICT IS RELIEVED OF REQUIREMENT OF FILING ANNUAL REPORT AND PERSONAL PROPERTY RETURN BY REASON OF ITS GOVERNMENTAL NATURE AND THE EXEMPT STATUS OF ITS PROJECTS.

May 14, 1958.

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

Your recent letter asks whether the Charles County Sanitary District Inc. is exempt from ad valorem taxes on its property. You also inquire whether this corporation is required to file a personal property return and an annual report with the State Tax Commission.

The Charles County Sanitary District Inc. was incorporated pursuant to a resolution of the County Commissioners of Charles County under the authority of Article 43, Sections 645-673, inclusive (1957 Code). Section 646 thereof permits the governing body of a county, by ordinance or resolution, to signify its intention to create a district "to acquire, construct, reconstruct, extend, repair, improve, maintain and operate a project under an appropriate name and title, containing the name 'district', which shall be a public body politic and corporate." The term "project" is defined by Section 245(b) as any water system, sewer system and any combination or part or parts thereof owned, constructed or operated by a district. By the terms of Section 650(a), each district thus created shall be deemed to be "an instrumentality exercising public and essential governmental functions to provide for the public health and welfare."

Section 655 declares that "No district shall be required to pay any taxes or assessments upon any project acquired, constructed or operated by it . . . or upon the income therefrom, * * *". We are of the opinion that this language operates to exempt the district from ad valorem taxes on

property composing a project as defined by Section 645(k). Compare 40 Opinions of the Attorney General 620 (1955), in which this office ruled that county liquor dispensaries are engaged in a governmental activity, and are therefore not subject to income taxation, even though the Maryland Income Tax Law did not expressly exempt such dispensaries from the tax.

We are also of the opinion that the district is relieved from the requirement of filing a personal property return and annual report. Section 251 of Article 81 (1957 Code) provides that "Every domestic corporation . . . against whom an assessment is to be made by the State Tax Commission . . . shall file an annual report in such form, and verified in such manner, and containing such information as may be prescribed by regulations of the State Tax Commission, in order that it may perform any duties imposed upon it . . ." This provision, in our view, contemplates corporations which may own property subject to assessment, and does not apply to an instrumentality specifically declared by the legislature to be deemed to exercise "public and essential governmental functions", and whose projects are expressly exempted from taxation. It would seem unreasonable to require a sanitary district to submit annual reports and personal property returns in view of its governmental nature. Of course, a district could conceivably acquire property beyond the shelter of the exemption which may be subject to assessment. Such an acquisition would presumably be *ultra vires* and invalid for this reason.

This interpretation of Section 251 should not be construed as relieving ordinary corporations from the obligation of filing annual reports and personal property returns, even though they may be entitled to exemptions. Whether a taxpayer is entitled to a particular exemption depends upon factual data which the taxpayer has and the taxing authority does not have. If a taxpayer could avoid the reporting requirements of this Section by simply claiming a property exemption, the Commission would be severely handicapped in determining the taxability of the property in question.

We rest our conclusion upon the governmental nature of a district's activities, together with the express exemption provided for its projects, and not upon the exemption alone.

It should be pointed out that Section 646 of Article 43 requires the filing of a sanitary district's articles of incorporation with the Commission in order to establish corporate existence. After organization and the election of officers, the secretary is required to certify to the Commission the names and addresses of its officers, the location of its principal office, as well as any change in the location thereof. Implicit in this provision, we believe, is the requirement that any change in the officers be similarly certified to the Commission.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—CIGARETTE TAX—CIGARETTES SOLD TO COASTAL SHIPPING FOR USE BY CREW ARE SUBJECT TO TAX—CIGARETTES SOLD IN BOND TO SHIPPING ENGAGED IN FOREIGN COMMERCE FOR USE BY CREW ARE NOT SUBJECT TO TAX—CIGARETTES SOLD THROUGH VENDING MACHINES LOCATED ON FEDERAL RESERVATIONS, AND CIGARETTES SOLD BY MARYLAND DISTRIBUTORS TO POST EXCHANGES ON FEDERAL RESERVATIONS ARE SUBJECT TO TAX.

May 14, 1958.

Mr. Walter E. Kennedy,
Retail Sales Tax Division,
Comptroller of the Treasury.

Your recent letter raises certain questions in regard to the state-wide cigarette tax imposed by Chapter 1 of the Acts of 1958. These will be considered in the order presented.

You first ask whether cigarettes held by wholesalers for sale to jobbers, who in turn resell them to coastal shipping for use by the crew, are subject to tax. Section 414 of Chapter 1 provides for the levy and imposition of the tax on "all cigarettes used, possessed or held in the State of Maryland by any person for sale or use in the State of Maryland. . . ." The first vendor or user having possession of cigarettes in Maryland for sale in the State is required to pay the tax, and affix stamps on the cigarettes evidencing such payment pursuant to Section 420.

We think the above sections clearly operate to impose the tax upon the wholesaler in the situation presented, since the cigarettes are obviously held by him for sale in Maryland. The fact that the cigarettes may ultimately be used outside Maryland is not material, because the tax reaches cigarettes held for sale as well as cigarettes held for use in this State. We are of the opinion that this reasoning applies with equal force to cigarettes held by wholesalers for sale direct to coastal shipping when the sale takes place within the territorial limits of the State.

You next ask whether cigarettes purchased from an out-of-state manufacturer (pursuant to a contract vesting title in the purchaser outside of Maryland) and thereafter shipped in bond to Maryland where they are stored in a bonded warehouse are subject to tax, when the cigarettes are subsequently sold to shipping engaged in foreign commerce for use by the crew as soon as the vessel has passed beyond the territorial limits of the United States. You state that the containers in which the cigarettes arrive at the warehouse are not broken until the vessel is outside territorial waters, and that they are delivered to the vessel under bond. We think the necessary effect of *McGoldrick v. Gulf Oil Corp.*, 309 U. S. 414, and *National Distillers Products Corp. v. City and County of San Francisco,* 297 P. 2d 61, cert. den. 352 U. S. 928, is to exempt the cigarettes in question from tax.

In the *Gulf Oil* case, the City of New York sought to impose a sales tax upon fuel oil manufactured there from crude petroleum which had been imported from a foreign country to New York, and there sold to vessels engaged in foreign commerce. The oil was imported and manufactured in bond. The Supreme Court held that the tax was in conflict with Congressional policy reflected in the Revenue Act of 1932, the Tariff Act of 1930, and applicable Treasury regulations to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stock, stating at 309 U. S. 429, as follows:

> ". . . As we have seen, the exemption and drawback provisions were designed, among other purposes, to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores. In furtherance of that end Congress provided for the segregation of the imported merchandise from the mass of goods within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted customs regulations prescribing that the merchandise, while in bonded warehouse, should be free from state taxation. It is evi-

> dent that the purpose of the congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. . . . The congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the congressional regulation of the commerce . . ."

The *National Distillers Products Corporation* case involved an attempt to impose an ad valorem personal property tax upon liquor transported in bond from Baltimore to San Francisco, and there stored in a bonded warehouse pending shipment to foreign countries or for use as supplies on vessels engaged in foreign commerce. Relying upon the *Gulf Oil* case, the California District Court of Appeals ruled the tax invalid, stating at page 65 of 297 P. 2d as follows:

> "The instant case seems to present a situation that is clearly within the rationale of the Gulf Oil case. Sections 309, 311 and 313 of the Tariff Act of 1930, as amended, Title 19 USCA 1309, 1311 and 1313, provide freedom from internal revenue taxation or for a drawback of taxes paid, when the required procedure is followed for domestic liquors exported, used as ships' stores, or sold to vessels employed in the fisheries. These provisions would seem to constitute regulations of foreign commerce

> in the instant case just as similar provisions did in the Gulf Oil case. Certainly the purpose of this regulatory scheme is to encourage commerce and give a competitive advantage to these items. If states were allowed to impose taxes on these items an interference with this purpose would result."

Title 19 USCA 1309 provides in substance that articles of foreign or domestic origin may be withdrawn from any customs bonded warehouse free of internal revenue tax for supplies of vessels operated by the United States, vessels of the United States employed in the fisheries or engaged in foreign trade, or trade between the Atlantic and Pacific ports of the United States or between the United States and its possessions. Title 19 USCA 1317 declares that shipment of cigarettes for consumption beyond the jurisdiction of the internal revenue laws shall be deemed exportation within the meaning of the internal revenue laws applicable to the exportation of such articles without payment of the internal revenue tax. As in the *Gulf Oil* and *National Distillers* cases, there is clear evidence in these provisions of an intent on the part of Congress to regulate this area of foreign commerce, to which the State cigarette tax must yield. We are consequently of the opinion that the cigarettes in question are not subject to tax.

Finally, you ask advice as to the tax consequences of cigarette sales through vending machines located in recreational areas on Federal Reservations, as well as the consequences of sales to Post Exchanges located thereon. In the former situation, you advise that the vending machine owner or operator purchases cigarettes from a distributor and periodically fills the machines. These machines are available to both military and civilian personnel for the purchase of cigarettes. In the latter case, the distributor purchases cigarettes from an out-of-state manufacturer pursuant to a contract which passes title to the cigarettes outside the State. The cigarettes are then shipped to the distributor's warehouse in Maryland, and are sold by him to Post Exchanges.

We have no difficulty in concluding that the cigarettes held by the vending machine owner or operator for sale on a Federal reservation are subject to tax. Even assuming that he is the first vendor in Maryland, the fact that the cigarettes are sold on a Federal reservation through vending machines does not defeat the tax. Section 105 of Title 4 USCA (the Buck Act) provides in substance that no person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State on the ground that the sale or use occurred in whole or in part within a Federal area. In 37 Opinions of the Attorney General 410, involving the obligation of a Naval Officers' Mess located on a Federal reservation to collect sales taxes, we stated that had the sales been made by a private individual, he would have been required to collect the taxes by reason of the Buck Act. The taxability of sales of this sort is well settled. *Davis v. Howard,* 206 S.W. 2d 467 (Ky.); *Bowers v. Oklahoma Tax Comm.,* 51 F. Supp. 653 (W.D., Okla.); *Hill v. Joseph,* 129 N.Y.S. 2d 348 (N.Y.).

We are also persuaded that cigarettes sold to Post Exchanges are subject to tax. As previously noted, the tax is laid upon cigarettes used, possessed or held in Maryland for sale or use in this State. Responsibility for payment rests upon the first vendor having possession of cigarettes for sale or use in Maryland, without regard to the identity of subsequent purchasers. In other words, it is the *possession for sale or use,* and not the sale itself, to which the tax attaches.

A reading of the statute discloses a careful plan to impose the tax upon the distributor of cigarettes. It is the distributor who, by definition (Section 447(b)), is the first vendor having possession of cigarettes for sale or use—it is the distributor who is required to obtain a license before possessing or selling cigarettes (Section 428)—and it is the distributor who must pay the tax (Section 420). The legislative purpose to place the tax upon the distributor stems from his position within the framework of the tobacco trade as the starting point for the distribution and sale of tobacco products to wholesalers and retailers, through whom cigarettes ultimately reach the consumer.

In only one situation—namely, where the distributor sells cigarettes to an out-of-state wholesaler or retailer for resale to out-of-state consumers—is the distributor relieved of paying the tax. Even in that event, however, the distributor must keep complete and accurate records of such sales, or in the absence thereof, subject himself to an assessment as if the sales had been made for use in Maryland in accordance with Section 433.

It is true, of course, that Section 107 of the Buck Act prohibits the levy or collection of sales and use taxes on or from instrumentalities of the United States. And there can be little doubt that Post Exchanges constitute such instrumentalities. *Standard Oil Co. v. Johnson,* 316 U. S. 481; *Falls City Brewing Co., Inc. v. Reeves,* 40 F. Supp. 35 (W.D., Ky.); and *Maynard & Child, Inc. v. Shearer,* 290 S.W. 2d 790 (Ky.). For the reasons stated above, however, we are of the opinion that the cigarette tax falls, not upon the Exchange, but upon the distributor. The fact that the economic incidence of the tax may reach the Exchange or authorized purchasers therefrom is not enough to render it invalid. *Alabama v. King & Boozer,* 314 U. S. 1.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—CIGARETTE TAX—COMPTROLLER IS EMPOWERED TO AUTHORIZE LOCAL CIGARETTE TAX INSPECTORS TO SEIZE UNSTAMPED CIGARETTES—INSPECTORS ARE AGENTS OF COMPTROLLER WHILE SEIZING CONTRABAND CIGARETTES.

June 10, 1958.

Mr. Walter E. Kennedy, Chief,
Retail Sales Tax Division,
Comptroller of the Treasury.

We have your recent letter stating that your office has been requested by Montgomery County officials to authorize one of the Montgomery County cigarette tax inspectors to seize unstamped cigarettes under the provisions of the statewide cigarette tax act (Chapter 1, Acts of 1958). You ask whether the Comptroller is empowered to grant such authorization, and if so, the nature of the inspector's relationship to the Comptroller as a result of such authorization.

Chapter 1 vests exclusive authority in the Comptroller for the collection of both local and statewide cigarette taxes. The vehicle of payment is the purchase of stamps from the Comptroller. Section 217. Because collection and enforcement go hand in hand, the General Assembly has conferred broad powers of seizure and confiscation upon the Comptroller. Section 425 declares unstamped cigarettes to be contraband goods, subject to seizure by the Comptroller, his agents or employees, or by any peace officer of the state, when directed by the Comptroller so to do, without a warrant. There is also provision for the sale of cigarettes so seized, the proceeds thereof to be handled in the same manner as the tax collected under the Act. This section further declares that the Comptroller, his agents, employees, and any peace officer of the state, when directed to do so, shall not in any way be held responsible in any court for the seizure or confiscation of any unstamped container of cigarettes.

We are of the opinion that Section 425 clearly empowers the Comptroller to authorize local inspectors to seize unstamped cigarettes. Such inspectors remain, of course, employees of the political subdivision in question—but to the extent of the authority conferred upon them to seize contraband cigarettes, they become, in our opinion, agents of the Comptroller. This necessarily follows, we believe, from the concentration of collection powers in the Comptroller in respect to statewide and local taxes, the extraordinary powers of enforcement conferred upon the Comptroller, and the requirement of a single stamp evidencing payment of both the state and local tax. Our views are further reinforced by the express immunity granted agents and employees of the Comptroller when seizing and confiscating contraband cigarettes pursuant to his direction. We notice that the Montgomery County Cigarette Tax (Ordinance No. 3-93, and Resolution No. 3-1615) confers no comparable immunity, so far as the local tax is concerned, and this may well have been the basis for including such a provision in the statewide law.

In summary, we are of the opinion that Chapter 1 empowers the Comptroller to authorize local tax inspectors to seize unstamped cigarettes; and that while seizing and confiscating contraband cigarettes pursuant to the authorization of the Comptroller, such inspectors are his agents, and enjoy immunity from liability, although they retain their relationship to the County as employees thereof.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—SOCIAL SECURITY BENEFITS AND VETERANS' ADMINISTRATION BURIAL ALLOWANCE SUBJECT TO INHERITANCE TAX WHEN PAID TO DECEDENT'S ESTATE.

July 2, 1958.

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

In your recent letter you ask whether Social Security benefits for a decedent and the Veterans' Administration allowance toward the funeral bill of a deceased veteran are subject to inheritance taxes.

This office has ruled that Seamen's War Risk Insurance benefits which are paid to the estate of a decedent are subject to inheritance taxes. 28 Opinions of the Attorney General 302. We have also ruled that veterans' back pay gratuity benefits payable to an estate are subject to inheritance taxes. 30 Opinions of the Attorney General 173.

It is accordingly our opinion, based on the previous opinions above cited, that the death benefits paid by the Social Security Administration, when paid to an estate or personal representatives of a decedent, should be subject to inheritance taxation since they are properly a part of the decedent's estate.

It is also our opinion that the amount allowed by the Veterans' Administration toward payment of the funeral bill of a deceased veteran should be subject to inheritance taxes when it is paid to the estate or personal representative of the decedent. The entire funeral bill, not taking into account the Veterans' Administration allowance, would in this case be allowable in the discretion of the Orphans' Court as a deduction in the administration account. If the allowance were paid, as is authorized, directly to the person paying the funeral bill and does not form a part of the estate, then it would not be subject to inheritance taxes. In such case, only the net amount of the funeral bill would be deductible as a funeral expense in the administration ac-

count. Furthermore, this has been the administrative practice in Baltimore City for a number of years, and we see no reason to disturb it.

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—NO TAX DUE ON DEATH OF CESTUI QUE TRUST WHO PREDECEASES SETTLOR WHERE ACCOUNT SUBJECT ONLY TO ORDER OF SETTLOR AND NO JOINT TENANCY NOR TENANCY IN COMMON CREATED.

July 14, 1958.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

A savings account is put in the name of "A, in trust for A and B, subject only to the order of A, balance on death of A to belong to B". B predeceases A. No words of joint tenancy are used. No joint tenancy is intended. A and B are not husband and wife. You ask whether any inheritance taxes are due upon B's death.

This situation is practically identical with one discussed in 40 Opinions of the Attorney General 546 at 555, except that in that example, title was "A, in trust for A and B, joint owners, subject to the order of A only". Article 81, Section 151 provides, in pertinent part, that the inheritance taxes imposed by Sections 149 and 150 shall be imposed upon various types of property "including property in which the decedent, prior to his death, had an interest as joint tenant or tenant in common . . .".

There is no question that, upon the prior death of A, the entire account would be subject to inheritance tax under other provisions of Section 151, since A has retained dominion over the account by having it subject to his sole order. However, merely by creation of a simple trust and without the words of joint ownership, it is our opinion that B has obtained no interest which would pass upon his death and thus be subject to taxation. Our conclusion seems to be supported by the following language from a recent opinion of this office:

> " . . . *Thus, if A creates a trust for B for life, remainder to C, there is no tax liability on B's death.* However, if A creates a similar trust for A for life, remainder to C, an inheritance tax lia-

> bility does arise on A's death." 37 Opinions of the Attorney General 383 at 384 (Emphasis supplied).

The only difference between the situation under consideration here and that which was discussed in the above opinion is that the remainder is payable to one of the cestuis que trustent, rather than to a third party as remainderman. Believing that the above quoted language would be applicable to the case presently under consideration, it is our opinion that, upon B's death prior to A, no inheritance tax would be due the State of Maryland.

STEDMAN PRESCOTT, *Deputy Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

TAXATION—CIGARETTE TAX—CIGARETTES SHIPPED BY COMMON CARRIER FROM WITHOUT THE STATE TO POST EXCHANGES IN MARYLAND, AND CIGARETTES DELIVERED TO POST EXCHANGE TRUCKS OUTSIDE THE STATE AND TRANSPORTED THEREIN TO MARYLAND INSTALLATIONS ARE NOT SUBJECT TO TAX.

July 22, 1958.

Mr. Walter E. Kennedy,
Retail Sales Tax Division,
Comptroller of the Treasury.

We have your recent communication forwarding a copy of letter from two wholesale cigar and tobacco dealers whose principal places of business are in the District of Columbia. These dealers state that for the past several years they have acted as agents for several cigarette manufacturers in supplying cigarettes at cost to post exchanges at various military installations in Maryland. The cigarettes have heretofore been delivered by the dealers in their own trucks.

Our ruling in 43 Opinions of the Attorney General 337, that cigarettes in the hands of a Maryland distributor for sale to post exchanges are taxable has prompted further inquiry on the part of those dealing with exchanges. The District dealers now present a two-fold question, namely (a) whether shipment of cigarettes by common carrier from warehouses in the District to the military installation would subject the cigarettes to tax, and (b) whether cigarettes delivered to post exchange trucks at the District warehouses and then transported therein to installations in Maryland would be taxable.

We think that the cigarettes in both instances are beyond the taxing power of the State. Under the Buck Act (4 U.S.C.A. 105), Congress re-ceded jurisdiction to the States in respect to the levy and collection of sales and use taxes in Federal areas. But it declined to waive the sovereign immunity of the United States or instrumentalities thereof from such taxation. Section 107(a) of the Buck Act declares that the provisions of Section 105 "shall not be deemed to

authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser."

We recently held that Post Exchanges are federal instrumentalities. See 43 Opinions of the Attorney General 337. In the situation before us, the exchange would constitute the taxpayer under the cigarette tax act, since it would be the first vendor or user having possession of cigarettes in Maryland for sale or use in this State (Section 420, Article 81 of the Annotated Code (1957)). This would amount to a direct tax upon a governmental instrumentality, in violation of the principle of sovereign immunity reflected in Section 107 of the Buck Act. We are accordingly of the opinion that the cigarettes in question are not subject to tax.

It may be well to add that continuation of the wholesalers' practice of cigarette deliveries to Maryland post exchanges in the vendors' vehicles would, in our opinion, render them liable for the tax under Section 420. This view is not altered by the fact that they act as agents for cigarette manufacturers.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—RECORDATION TAX—THE TAX IS PAYABLE ON THE TOTAL SUM OF ALL NOTES ISSUED UNDER A TRUST, LESS ANY AMOUNTS USED TO REFUND OUTSTANDING OBLIGATIONS UNDER THE TRUST.

July 29, 1958.

Mr. Ellis C. Wachter, Clerk,
Circuit Court for Frederick County.

In your recent letter you ask how to compute the amount of recordation tax imposed by Section 277, Article 81, Annotated Code of Maryland (1957 Ed.), in the following situation:

A and B have given a trust indenture to a bank, acting as trustee, under the provisions of which they may borrow from time to time different sums, the total amount of which shall never exceed $1,398,000. The trust indenture was recorded in your office and, at that time, the Maryland recordation tax was paid on the obligations then outstanding under the trust. A and B are both canners and their business is a seasonal one. Normal operations call for maximum credit during the canning season and when the pack is sold the greater part of the debt is paid off. The next year the cycle is repeated, the financing in effect being a revolving secured credit. The highest outstanding balance has never reached the top figure of $1,398,000.

Section 277(a) and (b), Article 81 of the Annotated Code imposes a recordation tax on instruments securing debts at the rate of 55c for each $500.00 of the principal amount of the debt.

Section 277(k), Article 81, reads as follows:

> "If the total amount of the debt which may become secured by any instrument securing a debt shall not have been incurred at the time such instrument is offered for record, the tax shall be computed solely in the principal amount of the debt then incurred and secured by such instrument. Before any additional debt is incurred which is to be

secured by an instrument previously recorded, the debtor shall file with the clerks of the courts with which such instrument has been recorded, a duly verified statement showing the amount of such additional debt and shall pay the tax with respect thereto upon, but only upon, the amount of such additional debt so secured which has been incurred after May 31, 1937, and with respect to which such tax shall not therefore have been paid, less the principal amount of any debt then outstanding and secured by such instrument which is to be paid or refunded out of the proceeds of such additional debt."

The Legislature intended that a recordation tax be paid on any new debt upon which the tax has not previously been paid. It is our opinion that each time a new loan is made and a new note is issued under the trust indenture, a verified statement showing the amount of such additional loan should be filed with you and the recordation tax paid on the amount of that new loan. If, however, at the time the notes for the new loan are made there are current notes then outstanding which are paid off from the proceeds of the new loan, the tax is only to be paid on the difference between the amount paid off on the outstanding notes and the amount of the loan covered by the new notes, it appearing to be the legislative intent that the recordation tax be paid only upon a new debt upon which such tax has not previously been paid. If there is no refunding of outstanding notes but a new loan is made under the trust to increase the amount of debt outstanding, or is made to create a new debt at a time when all previous loans have been paid off, then the tax is payable on the full amount of the new loan. In other words, the tax will be payable on the aggregate amount of all notes ever issued under the trust indenture less any amounts used to refund outstanding notes under the trust.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—RECORDATION TAX—CONSTRUCTION LOANS—TAX IS ONLY PAYABLE ON THE AMOUNT ACTUALLY ADVANCED TO THE BORROWER AT THE TIME IT IS ADVANCED UNDER A CONSTRUCTION LOAN.

October 8, 1958.

Mr. Robert B. Mathias,
Assistant County Attorney for Prince George's County.

In your recent letter you have asked whether or not a corporation which has paid the recordation tax in an amount sufficient to cover the entire amount of debt which may be incurred under a construction loan deed of trust is entitled to a refund if, in fact, no money has been advanced under the deed of trust. Article 81, Section 277 (k), Annotated Code of Maryland (1957 Ed.) reads as follows:

> *"When total amount of debt to be secured has not been incurred.*—If the total amount of the debt which may become secured by any instrument securing a debt shall not have been incurred at the time such instrument is offered for record, the tax shall be computed solely in the principal amount of the debt then incurred and secured by such instrument. Before any additional debt is incurred, which is to be secured by an instrument previously recorded, the debtor shall file with the clerks of the courts with which such instrument has been recorded a duly verified statement showing the amount of such additional debt and shall pay the tax with respect thereto upon, but only upon, the amount of such additional debt so secured which has been incurred after May 31, 1937, and with respect to which such tax shall not theretofore have been paid, less the principal amount of any debt then outstanding and secured by such instrument which is to be paid or refunded out of the proceeds of such additional debt."

It is obvious that the Legislature only intended to tax the amount of debt actually incurred and secured. Until such time as the corporation has actually received money

under the trust, no debt has been incurred and secured and no taxes are payable. The only debt that the borrower under a construction loan deed of trust becomes liable for is the amount actually paid out to it under the trust. Often the full amount of loan set out in the deed of trust is never paid to the borrower, and if required to pay the full tax in advance, it would pay more than was ever due. The meaning of the language of the statute is quite clear and, in our opinion, there is no question that until money is advanced under the deed of trust, no recordation tax is required to be paid. We realize the difficulty that the clerks of court will have in knowing when additional recordation taxes become due upon the advancement of additional sums to the borrower. Section 277 (k) does place the duty on the borrower to notify the clerks and Section 278, Article 81 (Code, 1957 Ed.) provides for criminal penalties if it fails to do so. If the methods for notice and payment provided by the statute do not prove satisfactory, it is a matter for the Legislature to change, not this office.

Sections 215 and 216 of Article 81 (Code, 1957 Ed.) provide that whenever any person has erroneously paid to any State agency more money for special taxes imposed under Article 81 than are legally payable at any time, he may within three years file a verified written claim with that agency for the refund thereof, and that if, after investigation and hearing, the agency finds he is entitled thereto, it shall allow such refund.

We are of the opinion that the corporation in this case is entitled to a refund of all taxes paid. Each time money is paid to the borrower under the trust, the borrower must file the verified statement required by the statute with the clerk of the court showing the additional amount of debt incurred and secured and must pay the recordation tax due on that amount. Failure to do so, as said before, will subject the borrower to the criminal penalties provided by Section 278 of Article 81 of the Code.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—INHERITANCE TAXES—POWER OF APPOINTMENT —COLLECTION OF ADDITIONAL INHERITANCE TAXES BARRED BY FOUR YEAR STATUTE OF LIMITATIONS ALTHOUGH ASSESSMENT INCORRECTLY MADE—PROPERTY WHICH COULD PASS UNDER POWER TO COLLATERALS SHOULD BE ASSESSED AT COLLATERAL RATE.

November 19, 1958.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

Re: Estate of Thomas N. Taylor, Deceased.

In reference to your recent letter concerning the above estate, we herewith advise you that it is our opinion that no further inheritance taxes are due the State of Maryland.

According to the facts which have been presented to us by your office and by counsel for the estate, the testator died on June 20, 1935, leaving his residuary estate in trust, the income therefrom to be paid to his wife for her life and upon her death to his two sons for their respective lives. Each son was given a power of testamentary appointment over one-half of the estate at his death. One of the sons died in October, 1957, and appointed his share to his wife for her life and upon her death to his children with full power of withdrawal of principal at age thirty-five.

In the course of the administration of the original testator's estate, his personal representatives elected to pay inheritance tax on the entire trust estate under the provisions which are now codified as Article 81, Section 161, Annotated Code of Maryland (1957 Ed.). The tax was assessed at the one percent (1%) direct inheritance tax rate and was paid by the personal representatives. You have asked us whether any additional inheritance taxes are now due by reason of the manner in which the son exercised his power of appointment.

The appointed property is not subject to inheritance tax in the son's estate since it is considered as having come from the original testator, the donor of the power of appointment.

Connor v. O'Hara, 188 Md. 527, 530; see also 40 Opinions of the Attorney General 486. Thus, if any inheritance taxes were due, they would be due in the original testator's estate by reason of the son's exercise of his power of appointment, in part, at least, to his wife, a collateral of the original testator.

We believe, however, that further inheritance taxes are barred by Article 81, Section 212, Annotated Code of Maryland (1957 Ed.). This section was enacted in substantially its present form as Chapter 701 of the Acts of 1941. It provides a four year statute of limitations on the collection of State, county or city taxes of every kind for which no other period of limitation is prescribed.

Article 81, Section 161 (1957 Code) permits the election of payment of inheritance taxes on an entire estate. It does not specifically require the Orphans' Court, or other courts having jurisdiction, to assess inheritance tax at the collateral rate where a power of appointment might be exercised in favor of collaterals. Our office has on several occasions considered this problem of the rate at which inheritance taxes should be assessed where an election has been made to pay the tax on the entire estate and where it was possible that interests might pass to collateral. In an opinion reported in 24 Opinions of the Attorney General 936, this office indicated that payment of inheritance taxes on a bequest for the benefit of a testator's brother, with remainder to the testator's children or their issue, could not be collected at the collateral rate. In an earlier opinion this office noted that trustees had paid inheritance taxes at the collateral rate on the entire corpus of the trust, including appointed property, since there were no lineal descendants. 22 Opinions of the Attorney General 738. In the most recent opinion, the question of the applicable rate was squarely presented where a testator devised certain real property to his wife with the power of sale, and then to his brother if she failed to exercise her power. This office ruled:

> " * * * If the election is made, because of the brother's possibility of acquiring the entire re-

> mainder under item 2, *the rate for collaterals must be applied.* * * * ". 34 Opinions of the Attorney General 259 at 261. (Emphasis supplied).

The above conclusion appears to be supported by language of the Court of Appeals in a decision concerning the taxation of remainders in which the Court of Appeals said:

> "* * * It is undoubtedly true that, under this provision for advanced valuation and assessment, a contingent remainderman has the right to pay a tax on something which he may possibly never receive. * * * ". *Safe Deposit & Trust Co. v. Bouse,* 181 Md. 351 at 361.

In view of the foregoing, it is our opinion that the tax was incorrectly assessed by the Orphans' Court in 1935; nevertheless, an assessment was made and the tax became due as assessed as to the entire estate. 37 Opinions of the Attorney General 365; 34 Opinions of the Attorney General 273. Since the assessment was made and the tax became due in 1935, or at the very latest in 1941 when Chapter 701 was enacted, it is our opinion that any further imposition of inheritance tax, by reason of the manner in which the son exercised his power of appointment, to a collateral of the original testator would now be barred by the four year limitation set forth in Article 81, Section 212 (1957 Code).

C. FERDINAND SYBERT, *Attorney General.*

CHARLES B. REEVES, JR., *Asst. Attorney General.*

TAXATION—CIVIL RELIEF ACT—EXEMPTION—TRAILERS—TRAILERS ARE PERSONAL PROPERTY WITHIN THE MEANING OF THE CIVIL RELIEF ACT EXEMPTING SUCH PROPERTY FROM TAXATION IN THE HANDS OF NON-RESIDENT MILITARY PERSONNEL ON DUTY IN MARYLAND.

November 21, 1958.

Mr. Robert H. Archer,
Attorney to Board of County
Commissioners of Harford County.

We have your recent letter asking whether trailers located in Harford County and owned by non-resident military personnel on duty under official orders in Maryland are exempt from personal property taxes. We are of the opinion that such trailers are exempt under the provisions of the Civil Relief Act, Title 50 U.S.C.A., Section 574.

Even though the trailers are attached to sewerage, water, and electrical facilities, and are used for human habitation, we are of the view that they remain personal property for the purpose of taxation. In *Anne Arundel County v. English,* 182 Md. 514 (1943), trailers were assessed as personal property pursuant to a public local law imposing an annual license fee thereupon. In the course of its opinion, the Court of Appeals noted that trailers are movable and not connected with the land. We are reinforced in this conclusion by *Anne Arundel County v. Sugar Refining Co.,* 99 Md. 481 (1904), which establishes the test for the taxability of property as realty or personalty, and prior opinions dealing with this question. See 39 Opinions of the Attorney General 312 (1954); 42 Opinions of the Attorney General 411, (1957). We find nothing in the local laws of Harford County which would call for a departure from these principles.

You direct our attention to the provisions of Article 81, Section 9(32) (enacted by the General Assembly as Chapter 205, Acts of 1957), which reads as follows:

> "(32) *Certain motor vehicles; house trailers in Carroll, Harford and St. Mary's Counties.*—Motor

> vehicles, Classes A to J, inclusive. Nothing herein shall be construed to exempt house trailers designed primarily for human habitation from the assessment of the local property tax in Carroll County, Harford County and St. Mary's County, notwithstanding any fees paid to the Department of Motor Vehicles for the privilege of the use of the highways by such house trailers."

This enactment, located in that section of our revenue laws providing for the exemption from taxation of specified classes of real and personal property, simply excludes from exemption trailers used for human habitation in certain counties for the purposes of the "local property tax", despite fees paid to the Department of Motor Vehicles for their use on the highways. We do not construe this measure as a classification of trailers as realty.

Section 574 of the Civil Relief Act declares in substance that for the purposes of taxation in respect to the personal property of a person who is absent from his State of residence or domicile in compliance with military orders, that property shall not be deemed to be located or present in or to have a status for taxation in the State where actually located. Personal property is broadly defined as tangible or intangible property, including motor vehicles, and we are of the view that the trailers in question clearly fall within the scope of this definition.

We are accordingly of the opinion that trailers owned by non-resident military personnel are exempt from taxation.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION — STATE TAX COMMISSION — FEDERAL CREDIT UNIONS — EXEMPTION — REPORTS — FILING FEES — UNIONS ARE REQUIRED FO FILE ANNUAL REPORTS AND TO PAY FILING FEE THEREFOR—PAYMENT OF FEE IS CONDITION OF COMMISSION'S ACCEPTANCE OF REPORT FOR FILING.

November 24, 1958.

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

We have your recent letter in which you state that certain Federal Credit Unions (organized under the Federal Credit Union Act—Chapter 14, Title 12 U.S.C.A.), while complying with the requirement of filing an annual report with the Commission, have failed to pay the filing fees prescribed therefor. You ask whether they are liable for such fees, and if so, the manner in which collection may be enforced.

The fees in question are imposed under Section 130 (a) (2), Article 23 (1957 Code), reading in part as follows:

> "Amount of fees—The Commission shall charge and collect, in addition to the bonus tax, if any, the following fees:
>
> * * *
>
> "(2) For each of the following papers filed but not recorded:
>
> * * *
>
> "Annual report of . . . credit union . . . subject to the jurisdiction of this State.....$10."

Of course, Federal Credit Unions have, to some extent, been exempted from State and local taxation under Section 1768, Title 12 U.S.C.A., providing as follows:

> "The Federal credit unions organized hereunder, their property, their franchises, capital reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Terri-

> torial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located: *Provided, however,* That the duty or burden of collecting or enforcing the payment of such tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions."

You will notice that while franchise taxes are exempt, real and tangible personal property of credit unions remain subject to State and local taxes to the same extent as other similar property.

We are of the opinion that the sum of $10 charged pursuant to Section 130(a) (2) is a fee, and not a franchise tax within the meaning of the above exemption. That this is true appears clear not only from the language used in that section characterizing the charge as a fee, but also from the moderate charges listed therein for the recordation and filing of various instruments. The latter were manifestly designed to defray handling costs.

The fact that Federal Credit Unions are exempt from franchise and certain other taxes does not, in our opinion, relieve them of the obligation to file annual reports and pay the prescribed filing fee therefor. This view finds support in the provisions of Section 251, Article 81 (1957 Code), reading in part as follows:

> "Every domestic corporation, every foreign corporation subject to the jurisdiction of this State and every firm or individual against whom any assess-

> ment for ordinary taxes is to be made by the State Tax Commission under this article, shall file with the State Tax Commission an annual report in such form, and verified in such manner, and containing such information as may be prescribed by regulations of the State Tax Commission, in order that it may perform any duties imposed upon it by this article. . . ."

Since real and tangible personal property are fair objects of State and local taxation under the Federal Credit Union Act, the importance of the annual report to the State Tax Commission in the discharge of its responsibilities is obvious. When a credit union fails to file such a report, the Commission may estimate the value of its assessable property from any information it can obtain, and assess such property at twice its estimated value pursuant to Section 251. Or the Commission may compel the filing of an annual report by a mandamus proceeding similarly authorized by this section.

You point out that the credit unions in question have complied with the filing obligations of Section 251, but have ignored the fee requirements of Section 130(b). In this connection, we call your attention to Section 128(b), Article 23 (1957 Code), which makes payment of the fee a condition of the Commission's acceptance of the report for filing. This provision reads as follows:

> "(b) *Payment of filing fees, special fees and bonus tax.*—The Commission shall not accept for record or filing any charter paper, qualification, registration, change of resident agent or principal office, report, service of process or notice or other paper until all recording, filing and other special fees, and the bonus tax (if any) payable by law, have been paid to the Commission."

In view of the Commission's acceptance of annual reports heretofore without pre-payment of the prescribed filing fee, a practice which we do not believe accords with the fore-

going provisions, we feel that each credit union should be informed by letter that it will be required in the future to pay the filing fee of $10 as a condition to the Commission's acceptance of its annual report for filing. In the event that the 1959 annual report (due before April 15, 1959) is submitted but the fee is not, the Commission should return same to the union as being unacceptable for filing. Where either the report is not filed or the fee unpaid within the period prescribed by law, the unions should be further informed that it will be the policy of the Commission, with the assistance of this office, to invoke the penalty provisions of Sections 251-253 of Article 81 (1957 Code), including forfeiture of the union's right to do business in Maryland pursuant to Section 253.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—ROAD TAX—EXEMPTION—CORPORATION ORGANIZED UNDER THE LAWS OF OHIO BUT QUALIFIED TO DO BUSINESS IN MARYLAND IS NOT RESIDENT CORPORATION WITHIN MEANING OF EXEMPTION.

December 10, 1958.

Mr. Bernard F. Nossel,
Gasoline Tax Division,
Comptroller of the Treasury.

Your recent letter asks whether a corporation organized under the laws of Ohio, but qualified to do business in Maryland, is subject to the Maryland road tax.

This concern has a factory and office in Baltimore, and operates therefrom one truck which is registered in Maryland and is employed principally within this State. The vehicle is used entirely for the taxpayer's own use and not for hire. Judging from the correspondence before us, the corporation's principal offices and places of business appear to be located outside of Maryland.

The Maryland road tax is a tax upon motor carriers as defined by Section 412(a), Article 81 (1957 Code). Under that section, the term "motor carrier" means every person, firm or corporation who or which operates or causes to be operated on any highway in this State any passenger vehicle that has seats for more than nine passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles, "except any resident person, firm or corporation owning or operating not more than one truck for his own use and not for hire". The corporation urges that it is exempt from the tax by reason of the language above quoted.

We do not think that mere qualification to do business in Maryland, together with the existence of a factory and truck in this State, constitutes this concern a "resident" corporation within the meaning of Section 412(a). In our view, the term "resident" as applied to a corporation refers to its domicile, which belongs exclusively to the State under

whose laws it was created. *B. & O. R. Co. v. Glenn,* 28 Md. 287; *Smith v. Silver Val. Mining Co.,* 64 Md. 85, 13 Am. Jur. 147-148. Since the company in question was chartered under the laws of Ohio, it is domiciled in that State, and cannot acquire a domicile or resident status in Maryland under Section 412(a) unless it also incorporates in this State.

It is accordingly our opinion that the corporation in question is subject to the road tax.

C. FERDINAND SYBERT, *Attorney General.*

THEODORE C. WATERS, JR., *Asst. Attorney General.*

TAXATION—RECORDATION TAX—CHURCHES NOT EXEMPT FROM TAX.

December 18, 1958.

Mr. W. Waverly Webb,
Clerk of the Circuit Court
for Prince George's County.

In your recent letter you ask whether or not a construction loan mortgage secured on property upon which a church building is to be erected is exempt from the recordation tax and the Prince George's County transfer tax.

Article 81, Section 277, Annotated Code of Maryland (1957 Ed.) imposes a recordation tax and Chapter 784 of the Acts of 1957 imposes the Prince George's County transfer tax on instruments of writing conveying any interest in real estate. Both statutes define mortgages as being instruments of writing included within the meaning thereof. We have been unable to find any exemption of churches from the payment of the taxes imposed by either of the two statutes and are, therefore, of the opinion that both of the taxes must be paid on a construction loan mortgage secured on property upon which a church is to be erected before the mortgage may be recorded among the Land Records of Prince George's County.

C. FERDINAND SYBERT, *Attorney General.*

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

TIDEWATER FISHERIES

TIDEWATER FISHERIES—SIZE OF DREDGES TO BE USED IN MARYLAND WATERS.

January 3, 1958.

Hon. Lloyd L. Simpkins,
Member, House of Delegates.

Your recent letter addressed to Attorney General Sybert has been referred to me for reply. You request an opinion concerning the legal size of dredges to be used in the waters of this State under Article 66C, Section 655(1) of the Annotated Code of Maryland (1951 Ed.). (Section 702(1), (1957 Code)).

There have been no written rulings of this office construing Section 655(1) of Article 66C, but the statute has been informally interpreted for the Commission.

In the second paragraph of your letter to Mr. Sybert you state that the law seems fairly clear as to the size and nature of dredges that can be used in this State on mud bottoms, and quoted a portion of the said Section as follows: "* * * or 44 inches in length, measuring from the outside teeth on dredges used in dredging on mud bottoms, * * *". Upon reading Section 655, Subsection (1), of Article 66C, it is necessary to read and consider the same in its entirety.

> "It shall be unlawful for any person to use or employ in catching or taking oysters in the waters of the State or to have in his possession any scoop, dredge, scrape or similar instrument *having* a *tooth bar more than forty-two inches in length* measuring from the outside teeth on dredges used in dredging on rock bottoms or forty-four inches in length measuring from the outside teeth on dredges used in dredging on mud bottoms, or of a weight exceeding two hundred pounds. * * *". (Emphasis added.)

This Section clearly sets forth the size of the dredges to be used in Maryland. The instrument shall not have a *tooth*

bar of more than forty-two inches in length when used on rock bottoms, or forty-four inches in length when used in dredging on mud bottoms. It is my opinion that the limitations on the size of the dredge, as prescribed in Article 66C, Section 655, Subsection (1), refers to the entire length of the tooth bar.

If the Legislature had meant a different interpretation, the wording of the Act could have easily been changed and limit merely the distance from the outside teeth on the dredges without reference to the tooth bar.

EDWARD S. DIGGES, *Special Asst. Attorney General.*

TRAFFIC COURT

TRAFFIC COURT, BALTIMORE CITY—TO TRY OVERWEIGHT VIOLATIONS COMMITTED ON THE APPROACHES TO THE HARBOR TUNNEL IN BALTIMORE CITY ONLY AND NOT THOSE WHICH OCCUR OUTSIDE THE CITY—MAY NOT SUSPEND SENTENCE IN OVERWEIGHT CASES.

April 3, 1958.

Judge Richard Paul Gilbert,
Acting Chief Magistrate, Traffic
Court of Baltimore City.

In your recent letter you have asked whether or not Justices of the Peace of the Traffic Court of Baltimore City have jurisdiction to try overweight violations committed on that portion of the approaches to the Harbor Tunnel that are not within the confines of the City of Baltimore.

Section 315, Article 66½, Annotated Code of Maryland (1957 Ed.), provides that it shall be a misdemeanor for any person, firm, corporation, co-partnership, association, or the agent or servant of any person, firm, etc., to operate any vehicle, commercial vehicle, tractor trailer, semi-trailer, trailer, or combination thereof, on a public highway if that vehicle has a gross weight in excess of the maximum registered weight, as indicated on the certificate of registration issued pursuant to Section 81, Article 66½, or any statutory weight limit allowed under the provisions of Article 66½ or Article 89B of the Code. Subsection (1) of Section 315 specifically confers jurisdiction upon the Justices of the Peace of the Traffic Court of Baltimore City to hear and determine all complaints of the violation of any of the provisions of the law relating to truck weights.

Section 320, Article 66½, Annotated Code, (1957 Ed.) provides that any person who shall be taken into custody because of a violation of any of the provisions of Article 66½, shall forthwith be taken in the counties of the State of Maryland before the nearest available Justice of the Peace or Trial Magistrate, or Clerk to the Trial Magis-

trate, Committing Magistrate or police justice of the county in which the offense is committed, or if in Baltimore City, before the Justice of the Peace of the Traffic Court, or Clerk of said Court, and be entitled to immediate hearing before said Justice of the Peace, Trial Magistrate, Committing Magistrate, Police Justice or Justice of the Peace of the Traffic Court.

Section 348, Article 66½ of the Annotated Code (1957 Ed.) provides that the Magistrates of the Traffic Court of Baltimore City shall have exclusive jurisdiction within the City of Baltimore to hear and determine all complaints of violations of the motor vehicle laws of the State and of the traffic ordinances of Baltimore City.

The jurisdiction of all Justices of the Peace in Maryland is entirely statutory, and is determined by the British Statutes in force in Maryland and the constitutional and statutory law of the State. *State v. Glenn,* 54 Md. 572; Thomas, *Procedure in Justice Cases,* 1917 Ed., Section 30.

In my opinion, it is quite clear that the law only grants jurisdiction to the Justices of the Peace of the Traffic Court of Baltimore City to hear and determine violations committed within the confines of the City. You are therefore advised that the Traffic Court of Baltimore City does not have jurisdiction to try overweight violations which occur on that portion of the approaches to the Harbor Tunnel which lie outside of the boundaries of the City of Baltimore.

You also ask if the Justices of the Peace of the Traffic Court of Baltimore City have authority to suspend fines imposed under the provisions of Section 315, Article 66½.

Section 352, Article 66½, Annotated Code (1957 Ed.) enacted in 1943, provides that the Magistrates of the Traffic Court shall possess the same power, to impose a lesser penalty of the same character in lieu of the minimum penalty provided by the motor vehicle laws, that is now conferred upon the Criminal Court of Baltimore City by Section 643, Article 27, Annotated Code (1957 Ed.). Section 353, Article 66½, also enacted in 1943, provides that the Mag-

istrates of the Traffic Court shall have and possess power to suspend sentence in any case within their jurisdiction, provided that such suspension is made at the trial of the case and not after judgment has been pronounced.

Section 315(h), which was enacted in 1955, provides that the Trial Magistrate shall not have power to suspend or reduce the fine in the case of a conviction for a violation of any of the provisions of Article 66½ relating to the weight of a vehicle.

Section 315(k), also enacted in 1955, provides that the Trial Magistrate finding a driver guilty of violating that Section shall not have power to suspend the fine or imprisonment provided therein.

The conflict between the provisions of Sections 352 and 353 and those of Sections 315(h) and (k) is quite evident. The cardinal rule to be followed in the construction of statutes, however, is to ascertain the intention of the Legislature and to see to it that that intention is carried out. *Clem v. Valentine,* 155 Md. 13; *Hagerstown v. Littleton,* 143 Md. 591. Since the provisions of Sections 352 and 353 are repugnant to those of Sections 315(h) and (k), the statute last enacted into law will be the effective statute, and should guide the Magistrates of the Traffic Court of Baltimore City. *State v. Gambrill,* 115 Md. 506; *Ferry Corp. v. Queen Anne's County,* 160 Md. 398. The statute last in order of passage is the last expression of the legislative will and I am of the opinion that the Legislature knew of the existence of Sections 352 and 353 when Section 315 was passed, and that it definitely intended that no Magistrate was to have the power to suspend the fines and imprisonment provided for violations of the laws governing overweight motor vehicles.

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

TRIAL MAGISTRATES

TRIAL MAGISTRATES—CITY OF CUMBERLAND—CITY CANNOT TAKE AWAY MAGISTRATE'S POWER TO SUSPEND SENTENCE—CITY POWERS TO BE STRICTLY CONSTRUED.

December 10, 1958.

Judge Morris Baron,
Trial Magistrate of Allegany County.

In your recent letter you ask whether or not the Mayor and City Council of Cumberland may pass an ordinance which prohibits you as a Police Magistrate for that City from suspending sentence in cases involving parking violations.

Article IV, Section 42, Maryland Constitution, provides for the office of Justice of the Peace, and further provides that Justices shall have such powers and duties as are prescribed by law. Section 97, Article 52, Annotated Code of Maryland (1957 Ed.), provides for the appointment by the Governor of Justices of the Peace to be known as "Committing Magistrates" or to be designated "Trial Magistrates" in all of the counties of the State, and Section 108(1), Article 52, provides the number of Justices of the Peace to be designated as Trial Magistrates for Allegany County. Sections 26 and 79 of the Charter of the City of Cumberland (1950 Ed.) provide for the election of a Police Magistrate for that City by the Mayor and City Council from among the Justices of the Peace of the State of Maryland residing in said City.

Section 100, Article 52, (1957 Code), provides that the authority and powers in civil and criminal matters of each of the Justices of the Peace designated "Trial Magistrates", *except as modified by said Section 100,* shall be such as Justices of the Peace had at the time of its passage under the applicable laws of the counties or municipal corporations within which the Justices of the Peace were sitting. Section 100 further provides that Trial Magistrates shall have and possess power to suspend sentence or both sentence and

costs in any case within their jurisdiction, provided it is done at the trial of the case and not afterwards.

Section 78 of the Charter grants authority to the Mayor and City Council of Cumberland to impose such fines and penalties or imprisonment as they deem fit for violations of the City ordinances. This, in our opinion, however, does not grant to them the authority to limit or change the power of the Police Magistrate for the City. Nowhere in the City Charter, or in Article 23A, (1957 Code), which by its terms has become part of the City Charter, have we been able to find any grant of authority to the City of Cumberland to prescribe or limit the jurisdiction, authority or duties of the Police Magistrates of that City. The Charter only provides that the Mayor and Council elect a Police Magistrate and grants to them the authority to enforce their ordinances by fines and penalties or imprisonment.

Ordinances which assume directly or indirectly to prohibit that which State statutes or the Constitution permit are null and void. *Heubeck v. City of Baltimore,* 205 Md. 203; *Rossberg v. State,* 111 Md. 394. Municipal corporations of this State possess only those powers expressly granted to them, or those necessarily implied as incidental to the powers expressly granted. They have no inherent rights or powers, but possess only those which are delegated to them by the General Assembly. Their powers must be found, if at all, in their charter or in legislative grant of authority. *Schultz v. State,* 112 Md. 211; *Havre de Grace v. Johnson,* 143 Md. 601; *Baltimore v. Canton Co.,* 186 Md. 618; *Duvall v. Lacy,* 195 Md. 138; *Mt. Airy v. Sappington,* 195 Md. 259. Powers conferred on municipal corporations are to be strictly construed and any reasonable doubt concerning the existence of power in a municipality must be resolved against the municipality. *Rushe v. Hyattsville,* 116 Md. 122; *Hanlon v. Levin,* 168 Md. 674.

Since the State statute provides that Trial Magistrates shall have the authority to suspend sentence and since the city has not been expressly granted the power to take away that authority, we are of the opinion that the Trial Magis-

trates elected as Police Magistrates for the City of Cumberland are not bound by any provision contained in an ordinance of the City which attempts to take away that authority.

C. FERDINAND SYBERT, *Attorney General.*

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

UNSATISFIED CLAIM AND JUDGMENT FUND

UNSATISFIED CLAIM AND JUDGMENT FUND—AMOUNT OF FEE IS DETERMINED AT TIME OF REGISTRATION OF MOTOR VEHICLE—HIGHER FEE CHARGED FOR UNINSURED VEHICLE MAY BE REFUNDED IF PAID UNDER MISTAKE OF FACT BY REGISTRANT BECAUSE VEHICLE WAS ACTUALLY INSURED AT TIME OF REGISTRATION—HIGHER FEE MAY NOT BE REFUNDED IF VEHICLE UNINSURED WHEN REGISTERED BUT POLICY OF LIABILITY INSURANCE OBTAINED SUBSEQUENTLY—DEPARTMENT OF MOTOR VEHICLES AND COUNTY TREASURERS MAY BE REIMBURSED FROM FUND FOR EXTRA EXPENSES INCIDENT TO COLLECTION OF UNSATISFIED CLAIM AND JUDGMENT FUND FEES.

July 11, 1958.

Mr. Carlton S. Hardwich, Chairman,
Unsatisfied Claim and Judgment
Fund Board.

You have requested advice upon several questions which have arisen in the administration of the Unsatisfied Claim and Judgment Fund Law.

I.

Section 151 (a) of Article 66½ of the Annotated Code of Maryland (1957 Ed.) requires every registrant of a motor vehicle in this State for the yearly registration period commencing April 1, 1958, or May 1, 1958, to pay a fee of Eight Dollars ($8.00) *"at the time of registering"* the motor vehicle if the vehicle is not covered by a policy of liability insurance meeting the requirements of Section 122 of Article 66½ of the Annotated Code, or if the owner of the vehicle does not hold a certificate of self-insurance issued by the Department of Motor Vehicles as provided in Section 122 of Article 66½ of the Annotated Code. If there is a proper policy of liability insurance or a certificate of self-insurance covering the vehicle, the fee to be paid by the registrant is only One Dollar ($1.00). Article 66½, Section 151 (b) of the Annotated Code.

You have received requests for refunds of Seven Dollars ($7.00) from (a) registrants who paid the higher fee of Eight Dollars ($8.00) because they stated that they did not have the required policy of liability insurance but discovered subsequently that a proper policy was in force at the time of registration; (b) registrants who paid the higher fee of Eight Dollars ($8.00) because, in fact, they did not have the required policy of liability insurance at the time of registration but procured a proper policy before the expiration date of the prior registration year, April 1, 1958 or May 1, 1958, as the case might be; and (c) registrants who paid the higher fee of Eight Dollars ($8.00) because, in fact, they did not have the required policy of liability insurance at the time of registration but procured a proper policy since then and subsequent to the expiration of the prior registration year.

Liability to pay the higher fee of Eight Dollars ($8.00) depends upon whether there is a required policy of liability insurance or certificate of self-insurance in effect as to the vehicle *when it is registered.* The fee is to be paid when the motor vehicle is registered and if it is at that time an "uninsured motor vehicle", as defined in Section 150(b) of Article 66½ of the Code, the fee is Eight Dollars ($8.00).

There is no statutory provision for a refund of all or part of the additional fee paid to the Unsatisfied Claim and Judgment Fund under a mistake of fact or of law. At common law, a tax or license fee paid under a mistake of fact by the payor or under a mutual mistake of fact may be refunded to the payor upon request. *George's Creek Coal & Iron Co. v. County Commissioners,* 59 Md. 255, 260 (1883); *Wasena Housing Corp. v. Levay,* 188 Md. 383, 387 (1947).

In our opinion, you may refund the Seven Dollars ($7.00) paid in excess under a mistake of fact by registrants whose motor vehicles were not "uninsured motor vehicles", as defined by the statute, at the time of registration. You should require proof that there was a proper policy of liability insurance or certificate of self-insurance in effect as to the vehicle at the time of registration.

Registrants who have requested a refund because they procured a proper policy of liability insurance since the registration of the vehicles, whether the policy was obtained before or after the expiration date of the prior registration year, are not entitled to a refund, in our opinion, if the vehicle was an "uninsured motor vehicle", as defined by the statute, at the time of registration.

II.

The Department of Motor Vehicles has requested reimbursement from the Unsatisfied Claim and Judgment Fund for expenditures incurred by that department to collect fees for the Fund for the registration year commencing in 1958. You have received similar requests from the fiscal officers of several counties who act as agents for the Department of Motor Vehicles to register certain vehicles. The county officers receive and retain a fee of fifteen cents (15c) from each registrant for the "services rendered by the County Treasurer in connection with such registration, . . .". Article 66½, Section 33 of the Annotated Code.

The department and the county officers have represented to you that additional personnel were hired to process the applications for the recent registrations. Registrants were required to state whether the vehicle was an insured or an uninsured motor vehicle. Each of these applications was reviewed to determine whether the fee of Eight Dollars ($8.00) or the lesser fee of One Dollar ($1.00) was due. The additional fees were collected and tabulated so that a proper disbursement could be made to the Fund.

All sums paid to the Commissioner of Motor Vehicles as Unsatisfied Claim and Judgment Fund fees shall be remitted by the Commissioner of Motor Vehicles to the Treasurer of the State of Maryland within thirty days after receipt. The money received by the Treasurer shall be "held by the Treasurer in trust for the carrying out of the purposes of . . . and for the payment of the cost of administering" the Unsatisfied Claim and Judgment Fund law. The Treasurer is the custodian of the Fund and is authorized to make dis-

bursements from the Fund. Article 66½, Section 175 of the Annotated Code. The Unsatisfied Claim and Judgment Fund Board is charged with the responsibility for administering the Fund and is empowered to employ such administrative, clerical and other help as may be necessary for the proper discharge of the Board's duties. Article 66½, Section 152 of the Annotated Code.

The Legislature may devote funds to a particular purpose from which they may not be diverted. *Wyatt v. State Roads Commission,* 175 Md. 258, 269 (1938). The Unsatisfied Claim and Judgment Fund may be used to pay authorized claims and to pay the expenses of administering the Unsatisfied Claim and Judgment Fund law.

The collection of the fees which constitute the Fund is obviously a part of the administration of the law. In our opinion, moneys from the Fund may be used to reimburse the Department of Motor Vehicles and the fiscal officers of the counties for expenses directly incurred to collect the Unsatisfied Claim and Judgment Fund fees. Before disbursements from the Fund are authorized for this purpose, you should require proof that the additional expenses were directly related to the collection of the Unsatisfied Claim and Judgment Fund fees.

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

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND LAW—IF POLICY OF INSURANCE ISSUED WHEN MOTOR VEHICLE WAS REGISTERED IN MARYLAND, VEHICLE IS AN "UNINSURED MOTOR VEHICLE" UNLESS POLICY WAS ISSUED BY INSURER AUTHORIZED TO DO BUSINESS IN MARYLAND—IF POLICY ISSUED BY UNAUTHORIZED INSURER, MOTOR VEHICLE IS AN "UNINSURED MOTOR VEHICLE" UNLESS VEHICLE WAS REGISTERED IN ANOTHER STATE WHEN POLICY WAS ISSUED AND INSURER HAS AUTHORIZED DEPARTMENT OF MOTOR VEHICLES TO ACCEPT SERVICE OF PROCESS.

December 9, 1958.

Mr. Carlton S. Hardwich, Chairman,
Unsatisfied Claim and Judgment
Fund Board.

An owner of a motor vehicle registered in Maryland has a policy of automobile liability insurance issued by a company not qualified to do business in this State. The insurer has executed a power of attorney authorizing the Department of Motor Vehicles to accept service on the insurer's behalf of notice or process in any action upon such policy arising out of an accident.

You ask whether this motor vehicle is an "uninsured motor vehicle" within the definition of that term in the Unsatisfied Claim and Judgment Fund law.

An uninsured motor vehicle is defined in the Unsatisfied Claim and Judgment Fund law as a motor vehicle "as to which there is not in force a liability policy meeting the requirements of Section 122 of (Article 66½) and which is not owned by a holder of self-insurance under said (Section)". Article 66½, Section 150(h), Annotated Code of Maryland (1957 Ed.). Section 122 requires that in certain instances the owner or operator of a motor vehicle involved in an accident must deposit security in a sum sufficient to discharge any judgment for damages resulting from the accident. The deposit is not required if the owner or operator was protected by a policy of automobile liability insur-

ance when the accident occurred. The policy must have been issued by an insurer authorized to do business in this State if the vehicle was registered in this State when the policy was issued or last renewed. If the vehicle was not registered in this State when the policy was issued or last renewed, a policy issued by an insurer not authorized to do business in this State will be sufficient if the insurer has executed a power of attorney authorizing the Department of Motor Vehicles to accept on the insurer's behalf service of notice or process in any action upon the policy arising out of the accident.

In our opinion, if the policy of automobile liability insurance was issued or last renewed when the motor vehicle was registered in this State, the vehicle is an uninsured motor vehicle, as that term is defined in the Unsatisfied Claim and Judgment law, unless the policy was issued by an insurer authorized to do business in this State. If the policy of automobile liability insurance was not issued by an insurer authorized to do business in this State, the motor vehicle is an uninsured motor vehicle, as that term is defined in the Unsatisfied Claim and Judgment Fund law, unless the vehicle was registered in another State when the policy was issued or last renewed and the insurer has executed a power of attorney authorizing the Department of Motor Vehicles to accept service of notice or process in any actions upon the policy.

C. FERDINAND SYBERT, *Attorney General.*

E. CLINTON BAMBERGER, JR., *Asst. Attorney General.*

WORKMEN'S COMPENSATION

WORKMEN'S COMPENSATION—EXEMPTION OF CERTAIN EMPLOYERS AND EMPLOYEES FROM MARYLAND LAW UNDER CERTAIN CIRCUMSTANCES—SELF-INSURANCE—APPROVAL OF APPLICATION TO SELF-INSURE IS WITHIN DISCRETION OF COMMISSION, AND MAY BE CONDITIONED UPON SUCH TERMS AUTHORIZED BY STATUTE AS COMMISSION MAY IMPOSE.

August 14, 1958.

Mr. Meyer M. Cardin, Chairman,
Workmen's Compensation Commission.

We have your letter of August 5, 1958, enclosing copies of correspondence from counsel for the Potomac Electric Power Company, together with that company's application to insure itself pursuant to the provisions of Section 16(3)(a) of Article 101 (1957 Code). You ask whether the application should be approved.

We note from the correspondence that Potomac is a District of Columbia and Virginia corporation engaged in supplying electric service to the public in the metropolitan Washington area. Its principal office is in Washington, where all of its employees are hired. With the expansion of services, an increasing number of Potomac's employees have been regularly working in Maryland.

The predecessor commission granted Potomac's application to carry its own risk in 1915 "without bond" according to the correspondence. Since 1928, all of Potomac's compensation claims arising from injuries in Maryland have been processed under the Federal Longshoremen's and Harbor Workers' Compensation Act, which was made applicable to the District of Columbia. This Act provides more liberal benefits than the Maryland law, which accounts for the processing of claims thereunder instead of under the Maryland Act.

The application for the privilege to self-insure discloses that Potomac is a public utility possessing substantial

assets. As a public utility, it is, of course, subject to federal regulation.

Section 16, Article 101 (1957 Code) provides three methods whereby the employer shall secure compensation to his employees, including self-insurance pursuant to subsection (3) (a). You will notice that approval of this method is entirely within the Commission's discretion, and upon such terms and conditions, in accordance with subsection (3) (a), as the Commission may require.

Your attention is also directed to the provisions of Section 67 (3) which state that non-resident employees of a non-resident employer whose contract of hire is entered into in another State are exempt from the Maryland Act while temporarily or intermittently doing work in this State, provided there is workmen's compensation insurance coverage under the laws of the other State which reaches employment in this State, and provided further that the extra-territorial provisions of the Maryland Act are recognized in such other State, and employers and employees covered in Maryland are likewise exempted from the application of the workmen's compensation laws of such other State. This section also declares that the laws of such other State shall be the exclusive remedy for injuries received while working in this State.

Counsel for Potomac represents that there are approximately 70 employees working "more or less regularly" in Maryland, which indicates something more than the "temporary" or "intermittent" employment required to qualify for exemption from the Maryland Act under the above section, assuming the other tests therein provided are met. For this reason, we are not prepared to say that Potomac or its employees are exempt from the Maryland Act, or that the Longshoremen's and Harbor Workers' Act is the exclusive remedy for injuries occurring in Maryland. At the same time, Section 67 (3) reflects a legislative intent to give extra-territorial effect to the compensation laws of sister States in respect to injuries occurring in Maryland, at least to the extent of employees who are on a temporary or intermittent basis in this State at the time of the accident.

In view of the nature of the employer's business, the substantial assets reflected in the application, and the long-standing practice of processing claims under the District Act, regardless of where the accident occurs, we see no legal objection to the Commission's approval of the application to self-insure. This is a matter entirely within the Commission's discretion, of course, and approval may be conditioned upon such terms authorized by Section 16(3) (a) as the Commission may choose to impose.

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

THEODORE C. WATERS, JR., *Asst. Attorney General.*

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