

HALL OF RECORDS

ANNAPOLIS, MARYLAND

201012053

ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1960

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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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

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

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

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

⁴On 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.

⁶Mr. 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
James O'C. Gentry.....	Assistant Attorney General
Mary Arabian.....	Assistant Attorney General
James H. Norris, Jr.....	Special Assistant Attorney General
¹ John Martin Jones, Jr.....	Special Assistant Attorney General for the Comptrol- ler of the Treasury
² William J. McCarthy.....	Special Assistant Attorney General for the Comptrol- ler of the Treasury
³ Lawrence F. Rodowsky.....	Special Assistant Attorney General for the Depart- ment of Assessments and Taxation
Robert C. Murphy.....	Special Assistant Attorney General for the University of Maryland
⁴ LeRoy W. Preston.....	Special Assistant Attorney General in Charge of Sub- versive Activities Control
Joseph D. Buscher.....	Special Assistant Attorney General for the State Roads Commission
Bernard S. Melnicove.....	Special Assistant Attorney General for the Depart- ment of Employment Security
Edward S. Digges.....	Special Assistant Attorney General for the Depart- ment of Tidewater Fisheries
Eli Baer.....	Special Assistant Attorney General for the Depart- ment of Motor Vehicles
⁵ Louis E. Schmidt.....	Special Assistant Attorney General for the Depart- ment of Health
J. Howard Holzer.....	Special Attorney for State Accident Fund

Mrs. Anne Davis Greer.....	Administrative Assistant, State Law Department
Miss Margaret E. Holliday.....	Stenographer, Law and Legislative
Miss Agnes T. Conroy.....	Stenographer, Law and Legislative
Mrs. Katherine D. Hudlin.....	Stenographer, Law and Legislative
Mrs. Mary G. Kress.....	Stenographer, Law and Legislative

¹Resigned August 30, 1960.

²Appointed August 31, 1960.

³Appointed January 6, 1960

⁴Resigned April 12, 1960

⁵Appointed December 12, 1960

Offices: 1201 Maryland National Bank
Building
Baltimore 2, Maryland

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Annual Report For 1960

January 1, 1961.

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

DEAR GOVERNOR TAWES:

I am herewith submitting to you a report of the business and proceedings of the State Law Department during the period beginning January 1, 1960, and ending December 31, 1960. I am submitting also, a detailed financial statement for the fiscal year beginning July 1, 1959, and ending June 30, 1960.

There has been such an increase in the number of cases that it is impractical to give a resume of each one and I have therefore indicated the various Courts and the number of cases in each in which the Department participated. Some have been completed, others partially tried and some still pending.

SUPREME COURT OF THE UNITED STATES	5 cases
UNITED STATES CIRCUIT COURT FOR THE FOURTH CIRCUIT	9 cases
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.....	18 cases
COURT OF APPEALS OF MARYLAND	
Civil cases	9 cases
Criminal cases	88 cases
APPEALS FROM PATUXENT INSTITUTION..	4 cases
MEMORANDA IN POST CONVICTION CASES	68 cases
CASES IN LOWER COURTS.....	112 cases

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 eighteen hundred were approved during the year.

Before being accepted by the State, all leases, contracts, contract bonds, deeds, agreements and easements submitted to the Department of Public Improvements and the Department of Budget and Procurement were approved by this Department as to form and legal sufficiency, as well as all deeds and agreements submitted by the Board of Public Works and similar documents submitted by other Departments in which the State had an interest. All rules and regulations were examined by us as to legality before being filed with the State Departments designated by statute.

The General Assembly convened on February 3, 1960, and adjourned March 3, 1960.

The Annapolis office during the session was in charge of Mr. Walter R. Tabler, although 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. After the adjournment of the General Assembly, at your request, we examined all bills passed as to legality before they were signed by you.

In May, I attended the meeting of the Southern Regional Group of the National Association of Attorneys General which was held in Nashville, Tennessee. Deputy Attorney General Prescott and I attended the National Convention of the Association which was held in San Francisco in July.

The following changes in the personnel of the Department occurred during the year: On August 30, 1960, Mr. John Martin Jones, Jr. resigned to resume the private practice of law and I appointed Mr. William J. McCarthy in his place on August 31, 1960. On January 6, 1960, I appointed Mr. Lawrence F. Rodowsky to the newly created

position of Special Assistant Attorney General for the Department of Assessments and Taxation. On April 12, 1960, Mr. LeRoy W. Preston resigned as Special Assistant Attorney General in Charge of Subversive Activities Control, and the duties in connection with this Department were assumed by one of my other Assistants. The work was greatly curtailed by the decision of the United States Supreme Court in the *Nelson* case. On December 12, 1960, I appointed Mr. Louis E. Schmidt to the newly created position of Special Assistant Attorney General for the State Department of Health.

I wish to express to you my appreciation of your kindness and consideration, and to assure you that I, as well as the members of my staff, are ready and willing to respond to any demands made upon us to further the efficient handling of the State's interests.

With kindest regards, I am

Very truly yours,

C. FERDINAND SYBERT,
Attorney General.

FINANCIAL STATEMENT OF THE STATE LAW DEPARTMENT
FOR THE FISCAL YEAR BEGINNING JULY 1, 1959
AND ENDING JUNE 30, 1960

Appropriations and Budget Credits :

Program .01	\$160,140.37
Program .02	17,565.06
	\$177,705.43

Program .01

Legal Counsel and Advice :

Appropriation	\$156,552.00
Appearance Fees	276.00
Budget Credits	3,588.37
	\$160,416.37

Appearance fees turned into State Treasury.....	276.00
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Net Appropriation	\$160,140.37
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Salaries :

Attorney General	\$ 15,000.00
Deputy Attorney General.....	12,000.00
Assistant Attorney General (4)	40,000.00
Special Assistant Attorney General	7,500
Administrative Assistant, State Law Department	7,165.00
Stenographer, Law and Legislative (4)	19,483.19
Additional Clerical Assistance.....	—————

Salaries	\$101,148.19
----------------	--------------

Expenses (Exclusive of Salaries)

Communication	4,772.63
Travel	2,289.13
Motor Vehicle Operation and Maintenance	929.17
Contractual Services	11,216.51
Supplies and Materials.....	1,279.22
Equipment—Replacement	3,049.00
Equipment—Additional	16,545.21
Fixed Charges	18,595.43
	<hr/>
Expenses (Exclusive of Salaries)...	\$ 58,676.30
Salaries & Expenses.....	\$159,824.49
Reverted to State Treasury.....	315.88
	<hr/>
Net Appropriation	\$160,140.37

Program .02

Subversive Activities Control:

Appropriation	\$ 16,689.00
Budget Credits	876.06
Refunds	42.06
	<hr/>
Net Appropriation	\$ 17,565.06

Salaries:

Special Assistant Attorney General	\$ 6,057.87
Stenographer, Law and Legislative	5,064.15
	<hr/>
Salaries	\$ 11,122.02

Expenses (Exclusive of Salaries)

Communication	394.28
Travel	1,122.88
Contractual Services	1,383.94
Supplies and Materials.....	159.23
Equipment—Additional	800.00

Expenses (Exclusive of Salaries).....\$ 3,860.33

Salaries & Expenses

\$ 14,982.35

Reverted to State Treasury.....\$ 2,582.71

Net Appropriation

\$ 17,565.06

Summary

Total Net Appropriations:

Program .01

\$160,140.37

Program .02

17,565.06

\$177,705.43

Total Expenditures:

Program .01

\$159,824.49

Program .02

14,982.35

\$174,806.84

Total Reversion to State Treasury.....\$ 2,898.59

OFFICIAL OPINIONS
of the
ATTORNEY GENERAL of MARYLAND

ALCOHOLIC BEVERAGES

APPLICATION TO REMOVE RESTRICTION ON LICENSE OF MEMORIAL STADIUM CONCESSIONNAIRE—LIQUOR BOARD SHOULD NOT ACT THEREON UNTIL DEPARTMENT OF RECREATION AND PARKS HAS DECIDED WHETHER IT WILL PERMIT CHANGE IN PRACTICE REQUESTED.

April 5, 1960.

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

You have asked our opinion concerning the application of Maryland Sportservice, Inc., the concessionaire and licensee at the Baltimore Memorial Stadium, to remove the following restriction from its Class D Beer and Wine License:

“No beer to be dispensed by vendors passing through the stands—all sales to be made only at the twenty-one (21) fixed refreshment stands as set forth on the plat filed with this office.”

Your specific question is whether the Board is empowered to act on this application without having first received a statement from the City of Baltimore, Department of Recreation and Parks, assenting to the desired change in the method of sale, i.e., to the sale of beer in the stands themselves.

You state that the licensee concedes that no change in the method in which it dispenses beer can be made without having first received the permission of the Department of Recreation and Parks, regardless of any amendment to its liquor license. As the City of Baltimore is the owner of the Stadium and since the Department of Recreation and Parks has complete rule-making power concerning the operation thereof, you inquire whether the present application should be treated as one requiring the assent of the owner of the

premises under Section 56(17), Article 2B, Annotated Code of Maryland (1957 Ed.).

Section 56(17) requires all applications for licenses to contain certain information and to set forth certain statements, among which is a statement "duly executed and acknowledged by the owner of the premises in which the business is to be conducted assenting to the granting of the license applied for". While we have considerable doubt that this provision would apply in the ordinary case where a tenant requests a change in a restriction on an *existing* liquor license, we do not feel it necessary to rule on the scope of that Section at this time. The present case is not one where the landlord is a private party; it is one where the landlord is the City of Baltimore—a landlord whose property rights are held for the benefit of its citizens. Nor is this a case in which the contract rights between the landlord and tenant are a purely private matter. Here the Department of Recreation and Parks must act according to its own views as to the welfare of the public. While it has permitted the sale of beer in the Stadium under the present restrictions for some six years, you state that you have no indication whether that Department will permit a change along the lines of the present application.

Under the circumstances, we feel that basic principles of comity would justify, if not require, the Board's adopting the policy of taking no action until after the Department of Recreation and Parks has stated its position. It must be remembered that the Board could in no event authorize the sale of beer in the stands if the City would not permit such an action. It would seem to follow, therefore, that the City should have an opportunity to rule on the matter prior to any action by the Board.

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

JOHN MARTIN JONES, JR., *Asst. Attorney General.*

ALCOHOLIC BEVERAGES—LICENSES—ISSUANCE OF ALCOHOLIC BEVERAGE LICENSE TO WIFE WHERE COUNTY BOARD OF LIQUOR LICENSE COMMISSIONERS HAS ALREADY ISSUED ANOTHER LICENSE TO HUSBAND.

October 28, 1960.

*Hon. John L. Sanford, Jr.,
State Senator, Worcester County.*

We have your inquiry as to whether or not the Board of Liquor License Commissioners of Worcester County may issue to a married woman an alcoholic beverage license for establishment X when her husband already has been issued an alcoholic beverage license for establishment Y.

Article 2B, Section 41 (a) of the Annotated Code of Maryland (1957 Edition) provides:

“No more than one license . . . shall be issued in any county . . . to any person . . .”.

This language, in itself, simply raises the question you are posing, rather than answers it.

Article 2B, Section 56, further provides, however, that every application for a license shall contain, among others, the following statements:

“(12) A statement that the applicant . . . is not pecuniarily interested in any other place of business in said county . . . for which a license has been applied for, granted or issued . . .;” and

“(15) A statement that no person except the applicant is in any way pecuniarily interested in said license or in the business to be conducted thereunder . . .;”

Thus, the Legislature, by the enactment of the two above cited provisions in Article 2B, Section 56, has given an indication that even though two licenses are not issued to the same person in the technical sense that the same person has not been issued both licenses in his or her own name, if the two licenses are issued to two different named

persons who have a common pecuniary interest, there will be a violation of the licensing provisions of Article 2B.

As we stated in our opinion at 34 Opinions of the Attorney General 86, the question of whether or not this forbidden common pecuniary interest exists is one to be determined by the Board of Liquor License Commissioners from the evidence presented to it upon the application for a license.

This office does not attempt to determine whether or not the issuance of the second license in the specific situation you mention would violate the provisions of Article 2B, since this is a factual determination to be made by the Board on evidence not presently before us. Suffice it to say for guidance of the Board, this office has recognized the principle that the issuance of several licenses to close members of a single family is suspect. See 20 Opinions of the Attorney General 145. We have also been advised by the Alcoholic Beverages Division, Office of the Comptroller, which agency is charged with the administration of Article 2B and whose interpretation of such law is entitled to strong consideration, that as a general rule it considers the issuance of one license to a husband and another to a wife to be in violation of the licensing provisions of Article 2B, since each is normally pecuniarily interested in any business venture of the other by the very nature of their relationship and the rights incident thereto.

We advise you, therefore, that it is for the Board of Liquor License Commissioners of Worcester County to determine from the evidence presented to them whether or not such a forbidden common pecuniary interest would here exist. It is our opinion that the Board should require proof in the very strictest sense that no joint pecuniary interest would here exist between the subject husband and wife before it issues the requested license to said wife.

C. FERDINAND SYBERT, *Attorney General.*

WILLIAM J. MCCARTHY, *Asst. Attorney General.*

LICENSES—LIQUOR LICENSE MAY BE MADE SUBJECT TO A
CHATTEL MORTGAGE AND SOLD UNDER FORECLOSURE
PROCEEDINGS.

November 9, 1960

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

We have your inquiry as to whether an alcoholic beverage license may be made subject to a chattel mortgage and sold under foreclosure proceedings. For the reasons hereafter set forth, we are of the opinion that this question should be answered affirmatively.

In our recent opinion appearing at 43 Opinions of the Attorney General 83, we advised you that a liquor license may be seized and sold to satisfy an ordinary judgment. We adopt the reasoning of this prior opinion that such license is something of value and has the attributes of property for the purposes here under consideration, even though it may lack the full prestige of a property right in regard to certain constitutional protections which the Legislature has chosen not to afford it because of the necessity of unimpeded State regulation of the liquor industry. See Article 2B, Section 72, Annotated Code of Maryland (1957 Ed.).

As we indicated in our previous opinion, a liquor license may be sold or assigned pursuant to the provisions of Article 2B, Section 74. The Court of Appeals of Maryland has recognized that "the term personal property embraces all objects and rights which are capable of ownership except freehold estates in land . . ." *Elkton Electric Co. v. Perkins*, 145 Md. 224, at 245. The Court, in its opinion at page 229, includes franchises, which generic classification embraces a liquor license among those items which constitute personal property. Since, on the basis of the foregoing, an alcoholic beverage license can thus be termed transferable personal property, we feel that your question as to whether such license may be mortgaged is further

answered by the case of *Salabes v. Castelberg*, 98 Md. 645, in which the Court succinctly states, at page 651 :

“The general rule is that all personal property capable of being sold can be mortgaged.”

We find no authority in Maryland dealing directly with this question. Other jurisdictions under the laws of which a license can be transferred in a fashion similar to our procedure under Article 2B, Section 74, have held, however, that such a license can be made the subject of a chattel mortgage. *Nicolini v. Langermann*, 104 S.W. 501; see *Deggender v. Seattle Brewing & Malting Co.*, 83 Pac. 898. See also *In re Rainbow Express, Inc.*, 179 F. 2d 1, in which it was held that the certificate of convenience and necessity of an interstate motor carrier may be made subject to a chattel mortgage.

We do not feel that our previous opinion that an alcoholic beverage license is subject to levy and sale in satisfaction of an ordinary judgment is weakened by the decision rendered on July 29, 1960, in the case of *Lit v. Berger* (Superior Court of Baltimore City, 1953-441-29505, Harlan, J.). The *Lit* case decided that the fact that the alcoholic beverage laws require liquor licenses to be issued to named individuals, because of which a license was there taken out for a partnership business in the individual names of a husband and wife, does not support the conclusion that the husband and wife had *severable* property interests in such license which was used by them in the conduct of a business owned by them as tenants by the entireties.

We therefore advise you that an alcoholic beverage license may be made subject to a chattel mortgage and sold under foreclosure proceedings. Such sale would, of course, be subject to the approval of the Board of Liquor License Commissioners in the same manner as an original application for a license must be approved. See Article 2B, Section 74(a).

C. FERDINAND SYBERT, *Attorney General*.

WILLIAM J. MCCARTHY, *Asst. Attorney General*.

BANKS AND BANKING

FHA MORTGAGES—CHARGE FOR FHA MORTGAGE INSURANCE PREMIUM DOES NOT CONSTITUTE USURY—SERVICE CHARGE MADE BY MORTGAGEE UNDER FHA MORTGAGE CONSTITUTES USURY TO THE EXTENT THAT IT EXCEEDS THE LEGAL RATE OF INTEREST.

January 5, 1960.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You have forwarded to this office an inquiry concerning the question of the validity of certain practices relating to various FHA guaranteed mortgage loans and requested us to determine whether the interest and other charges are usurious under the provisions of Section 57 of Article III of the Maryland Constitution and the applicable sections of Article 49 of the Annotated Code of Maryland (1957 Ed.). It has been pointed out that under the provisions of the National Housing Act, as amended (12 U.S.C.A., Sections 1701, *et seq.*), the Federal Housing Administration is authorized to insure certain mortgages originated by FHA approved lending institutions upon compliance with the requirements set forth in the National Housing Act and in regulations issued by the Federal Housing Commissioner.

One of the regulations issued by the Commissioner is a limitation upon the maximum interest rate which may be provided on mortgages submitted to the FHA for insurance. Prior to September 23, 1959, the maximum permissible interest rate was $5\frac{1}{4}\%$ per annum. However, on that date the Commissioner amended the regulations and permitted interest on certain mortgages at the rate of $5\frac{3}{4}\%$ per annum. In addition to providing for the payment of interest and the imposition of certain usual settlement charges approved by the Commissioner, the act permits the Commissioner to collect a "premium charge" for the insurance of mortgages in an amount not less than $\frac{1}{2}$ of 1% per annum, nor more than 1% per annum, of the principal balance outstanding (12 U.S.C.A., Section 1709(c)). We

are advised that the current premium charge is $\frac{1}{2}$ of 1% per annum. We are also advised that the Commissioner has issued regulations permitting a "service charge" of $\frac{1}{2}$ of 1% per annum on the principal balance outstanding on FHA mortgage loans of \$8,000 or less.

It appears that your inquiry raises two questions :

1. Does the collection of a "premium charge" of $\frac{1}{2}$ of 1% per annum in addition to interest of $5\frac{3}{4}\%$ per annum on mortgages insured by the FHA constitute usury, and
2. Does the collection of a "service charge" of $\frac{1}{2}$ of 1% per annum in addition to interest of $5\frac{3}{4}\%$ per annum on mortgages of \$8,000 or less insured by the FHA constitute usury?

Section 57 of Article III of the Constitution of Maryland provides that the legal rate of interest shall be 6% per annum unless otherwise provided by the General Assembly. Implementing this provision, the General Assembly, in Article 49, Sections 1 and 3, Code, has provided that if any person shall exact, *directly or indirectly*, for the loan of money a rate greater than 6% per annum, he shall be deemed guilty of usury. The Court of Appeals has ruled that no device or subterfuge of a lender will be permitted to shield him in taking more than legal interest on a loan. In whatever part of the transaction usury may lurk or in whatever form it may take, or under whatever guise the offender may attempt to evade the law, the Court will seek to ascertain what the contract actually was between the parties and, where necessary, give the debtor relief. See *Plitt v. Kaufman*, 188 Md. 606; *Brenner v. Plitt*, 182 Md. 348; *Andrews v. Poe*, 30 Md. 485.

In the case of *Plitt v. Kaufman*, *supra*, the Court said :

"Where a creditor exacts of a debtor, as a condition of the loan, a sum in addition to the lawful interest, whether designated as a bonus, commission or carrying charge, or by any other name, the transaction is tainted with usury except where the

sum so exacted, when added to the stipulated interest, does not exceed interest at the maximum lawful rate on the principal sum of the loan.”

In answering the questions presented, it is necessary to examine the nature of the transaction and to analyze the elements involved. In regard to the “premium charge”, it is necessary to determine the purposes for the charge involved. Congress passed the National Housing Act for the purpose of encouraging improvement in housing standards and conditions and has made appropriate amendments from time to time in furtherance of this purpose. See *Darlington, Inc. v. FHA*, 142 F. Supp. 341. The provisions of the act permit the FHA to insure mortgages and thus afford adequate protection to mortgagees who lend on the security of a mortgage with no, or low, down payments. When a home buyer desires an FHA insured loan, the mortgagee applies for the insurance on forms provided by the Federal Housing Commissioner. (See C.F.R., Sections 221.9 and 221.10.) The application form, however, requires the signature of the proposed borrower and contains a statement as follows: “This statement . . . is made by the undersigned for the purpose of obtaining the benefits of a mortgage loan to be or which may be insured under the provisions of the National Housing Act”. In the event that the application is approved and the FHA insures the mortgage, the mortgagee is responsible for the payment of premiums to the Commissioner in the amount fixed by the Commissioner’s regulations. (12 U.S.C.A., Section 1709(c), *supra*; 24 C.F.R., Section 222.2.) The mortgagee collects the “premium charges” from the mortgagor and disburses them in accordance with the Commissioner’s regulations. (24 C.F.R., Section 221.23.) *No part of the “premium charge” is retained by the mortgagee.*

The only benefit received by the mortgagee as a result of this transaction is the receipt of FHA debentures in the event the borrower defaults. (See 12 U.S.C.A., Section 1710.) The “premium charge” supports the operation of the FHA system as well as the mutual mortgage fund created by 12 U.S.C.A., Section 1708.

Chief Judge Thomsen of the United States District Court for the District of Maryland had an opportunity to review the nature of FHA insured loans in *United States v. Bland*, 159 F. Supp. 395, affirmed per curiam 261 F. 2d 109. Judge Thomsen stated:

“The obligations assumed by the United States under Title I of the National Housing Act and the Regulations adopted pursuant thereto amount to a guarantee of the buyers’ note. The fact that it is called insurance rather than a guarantee does not change the essential character of the obligation. Nor does the fact that the premium of one-half of one per cent. was paid by the Loan Association alter the essential nature of the transaction. It is immaterial whether the premium on a surety bond is paid by the obligor or the obligee; a surety bond is still a surety bond, and a guarantee is still a guarantee. * * *”.

* * *

“The buyers, the Blands, did offer such a surety or guarantee, by signing the F.H.A. Title I credit application at the time they signed the order for the goods. True, they were not required to seek out some friend or relative who would guarantee their note; the government has agreed to serve as a universal uncle for the purpose. But the government serves only when it is requested to do so by the borrowers or buyers. The signing of the F.H.A. Title I credit application was such a request.

“The undertaking of the government was collateral to the obligation of the Blands, and was security for that obligation.”

This analysis shows that the FHA mortgage insurance is in effect a guarantee of the mortgage and the borrower pays the FHA for this guarantee. Both the payment and the guarantee go to the security for the loan and benefit the lender only to the extent that his security is made certain.

Thus, in effect, FHA insurance is itself security for a loan. It is an undertaking by the Government to guarantee a loan and such undertaking is collateral to the actual lending of the money.

It has long been the practice to require a borrower to insure his property against fire and other hazards which threaten a loss in value. Query:—If this is proper, is there any reason why a borrower cannot “insure” his property against loss in order to provide the lender with adequate security? Fire insurance or life insurance would also benefit the lender in the event of a loss to the extent of protecting his security for the loan. Similarly, it would appear that an FHA insurance premium is an additional charge as a condition of the loan and would seem to be an expense item such as real estate taxes or fire insurance on the mortgaged property. The lender does not profit from the FHA insurance, but merely obtains protection for the security of his loan. He does not attempt to transfer his operating expenses or costs to the borrower.

It appears to us that the transaction involved is not the type condemned by the courts, as emphasized by the fact that the lender retains less than the legal rate of interest in the case of FHA insured mortgages. Of particular significance is a ruling of the Internal Revenue Bureau (Internal Revenue Cumulative Bulletin, 1937-1; IT-3062; CCH Federal Tax Reporter, paragraph 1330.394) which states as follows:

“Advice is requested whether a mortgagor may deduct from his gross income for Federal income tax purposes the amount paid to a mortgagee for the purpose of paying a Federal Housing Administration mortgage insurance premium. It is stated that the mortgagor is obligated to make such payment but that the Federal Housing Administration holds the mortgagee responsible for the mortgage insurance premiums whether or not the money therefor has been received by him from the mortgagor.

“It is held that the amount paid by a mortgagor for mortgage insurance premiums on mortgages covering property not used in the trade or business does not fall within any provision contained in Section 23 of the Revenue Act of 1936 relating to deductions from gross income. Such expenditure is, therefore, not an allowable deduction to the mortgagor for Federal income tax purposes.”

Thus, the Internal Revenue Service has determined that the mortgage insurance premium is not interest and, therefore, not deductible when paid on property not used in trade or business.

You have informed us that a test suit has been filed in the Chancery Court of Shelby County, Tennessee, to determine the validity of the question here presented. (See Wall Street Journal, Thursday, December 24, 1959.) We will follow this case with interest and will review this opinion in light of the decision rendered therein.

In conclusion, it is our considered opinion that the $\frac{1}{2}$ of 1% mortgage insurance premium is not interest and, therefore, the addition of this to the interest of $5\frac{3}{4}\%$ per annum on mortgages insured by the FHA does not violate our constitutional provision or usury statute.

As to the second problem presented, it is our opinion that a different result must be reached. We are advised that the $\frac{1}{2}$ of 1% “service charge” authorized by the FHA in cases of loans of \$8,000 or less is collected and retained by the mortgagee for its own use. We have been informed of no service rendered by the mortgagee to the mortgagor for which this charge could be justified. The only service performed is the collection and application of the payments to the reduction of the mortgage balance. We believe that the Court of Appeals of Maryland, in the case of *The Real Estate Trustee, Inc. v. Lentz*, 153 Md. 624, succinctly answers this question. In discussing a “service charge”, the Court of Appeals stated as follows, at page 629-630:

“* * * The only service rendered by the mortgagee to the mortgagors in the transaction was the lending of the money and its application to the specified payments. When the money had been fully applied, at the time the loan was made, no further action remained to be taken by the mortgagee for the mortgagors’ benefit. For the use of the money loaned, the compensation of the mortgagee could not legally exceed the six per cent. interest which was agreed to be paid. It was permissible for the parties to contract for the rendition by the mortgagee of a service collateral to that which was directly incident to the lending of the money, and for such an additional service a promise of payment could legally be made and enforced. If, for example, a mortgagee is required to perform continuing duties in the application of the loan to the cost of building or other operations, over which he is intended to have supervision, a service would be thus contemplated for which a commission, fairly proportionate to its value, could be charged without being subject to the suspicion that it was an effort to circumvent the law against usury. In this instance there was no actual or promised service by which the commission to the mortgagee can be supported. The acts of the mortgagee in regard to the examination of the property prior to the loan, and its subsequent investigations to discover whether a covenant in the mortgage to develop certain streets was being fulfilled, were only such attentions as lenders would naturally give to the protection of their own interests. To call the commission a ‘service charge’ could not give it a quality which it did not in fact possess. So far as this transaction is concerned, it was plainly a means of increasing the rate of compensation for the use of the money loaned.”

Also, in *Brown v. Real Estate Investment Company*, 134 Md. 493, it was held that a “service charge” of 5% of a

loan in addition to legal interest was usurious and could not be collected. See also *Walter v. Foutz*, 52 Md. 147; *Bowdoin v. Hammond*, 79 Md. 173; *Commercial Association v. Mackenzie*, 85 Md. 132; *Pentrose v. Canton National Bank*, 147 Md. 200; and *Carozza v. Federal Finance Company*, 149 Md. 223.

Based on the aforementioned decisions, we believe that the "service charge" to the extent that it exceeds the legal rate of interest on FHA guaranteed loans is usurious. In connection therewith we can find no legislative sanction for this practice; therefore, there is no exemption from the constitutional or statutory usury provisions.

C. FERDINAND SYBERT, *Attorney General*.

JOSEPH S. KAUFMAN, *Asst. Attorney General*.

BANK COMMISSIONER—INDUSTRIAL FINANCE ACT—DELIN-
 QUENT CHARGE SECTION MUST BE CONSTRUED MOST
 FAVORABLY TO THE BORROWER.

March 8, 1960.

Mr. John D. Hospelhorn,
Acting Bank Commissioner.

You have requested an opinion as to the proper interpretation of Subsection (A) (3) of Section 196 of Article 11, Annotated Code of Maryland (1957 Ed.), which is part of the Industrial Finance Act. Two factual situations are presented.

In the first, you state that a borrower contracts for a loan to be payable in twelve equal monthly installments, the first payment becoming due one month after the date of the loan. The borrower fails completely to meet his first monthly payment. Thereafter, however, he makes all payments at the designated time and the lender credits the payments to the preceding matured payment. Due to the original default on the initial payment, the loan extends over a period of thirteen months and the lender exacts a penalty at the time each payment is made, thereby resulting in twelve penalties being collected. Subsection (A) (3) states as follows:

“(A) Every licensee . . . may . . . :

“(3) Collect from the borrower a delinquent charge of five cents (5c) for each default continuing for five (5) or more days in the payment of one dollar (\$1.00) or a fraction thereof at the time any periodical installment is made provided, however, *that such delinquent charge shall not be imposed more than once for the same default.*”
 (Emphasis supplied.)

It is our opinion that the Industrial Finance Law, being remedial legislation regulating the lending of money, must be construed most favorably to the borrower. *Palmore v. B. & O. R.R.*, 156 Md. 4; *Liberty Finance Co. v. Catterton*, 161 Md. 650. With this rule of construction in mind, it is our opinion that the provisions of Section 196, aforemen-

tioned, require that only one delinquent charge may be made for the initial default.

In the second factual situation presented, the borrower contracts for a loan to be paid in twelve monthly payments. Each monthly installment payment is paid fifteen days after the due date. The borrower, therefore, is in arrears throughout the entire life of the contract. However, in this factual situation the lender exacts no penalties at the time the periodic installments are paid but waits until the borrower tenders his final payment, at which time the lender charges the borrower a sum representing twelve penalties. You specifically ask whether the lender may avail himself of the penalty at the end of the loan, or must he assess the borrower at the time each periodic installment is in default. Subsection (A) (3) of Section 196 of Article 11, Code, aforementioned, states that the lender may collect a delinquent charge as therein specified "at the time any periodical installment is made". It is our opinion that the General Assembly intended to have fines paid at the time the periodical installment was paid and that they may not be accumulated and charged at the end of the loan payment period.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

BOARD OF CORRECTION

POWER OF CONDEMNATION.

March 21, 1960.

*Mr. James W. Curran,
Superintendent of Prisons,
Department of Correction.*

Your letter of March 11, 1960, advises that the budget for the fiscal year 1961, which was submitted to the General Assembly by the Governor, contained an item for acquisition of land adjacent to the Maryland Penitentiary to be used for the central office and storage building of the State Use Industries. At the hearing before the House Ways and Means Committee this item was deleted from the capital improvement bill and you advise that you were instructed to use funds already to the credit of the State Use Industries' account for the purchase of the land which the Department was interested in acquiring.

You also state that it is your desire to request the Board of Correction at its next meeting to authorize the expenditure of \$250,000 from the account of the State Use Industries for the purpose of acquiring the land in question. If approved by the Board, it is your desire then to submit the matter to the Board of Public Works for approval.

You anticipate that because of the numerous property holders involved you may have difficulty in procuring the land by purchase and therefore you desire to ascertain whether the Department of Correction has the power to condemn property for the purpose of expanding one of the correctional institutions.

It has been held by this office that the Board of Public Works does not have any general authority to acquire land by condemnation and that no department of the State may acquire land by condemnation except when expressly authorized by the Legislature. 31 Opinions of the Attorney General 75. It is therefore necessary to determine the statutory authority of the Board of Correction.

Article 27, Section 680, Annotated Code of Maryland (1957 Ed.) creates the authority for the establishment of the State Use Industries and outlines the supervisory powers of the Board of Correction in relation thereto. The General Assembly, therefore, vested with the Board of Correction the sole and exclusive discretion as to the operation of industry, shops, etc., in the various penal institutions of the State.

Section 672 of Article 27 of the Annotated Code (1957 Ed.) states in part as follows :

“The title to and possession of all the property, real and personal appertaining to the Maryland Penitentiary and the Maryland House of Correction, shall vest in and be held by the Board of Correction, as trustees for the State. *The said Board shall have power to purchase or otherwise acquire on behalf of the State, any real property, or interest in real property, with the consent first obtained of the Board of Public Works, that may be appropriate to the needs of said institution, or either of them; * * **”. (Emphasis supplied.)

The General Assembly has therefore vested in the Board of Correction the power to purchase “or otherwise acquire” on behalf of the State any real property which may be appropriate to the needs of the named penal institutions. It is our opinion that the General Assembly, in authorizing the Board of Correction, with the approval of the Board of Public Works, to purchase “or otherwise acquire” real property, indicated an intention that the Department of Correction, after complying with the other requirements, may, on behalf of the State, institute condemnation proceedings. It is important to note that the General Assembly did not limit the right to acquire property only by means of purchase, but recognized that other means might be necessary, and it is our opinion that the words “otherwise acquire” extend the sovereign right of condemnation to the Board of Correction.

We are not unmindful of the opinion of Attorney General Curran, reported in 31 Opinions of the Attorney General 75. However, the statutory provision construed therein granted unto the Board of Natural Resources the right to "acquire by gift or purchase" certain real property. The Legislature in that bill expressly limited the manner of acquisition of property to the two mentioned means, and indeed deleted a power of condemnation contained in the bill as introduced. However, when the Legislature uses broad terms such as "otherwise acquire", it is reasonable to assume that it intended any means available to the State.

We are therefore of the opinion that the Department of Correction, exercising the sovereignty of the State after first obtaining approval of the Board of Public Works may, if necessary, acquire the land in question through condemnation proceedings.

C. FERDINAND SYBERT, *Attorney General*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

BOARD OF NATURAL RESOURCES

BOARD HAS ONLY ADVISORY POWERS OVER THE DEPARTMENTS CONCERNED WITH THE CONSERVATION OF NATURAL RESOURCES.

April 8, 1960.

Mr. William H. Bayliff,
Executive Secretary,
Board of Natural Resources.

In your recent letter you ask whether the Board of Natural Resources has legal authority to coordinate the activities of its component departments by directing the policies and activities of those departments or whether the Board is merely an advisory agency.

Article 66C, Section 1, Annotated Code of Maryland (1959 Supp.), created the Board of Natural Resources to coordinate the activities of the several State departments which are concerned with the conservation of natural resources. The Board's powers are established by Section 3, which provides that the Board shall discuss the problems of conservation, departmental, State or Federal, act as a clearing house for constructive suggestions and recommendations, deal with such conservation matters, complaints, suggestions or proposals as can be handled more satisfactorily by the Board than by the several departments represented upon said Board, and review the work of each such department. The Board shall annually submit to the Governor a comprehensive report covering the activities, accomplishments and recommendations of the several departments represented upon said Board. Such reports shall also include pertinent information on finance and budgets.

It is our opinion that the Board of Natural Resources is merely an advisory Board. A study of the statutes granting powers to the various departments whose activities are to be coordinated by the Board shows that those departments were given the power and authority to control themselves. The Board of Natural Resources is composed of the Chairmen or Directors of the six Departments that are concerned

with conservation of natural resources and eight other members. It is through general discussion prompted by those department heads, and suggestions from all members, that we believe the Legislature intended the Board to work out coordination of activities of the departments involved.

C. FERDINAND SYBERT, *Attorney General.*

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

BOARD OF PUBLIC WORKS

PAYMENT OF EMPLOYMENT SECURITY BENEFITS BY MAIL—
NOT LEGISLATIVE INTENT.

June 3, 1960.

*Mr. Andrew Heubeck, Jr., Secretary,
Board of Public Works.*

Reference is made to your recent letter inquiring whether it was permissible to have the Department of Employment Security make payments of unemployment insurance benefits to eligible individuals by mail. Article 95A, Section 3 (a), Annotated Code of Maryland (1957 Ed.) provides as follows:

“Payment of benefits. All benefits shall be payable from the fund and shall be paid through employment offices, in accordance with such regulations as the Executive Director may prescribe.”

There was introduced in the 1960 session of the General Assembly Senate Bill No. 55, which would have amended the above quoted section by expressly permitting the payment of benefits by mail; however, this bill failed to pass. Section 3 (a), *supra*, does not expressly prohibit the payment of unemployment insurance benefits to eligible individuals by mail. It grants a certain discretion to the Executive Director to prescribe the method of payment through the issuance of appropriate regulations.

However, the action of the General Assembly in rejecting the amendment as proposed in Senate Bill No. 55 clearly shows a legislative intent that it was the desire of the General Assembly that these payments not be made by mail. Although the Executive Director still has broad discretion to issue regulations relating to methods of payment of unemployment insurance benefits, it is our opinion that the will of the General Assembly should not be disregarded.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

BUDGET

AMENDMENT OF DEPARTMENT OF PUBLIC WELFARE BUDGET
TO TRANSFER ADMINISTRATIVE FUNDS TO ASSISTANCE
PROGRAMS PROPER IF GOVERNOR AND BOARD OF PUBLIC
WORKS APPROVE.

January 22, 1960.

*Mr. Andrew Heubeck, Jr., Secretary,
Board of Public Works.*

We have reviewed the inquiry of the Department of Public Welfare relating to the transfer of accumulated surplus funds in the Department's administration account of local departments. It is contemplated that such excess funds would be added to the Department's assistance appropriation. Such a transfer would be accomplished by the Governor through budget amendment under the provisions of Article 15A, Section 8 of the Annotated Code of Maryland (1957 Ed.).

We have considered the provision of Chapter 585 of the Acts of 1959 (page 797), which is as follows:

“The State Department of Public Welfare shall not be authorized to expend for public assistance in any month an amount in excess of that computed by dividing the total available appropriation of all funds originally appropriated by the General Assembly for such purpose by the number of remaining months in the fiscal year unless the approval of the Board of Public Works is secured for any such excess rate or amount of expenditure. The provisions of this restriction shall apply to the following programs:

Old Age Assistance
Aid to Dependent Children
Public Assistance to Needy Blind
Aid to Permanently and Totally Disabled

General Public Assistance
Boarding Care for Children
General Public Assistance to Employables”.

The effect of that restriction is to enforce pro rata or balanced monthly expenditure of assistance funds. We do not see in this any prohibition to the transfer within the Department of monies appropriated, so long as it is done with the approval of the Board of Public Works. As we understand it, the proposed budget amendment would not increase the total appropriation previously granted.

A similar question was considered by this office and answered by letter to the Budget Director, dated October 18, 1955. It was there stated :

“It is the opinion of this office, that, by budget amendment, the Governor can, if he so desires, approve a transfer of a portion of the unused aid funds to administration of local Departments.”

It is to be noted that the problem there ruled upon was identical to the present one, except in reverse. We can see no difference in principle, and therefore we are of the opinion that the proposed transfer by budget amendment would be both legal and effective.

C. FERDINAND SYBERT, *Attorney General*.

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

REVERSION OF SPECIAL FUNDS OF EXAMINING AND LICENSING
BOARDS TO GENERAL TREASURY AT YEAR END.

September 23, 1960.

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

You have asked us to review the matter of year-end disposition of Special Funds held by the twenty-two Examining and Licensing Boards which operate on Special Funds. We find that all of these Boards fall within the purview of Article 41, Section 198, of the Annotated Code of Maryland (1957 Ed.). The manner of expenditure of such special funds is there provided, and the law continues “. . . if not so used, or if not otherwise dedicated by law, the same shall revert in due course to the general treasury; . . .” Article 15A, Section 2, of the Code is to the same effect. It provides: “Any unexpended balance of such appropriation, against which there will be no outstanding obligation at the end of the fiscal year, except balances from sources dedicated by any act of Congress or by the laws of the State to some specific purpose or purposes, shall revert to the general treasury of the State at the end of the fiscal year.”

As you will note, both of the above laws provide for reversion of special funds of the Boards to the general treasury, *except as to amounts otherwise dedicated*. We list below those Boards as to which there is to be a reversion at the year end. The laws relating to these Boards (noted in parentheses) either provide for such reversion specifically or are silent on the matter.

1. Architects (Art. 43, Sec. 518, Code)
2. Electrical Examiners (Sec. 481, Ch. & P.L.L. Baltimore City)
3. Engineers (Sec. 315, Ch. & P.L.L. Baltimore City)
4. Hairdressers (Art. 43, Sec. 545, Code)
5. Law Examiners (Art. 10, Sec. 3, Code)
6. Medical Examiners (Art. 43, Sec. 143, Code)

7. Motion Picture Operators (Sec. 505, Ch. & P.L.L. Baltimore City)
8. Nurses (Art. 43, Sec. 291, Code)
9. Osteopathic (Art. 43, Sec. 472, Code)
10. Pharmacy (Art. 43, Sec. 259, Code)
11. Physical Therapy (Art. 43, Sec. 606, Code)
12. Plumbing (Art. 43, Sec. 331, Code)
13. Psychologists (Art. 43, Sec. 618-44, Code)
14. Public Accountants (Art. 75A, Sec. 4, Code)

Two Boards are in a special classification. The Barber Examiners law (Art. 43, Sec. 321, Code) provides for reversion as to the excess over the Comptroller's estimate of needs for the coming year. This latter amount remains as special funds. The funds of the Chiropody Examiners (Art. 43, Sec. 493, Code) which are in excess of \$500 shall revert to the general treasury. Up to \$500 is to remain as special funds.

The funds of the following Boards do not revert to the general treasury because of specific provision in each of the laws setting up these Boards that their funds shall be retained as special funds. Because of this dedication, we find that they are exempted from the provisions of Article 41, Sec. 198, and Article 15A, Sec. 2.

1. Chiropractic (Art. 43, Sec. 509, Code)
2. Dental Examiners (Art. 32, Sec. 9, Code)
3. Engineers and Surveyors (Art. 75½, Sec. 9, Code)
4. Funeral Embalmers (Art. 43, Sec. 359, Code)
5. Optometry (Art. 43, Sec. 371, Code)
6. Veterinary (Art. 43, Sec. 155, Code)

The procedure to be followed regarding such reversion has been previously described in 40 Opinions of the Attorney General 288 and 34 Opinions of the Attorney General 105.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

BUREAU OF MINES

MARYLAND STRIP MINING ACT—LESSEE CORPORATION OF
STRIPPING RIGHTS REQUIRED TO OBTAIN PERMIT WHERE
IT BECOMES OWNER OF COAL MINED.

April 7, 1960.

*Mr. Frank T. Powers, Director,
Bureau of Mines.*

We have your recent letter in which you inquire as to whether a corporation which leases, rather than owns, a tract of land for the strip mining of bituminous coal is required to obtain a permit in accordance with the provisions of the Maryland Strip Mining Act, codified as Article 66C, Sections 657-674, Annotated Code of Maryland (1957 Edition). Specifically, you advise us that while the corporation in question has obtained a strip mining permit for a particular tract of land which it owns, it does not hold a permit for the tract of land which it leases and operates. You state that the two properties are, however, contiguous; that the owner of the leased tract has not obtained a stripping permit; and that the lessee of the coal stripping rights becomes the owner of the coal once mined under the lease, and pays only a royalty to the owner of the tract.

The Act in question, the constitutionality of which was upheld in *Maryland Coal and Realty Company v. Bureau of Mines*, 193 Md. 627, is designed, *inter alia*, to conserve and improve areas of land affected by the strip mining of bituminous coal; to enhance the value of the land for taxation; and to decrease soil erosion and aid in prevention of water pollution. By Section 659 an "operator" engaged in strip mining must register with the Bureau of Mines of Maryland by filing a certificate and giving certain information relating to the area to be affected by the stripping operation. Contemporaneously with and as a part of such registration, the operator is required to file a bond to assure faithful performance of all requirements of the Act, including the all important provisions relating to "back fill"

of the land affected by the operation. The amount of the bond is largely conditioned upon the number of acres of coal to be stripped by the operator.

The term "operator" is defined in Section 658 to mean :-

" . . . a person, firm, corporation or partnership engaged in open pit mining, as a principal as distinguished from an agent or independent contractor, and, who is or becomes the owner of such coal as a result of such mining."

Implicit in the provisions of the Act is the fact that each permit is to cover a specific area of a specified tract, as designated by the operator. The term "tract" is defined in Section 658 to mean "a single parcel of land or two or more contiguous parcels of land with common ownership."

It is our opinion that the corporation leasing the tract for the stripping rights, and which thereafter owns the coal, as above set forth, is the proper party under the Act to obtain a permit. It is our view that this party is the "operator" within the statutory definition and, as such, must comply with all pertinent provisions of the Act; and must, therefore, apply for an additional permit with particular reference to the operations conducted on the leased tract.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

BUREAU OF MINES—MARYLAND STRIP MINING ACT—FUNDS
ON DEPOSIT IN STATE TREASURY IN “BITUMINOUS COAL
OPEN PIT MINING RECLAMATION FUND” MAY BE EX-
PENDED ONLY FOR BACKFILLING LAND AFFECTED BY
OPEN PIT MINING OF BITUMINOUS COAL.

October 5, 1960.

*Mr. Andrew Heubeck, Jr., Secretary,
Board of Public Works.*

You ask in your recent letter whether funds on deposit in the State Treasury in an account known as the “Bituminous Coal Open Pit Mining Reclamation Fund” may be expended for the purpose of assisting in a program designed to eliminate the draining of acid mine water into the Youghiogheny River near Oakland, Maryland.

The fund in question was created by the provisions of the Maryland Strip Mining Act, Sections 657-674 of Article 66C, Annotated Code of Maryland (1957 Ed. and 1960 Supp.). It is the basic purpose of this Act to conserve and improve areas of land affected in the mining of bituminous coal by the open pit or stripping method. To this end, Section 659 provides that no person shall engage in such mining operations until he first registers with the Bureau of Mines, pays a \$50.00 filing or registration fee, specifies the area of land to be affected, and files a performance bond, or cash or securities in lieu thereof, with the State to guarantee compliance with all requirements of the Act, including particularly the requirement that the operator backfill the area stripped following completion of the operation. Section 673 provides:

“All funds received by the Director from registration fees, and from forfeiture of bonds, and of cash deposits and securities, shall be held by the State Treasurer in a special fund, separate and apart from all other moneys in the State Treasury, to be known as the ‘Bituminous Coal Open Pit Mining Reclamation Fund,’ and shall be used by the Director of the Bureau of Mines *for the sole*

purpose of backfilling land affected by open pit mining of bituminous coal, and for such purposes are hereby specifically appropriated to the Bureau of Mines, funds received from the forfeiture of bonds and cash deposited in lieu of bonds shall be expended by the Director of the Bureau of Mines upon lands in which the operation occurred for which liability was charged on the bond other money in said fund shall be spent at the discretion of the Director of the Bureau of Mines for backfilling.” (Emphasis supplied.)

It is our understanding that the particular drainage of acid mine water into the Youghiogheny River now sought to be corrected was neither caused by nor resulted from an open pit or strip mining operation; rather, it is a direct consequence of conditions resulting from abandoned deep mining operations. Specifically, it is intended that the funds be used to divert a small stream of water running through an abandoned accumulation of coal bone and emptying into and polluting the Youghiogheny River, and to seal an abandoned mine which now drains a large quantity of acid mine water into this river.

It is our view that none of the funds on deposit in the Bituminous Coal Open Pit Mining Reclamation Fund may be used for the purpose suggested. It is clear from the provisions of Section 673 that such funds can be used only for the purpose of backfilling land affected by open pit mining of bituminous coal.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

CONSTITUTIONAL LAW

ARTICLE III, SEC. 15, MARYLAND CONSTITUTION—CONSTITUTIONALITY AT SHORT SESSIONS—TAX BILLS LIMITED TO SPECIFIC SUBDIVISIONS UNCONSTITUTIONAL—WHAT CONSTITUTES BILLS “IN THE GENERAL PUBLIC WELFARE”, “DEALING WITH AN ACUTE EMERGENCY”, AND “HAVING TO DO WITH BUDGETARY, REVENUE AND FINANCIAL MATTERS OF THE STATE GOVERNMENT”.

February 11, 1960.

Hon. Marvin Mandel,
Chairman, Baltimore City Delegation,
and

Hon. J. Raymond Buffington,
Chairman, Baltimore City Senators.

Your letter of February 8, 1960, requests our opinion as to the authority of the Legislature at the current session to enact certain legislation. Specifically, you inquire whether the constitutional limitations imposed upon the Legislature during 30-day sessions would prohibit the enactment of six types of tax statutes under various situations listed in your letter. Prior to any ruling on the specific questions which you pose, we feel certain general comments on the scope of a 30-day session to be appropriate.

Prior to the approval of the voters in November, 1948, of an amendment to Section 15 of Article III of the Maryland Constitution, the Legislature met every other year for a 90-day session. The effect of the amendment was to establish 30-day sessions of the Legislature to be held in even years. The constitutional provision restricted the subject matter which could be considered at these so-called “short sessions” in the following manner:

“In any of said thirty-day sessions in even years, the General Assembly shall consider no bills other than (1) Bills having to do with budgetary, revenue and financial matters of the State Govern-

ment, (2) legislation dealing with an acute emergency, and (3) legislation in the general public welfare.”

The Court of Appeals has construed this section of the Constitution in three cases. In the first such case, *Funk v. Mullan Contracting Co.* (1951), 197 Md. 192, the court was called upon to consider the validity of an Act creating a commission to prescribe maximum hours of work for all laborers and other employees employed by any contractor in the execution of any contract for the State. The Act in question, by virtue of the operation of existing law, applied only to Baltimore City and 20 of the 23 counties. The State tried to uphold the statute as coming within the third permissive category, i. e., “legislation in the general public welfare.” The Court of Appeals, after noting that the prime purpose of the 30-day session is the submission of annual budgets for the State Government, held the Act to be unconstitutional as not meeting the test of a statute in the *general* public welfare. The court pointed out that every statute is, or at least is supposed to be, in the “public welfare”, and that the term “general”, as used in the constitutional amendment, must be interpreted so as to give effect to the general legislative scheme established. Rejecting the contention that any statute which would be considered a general statute within other provisions of the Constitution should be considered valid, and rejecting the contention of the Attorney General that “general public welfare means welfare affecting the whole State *or a substantial part thereof*”, the court concluded that “by the use of the word ‘general’, the Legislature meant to restrict itself in these sessions to matters generally affecting the State, rather than affecting parts thereof.” While recognizing that even local legislation might possibly be upheld under the emergency sections, the court struck down the statute in question since it did not apply to three of the counties, holding that in order to meet the third criterion of Section 15 of Article III, the legislation in question must apply “to all of the State without exception”.

The second case coming before the court and decided the same day as the *Funk* case was *Washington Suburban Sanitary Comm. v. Buckley, et al.* (1951), 197 Md. 203. There the statute dealt with the manner in which plumbing connections could be made within the area covered by the Washington Suburban Sanitary Commission. Since the Act obviously did not meet the requirements of legislation in the general public welfare, an attempt was made to sustain the statute under the second category, i. e., "legislation dealing with an acute emergency". The statute itself contained a recitation that it was an "acute emergency measure", and was necessary for the immediate preservation of the public health, safety, etc. The Court of Appeals held that unlike the question of what constitutes an emergency for other purposes, the question of what constitutes an "acute emergency" under Section 15 of Article III is a question to be decided by the court and not by the Legislature by means of a legislative determination. The court pointed out that in order to come within this limitation, the statute must deal with an actual acute emergency and that the existence *vel non* of the emergency is to be determined by the courts. After a review of the circumstances in which the Act was passed, the court rejected the legislative conclusion that an acute emergency existed and held the statute to be unconstitutional.

The last of the three cases in point is *Miedzinski v. Landman* (1958), 218 Md. 3, app. dism'd 358 U. S. 644. In that case, the Court of Appeals was called upon to determine the constitutionality of a statute passed during the 30-day session in 1958, which prohibited the operation of gambling establishments upon any waters within the State of Maryland constructed in such a manner as to permit ingress and egress over a pier, wharf or other structure which cannot be entered from the shore of the State of Maryland. That Act had been passed at the request of the Governor of Virginia, and was intended to prevent the operation of gambling houses on piers built out into the Potomac River from the Virginia shore. It was designed to prevent the evasion of the Virginia law against gambling by the device of lo-

cating the actual gambling equipment in the section of a pier within those portions of the bed of the Potomac River which belong to the State of Maryland and which are in counties where gambling is legal. Although the statute was general in its terms, its impact was wholly local since it obviously applied to the four counties in Maryland where gambling devices are legal. The court upheld the statute as one passed in the general public welfare in view of its underlying purpose of comity between the States of Maryland and Virginia. As the court pointed out, "We think an Act in the nature of a compact could be passed at an even-year session, no matter how limited its actual effect upon particular areas or persons in the State."

As applied to the present case, we are of the opinion that none of the tax statutes suggested could be upheld on the first ground mentioned in the Constitution. Although some of them may have an effect upon financial matters of the State, we think it clear that they could not be considered to be statutes "having to do with budgetary, revenue and financial matters of the State Government."

As to the third ground, however, the questions must be taken up one by one:

"1. (A) May the Legislature in this short session validly enact legislation granting to all of the political subdivisions of the State, that is, to Baltimore City and all of the counties, the power to enact an earnings' tax applicable within an individual political subdivision?"

"(B) If such an enactment were passed and if one or more counties exempted themselves from the operation of such a statute, would such an enactment thereupon become invalid if passed at this short session?"

We believe that the answer to Question 1(A) must be in the affirmative. Assuming the Act to be otherwise valid, it appears that such a statute would be held to be within the general public welfare. Similarly, we think 1(B) must be

answered in the affirmative. If one or more counties are exempted from the statute, the Act would quite likely be held not to be within the general public interest under the doctrine of the *Funk* case, *supra*.

- “2. May the Legislature at this session validly enact legislation conferring on the City of Baltimore alone whatever additional taxing authority is necessary so that the City may adopt an earnings tax in such form as the Mayor and City Council may approve?”

We think this question must be answered in the negative insofar as any attempt to justify it under the third provision of Section 15, Article III, is concerned. It would constitute purely local legislation and not be within the general public welfare.

- “3. May the Legislature validly enact at this session a statute giving to all of the political subdivisions a portion of the sales tax now in effect, returning to each subdivision a percentage of the amount collected in such area?”

We think the answer to this question is the same as set forth in connection with 1 (A).

- “4. May the Legislature validly at this session amend the income tax law to provide that each political subdivision shall receive 34% of the State income tax as was provided in the law before the 1958 amendment which freezes the present income tax allocation to the counties and to Baltimore City?”

We understand this question to be simply whether the distribution of State income tax can be changed at this session of the Legislature. We believe that it can for the reasons stated in connection with Question 1 (A).

- “5. (A) May the Legislature at this session validly enact an amendment to the income tax law granting to the counties and to the City of Baltimore an additional income tax surcharge over and above the present income tax to be collected by the State and the

surcharge to be returned to the political subdivision by the State?

“(B) If any county exempts itself from such a statute would the statute thereupon become invalid?”

The answer to Questions 5(A) and (B) are the same as the answers to Questions 1(A) and (B), respectively.

“6. The State withholds income taxes from salaries, wages, etc. The shares of these taxes are paid to the subdivisions the following year instead of during the year when collected.

“May the Legislature at this session validly enact legislation providing for distribution of such withheld taxes to the political subdivisions on a current basis?”

From the standpoint of whether such a statute could be authorized under the general public interest requirement, we are of the opinion that this question should be answered in the affirmative. However, since you have asked that we give an immediate opinion we must qualify this answer to say that we would like an opportunity to study further the question of whether such a statute would be invalid for reasons other than the fact that this is a short session.

“7. May the Legislature at this session validly increase license fees for the sale of alcoholic beverages in Baltimore City without increasing such license fees generally?”

“8. May the Legislature at this session validly amend Section 277 of Article 81 to increase the rate of recordation tax in Baltimore City?”

We think these questions must be answered in the negative insofar as any attempt to justify them under the third provision of Section 15, Article III, is concerned. It would constitute purely local legislation and not be within the general public welfare.

The only remaining question is whether those of the above statutes which we feel could not meet the test of being “in

the general public welfare" could be justified under the second category, i.e., "legislation dealing with an acute emergency". As we have seen, a legislative declaration that an acute emergency exists does not bind the court. *Washington Suburban Sanitary Comm. v. Buckley, supra*. It still must be established to the satisfaction of the courts that the operative fact of an acute emergency exists. In *City of Baltimore v. Hofrichter* (1940), 178 Md. 91, the court held the word "emergency" as used in Article XI, Section 7 of the Constitution to mean a "sudden, unexpected and unforeseen condition . . . of such public gravity and exigency as to require forthwith municipal action for which the requisite public money is not presently procurable by the usual and regular methods of acquiring funds for municipal use". This case and the quotation therefrom were cited with approval in the *Washington Suburban Sanitary Comm. case, supra*, when dealing with the question of an emergency under Section 15 of Article III. Although the court did not directly attempt such a definition in the *Washington Suburban case*, it is possible that the acute emergency referred to in Section 15 of Article III may be held to be "a sudden, unexpected and unforeseen condition". If such is the case, it would seem difficult to support Baltimore City's long-standing and long known need for revenue on the basis of an acute emergency. On the other hand, we do not feel obliged to rule that there must be shown an unexpected and unforeseen element. It could well be that even a long existing problem could suddenly become so acute as to meet the requirements of this section.

Applying the acute emergency law to the present situation, we are unable to say that a local revenue measure for the City of Baltimore, passed at this session of the Legislature, would be valid or invalid. We feel it would all depend upon the view which the Court of Appeals would take as to (a) the necessity for an unforeseen element; (b) the acuteness of the City's revenue need; and (c) the effect of the alternative recourse to the increase in existing tax rates on subject matters which the City already has the right to tax. In the last analysis these are questions which could

be decided only upon the basis of a complete survey of the existing tax structure, tax policies and revenue needs of the City and could not be decided on the basis of the abstract questions which are posed in your letter.

C. FERDINAND SYBERT, *Attorney General.*

JOHN MARTIN JONES, JR., *Asst. Attorney General.*

HOME RULE—MUNICIPALITIES, WITHOUT ACT OF ASSEMBLY,
CAN ADOPT SEMI-ANNUAL DATES OF FINALITY FOR
REAL ESTATE TAXES.

December 27, 1960.

Hon. Edward S. Northrop,
Senate of Maryland.

You have requested our opinion as to whether or not a municipal corporation of this State, subject to the provisions of Article XI-E, Maryland Constitution, may validly provide under its Home Rule authority for the levy of property taxes as of an additional date during the year on real property becoming assessable after the annual date of finality, similar to the provisions for semi-annual dates of finality for State and county ordinary taxation, as was provided by Chapter 599 of the Acts of 1959, now Annotated Code (1960 Supp.) Article 81, Section 31(a), (d) and (e).

Section 5, Article XI-E, Constitution, provides in part as follows:

“No such municipal corporation shall levy any type of tax, license fee, franchise tax or fee which was not in effect in such municipal corporation on January 1, 1954, unless it shall receive the express authorization of the General Assembly for such purpose, by a general law which in its terms and its effect applies alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article.”

You also point out that under Article 81, Section 12, the incorporated towns in this State have been authorized to levy taxes on real and personal property which is assessable under Article 81. This provision ante-dates adoption of the Home Rule Amendment.

In *Hitchins v. City of Cumberland*, 208 Md. 134, 140-141 (1955), the Court of Appeals, in a *dicta* statement, described the provisions of Section 5 of the Municipal Home Rule Amendment, as follows:

“Section 5, which deals with limitations upon rates of municipal taxation of property, *upon sources of municipal taxation* and upon the amount of municipal debt and reserves powers to the General Assembly with regard to such matters (notwithstanding other provisions of the Article), is not directly pertinent.” (Emphasis supplied.)

Likewise, Bowen and Friedman, *Local Government in Maryland* (1955), generalizes concerning the effect of Article XI-E at pp. 57-58, as follows:

“This municipal home rule amendment, however, reserves to the General Assembly authority to enact legislation of a general nature regarding municipalities. *It also retains in the hands of the General Assembly control by general law of new forms of municipal taxation* and by local law of tax limits and debt limits.” (Emphasis supplied.)

In 41 Opinions of the Attorney General 138 (1956), this office ruled that the City of Frederick could, under its Home Rule powers, reduce the percentage of value of stock in business to be assessed for city taxes. The proposed change was held not to constitute the levy of a “type of tax” which was not in effect prior to January 1, 1954, since it was a relatively minor change in the degree of exemption and, in economic effect, was essentially equivalent to a change in the rate of taxation.

It is our opinion that the adoption by a municipality of semi-annual or other dates of finality for the levy of a tax on property becoming assessable after the annual date of finality is not within the constitutional limitation on Home Rule authority above set forth. The proposed change is only complementary or supplemental to the existing property tax system which has been in operation in the municipalities long prior to the Home Rule Amendment. The adoption of semi-annual or other dates of finality simply permits the collection of real estate taxes for a portion of the tax year by accelerating the date as of which taxes on property becoming assessable would first be levied. We therefore believe

the proposed change essentially deals with the collection of taxes already in existence, and that it would not be the levy of a type of tax not in effect on January 1, 1954.

In this opinion we do not mean to imply any broad conclusions as to what is meant by "type of tax". Nor do we intend the reference to the actual levy of property taxes prior to January 1, 1954 to indicate that "in effect" means actually levied, as opposed to authorized but not actually implemented. We express no opinion on this latter point which is not essential to answering your request.

C. FERDINAND SYBERT, *Attorney General*.

LAWRENCE F. RODOWSKY, *Asst. Attorney General*.

CORPORATIONS

NON-STOCK CORPORATIONS—NOT RESTRICTED TO NON-PROFIT ORGANIZATIONS—MAY HAVE CHARTER PROVISIONS USUALLY CONNECTED WITH PROFIT CORPORATION.

February 3, 1960.

*Mr. Albert W. Ward, Director,
State Department of Assessments
and Taxation.*

You have referred to us a copy of Articles of Incorporation which have been submitted to your Department, under which Articles a non-stock corporation is proposed to be formed. The tendered Articles recite the following purposes:

“(a) To operate a social club for its private members, their families, friends, and associates.

“(b) To sponsor social affairs for profit.

“(c) To rent any premises it might own for meetings of organizations, groups, or other committees as well as for the conducting of social affairs.

“(d) To provide social affairs for the entertainment of its members and such other activities that might contribute to the social, educational and cultural development of its members.

“(e) To purchase, lease, or otherwise acquire, hold, develop, improve, mortgage, sell, exchange, let, or in any manner encumber or dispose of real property or personal property wherever situated.

“(f) To manufacture, purchase or otherwise acquire, hold mortgages, pledge, sell, transfer, or in any manner encumber or dispose of goods, wares, merchandise, implements, and other personal property or equipment of every kind.

“(g) To purchase, lease or otherwise acquire, all or any part of the property, rights, businesses,

contracts, good-will, franchises and assets of every kind, of any corporation, co-partnership or individual (including the estate of a decedent), carrying on or having carried on in whole or in part any of the aforesaid businesses or any other businesses that the Corporation may be authorized to carry on, and to undertake, guarantee, assume and pay the indebtedness and liabilities thereof, and to pay for such property, rights, business, contracts, good-will, franchises or assets by the issue, in accordance with the Laws of Maryland, of stock, bonds, or other securities of the Corporation or otherwise.

“(h) To loan or advance money with or without security, without limit as to amount; and to borrow or raise money for any of the purposes of the Corporation and to issue bonds, debentures, notes or other obligations of any nature, and in any manner permitted by law, for money so borrowed or in payment for property purchased, or for any other lawful consideration, and to secure the payment thereof and of the interest thereon, by mortgage upon or pledge or conveyance or assignment in trust of, the whole or any part of the property of the Corporation, real or personal, including contract rights, whether at the time owned or thereafter acquired; and to sell, pledge, discount or otherwise dispose of such bonds, notes or other obligations of the Corporation for its corporate purposes.

“(i) To carry on any of the businesses hereinbefore enumerated for itself, or for account of others, or through others for its own account, and to carry on any other business which may be deemed by it to be calculated, directly or indirectly, to effectuate or facilitate the transaction of the aforesaid objects or businesses, or any of them or any part thereof, or to enhance the value of its property, business or rights.”

You have requested our opinion as to the following question:

“Under the Maryland law, can a corporation organized without capital stock have provisions in its charter relating to business activities usually connected with a corporation operating for profit?”

It is to be noted that sub-paragraph (g) of the tendered Articles provides for the acquisition of property and that the corporation may “pay for such property . . . by the issue . . . of stock . . .”. The proposed company seeks to be organized as a non-stock company and the proposed Articles state in Paragraph Fourth that it shall have no capital stock. The above quoted provision of Paragraph Third (g) is therefore not in accordance with the provisions of Article 23, Section 133 of the Annotated Code of Maryland (1957 Ed.) which require that a non-stock corporation shall specifically provide in its charter that it is not authorized to issue capital stock. We are therefore of the opinion that you may lawfully decline to accept for record the proposed Articles under the authority of Article 23, Section 128 of the Code.

However, in view of the fact that the above mentioned objectionable feature can be corrected by a simple deletion and the Articles resubmitted to you, we feel it is appropriate to comment on the basic question raised in your letter. For purposes of answering this question, we have assumed that the above recited charter provisions are in fact consistent only with a business organized for profit and inconsistent with a non-profit corporation.

While we understand it is the general practice to organize non-profit corporations as non-stock corporations, it does not necessarily follow that all non-stock corporations must be non-profit corporations, unless the statute governing the formation of non-stock companies expressly or by necessary implication so requires. Sections 132 to 138, inclusive, of Article 23 of the Annotated Code (1957 Ed.), dealing with the subject of non-stock corporations, do not in terms impose any requirement that such corporations be organ-

ized to operate only for non-profit purposes. In this connection it is interesting to compare the sections of the Maryland Code relating to non-stock corporations with the Delaware Code Annotated, Title 8, *General Corporation Law*, Section 102, *Certificates of Incorporation*, Subsection (4), dealing with stock provisions. After setting forth the charter provisions required in the case of stock companies, this statute further provides:

“The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit and which are not to have authority to issue capital stock. In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation.”

In the absence of any express prohibition, the question resolves itself to whether the term “non-stock” under the Maryland statute is so completely synonymous with “non-profit” as to exclude any type of profit organization from its meaning. Fletcher, *Cyclopedia of the Law of Private Corporations* (Permanent Edition), Vol. 1, page 234, Section 68, contrasts stock and non-stock corporations as follows:

“A stock corporation or joint stock corporation is a corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation. The capital of a non-stock corporation is not so divided. The ordinary, modern business corporations such as trading, banking and railroad companies are stock corporations, while religious corporations, mutual insurance companies and the like are non-stock corporations.”

The reference to mutual insurance companies above is an example of a type of non-stock profit corporation. In a mutual insurance company “the members are entitled to a *pro rata* distribution of the net profits at the end of each

year or quarter, according to the rule of distribution". *Charlton Bros. v. Casualty Co.*, 181 Md. 253, 257 (1942). While the conduct of the business of insurance of such corporations is regulated under the provisions of Article 48A, such companies, insofar as their creation as corporate entities is concerned, are formed under the provisions of Article 23 and Article 48A, Section 16 of the Annotated Code.

In *Glass v. Doctors Hospital*, 213 Md. 44 (1957), the Court of Appeals had occasion to consider certain activities of Doctors Hospital, Inc., a Maryland non-stock corporation. One of the questions discussed by the Court was whether the hospital was a non-profit organization. In this connection the Court reviewed the actual conduct of the operations of the hospital and concluded that it was non-profit. This approach by the Court would seem to indicate that a Maryland non-stock corporation could conduct its operations so as to be a profit, rather than a non-profit, organization.

Reference to the franchise tax provisions, Article 81, Section 197, also sheds light on the problem. The present act, as to its basic form, was enacted by the Laws of 1941, Chapter 912, Section 8. Subsection (d) of that Section provided, *inter alia*, that every domestic corporation having no capital stock should pay a minimum tax for its franchise to be a corporation. Subsection (d) was amended by the Acts of 1943, Chapter 313, to except from the minimum tax provisions "volunteer fire associations, charitable and benevolent institutions, service clubs, social groups, War Veterans' organizations, cemetery corporations, political clubs, musical or cultural corporations and civic improvement associations, *not operated for profit.*" (Emphasis supplied.) Subsection (d) was changed to its present form by the Acts of 1945, Chapter 515. The enumeration of excepted organizations under the Act of 1943 lists many which are usually organized as non-stock corporations. Nevertheless, the Legislature added the above underscored additional requirement for exception from the minimum tax provision. This would seem to indicate rather clearly that the terms

“non-stock” and “non-profit” are not to be considered as synonymous.

Brune, *Maryland Corporation Law and Practice* (Revised Edition), discusses articles of incorporation of non-stock corporations in Section 171. Footnote 2 to this discussion states:

“Attention is called particularly to the clause, desirable in the case of a corporation entitled to a tax exemption under the Federal Income Tax laws, stating that the corporation is not organized for profit.”

Mr. Brune’s comment indicates that this is an optional provision and that it would therefore seem possible to organize a non-stock corporation for profit.

We have also examined the preliminary and final reports of the Commission on Revision of the General Corporation Laws of Maryland and the explanatory notes of the Reporter and find nothing therein which would indicate that the term “non-stock” is intended to be synonymous with “non-profit”.

For the foregoing reasons, we are of the opinion that under the Maryland law a corporation organized without capital stock may have provisions in its charter relating to business activities usually connected with a corporation operated for profit.

C. FERDINAND SYBERT, *Attorney General*.

LAWRENCE F. RODOWSKY, *Asst. Attorney General*.

CORPORATIONS—BUILDING AND HOMESTEAD ASSOCIATIONS—
CAPITAL STOCK CHARTER PROVISIONS NOT PROHIBITED
BY CODE (1957), ART. 23, SECS. 144, ET SEQ.

June 23, 1960.

*Mr. Albert W. Ward, Director,
State Department of Assessments
and Taxation.*

You have referred to us proposed Articles of Incorporation for three savings and loan associations and have requested our opinion as to whether the charters are in conformity with Maryland law. We have heretofore orally advised you of our conclusion that the papers may be accepted. The reasons for our conclusion follow.

The proposed Articles of Incorporation of Company I provide for three classes of stock: 50,000 shares of Class A stock, par \$100 per share; 150,000 shares of Class B, par \$1.00 per share; and an unlimited amount of Class C stock, par \$100 per share. Each class carries one vote per share, so that the owners of the Class B stock, probably intended for the promoters, would receive 100 times the voting strength per \$100 of investment as would the owners of Class C stock, which is designated as the free shares. The priorities on liquidation are in the order of C, A, B to the extent of the par value. Any excess is then distributed among all classes in proportion to the number of shares. The effect of this is to prefer the Class B in distribution of the remaining assets in relation to the sum invested.

The proposed Articles of Incorporation of Company II would provide for four classes of stock, all of the par value of \$1.00 per share, divided 240,000 shares of Class A, 10,000 shares of Class B, 20,000 shares of Class C, and 30,000 shares of preferred. The holders of Class A and Class B have one vote per share. The holders of Class C stock have one vote per holder, regardless of the number of shares. The Class C stock is limited to issuance to borrowing members. The preferred stock is non-voting. Indirect control, through a form of veto, is preserved in the holders of Class

B stock by a provision requiring the concurrence of 75% of the holders of Class B common stock for any shareholder action. The preference of the preferred stock is both as to dividends and distribution on liquidation.

Under the proposed Articles of Incorporation of Company III, four classes of stock, each of 10,000 shares and each share of \$100 per share par value would be created. These classes are designated Common A and B, Preferred and Participating. Voting rights exist only in Class A Common. There is provision for dividend preference in the Preferred and Participating. All classes share equally on liquidation.

The basic question presented by these Articles of Incorporation is whether there is any prohibition, express or implied, of capital stock type building and loan associations in Maryland. Stated conversely, the question is whether Maryland law requires that building and loan associations be organized only on a strictly mutual basis, in which all of the shareholders participate in the profits and bear the losses in proportion to the interest or investment of each. The question has two aspects, namely, (1) whether one class of shareholders can be preferred over another, either in dividends or liquidation, and (2) whether a class or classes of non-voting or restricted voting stock can be created.

The statutory law with respect to building and home-
stead associations is set forth in Code (1957), Article 23,
Secs. 144, *et seq.* under Part III of that Article headed
"Particular Classes of Corporations". There is no provision
in these statutes which specifically prohibits capital stock
type building and loans or in terms requires that they be
mutual organizations. A comparison to the law regulating
mutual savings banks in this particular is noteworthy. In
Article 11, Section 40(a), the Legislature has clearly set
forth the policy of this State concerning such banks as
follows:

"(a) *No Capital Stock*—No savings institution
or savings bank hereafter incorporated shall have
any capital stock, but shall be a mutual associa-
tion."

It would therefore appear that any requirement that building and loans be mutual would have to be based on a principle of law which implies this requirement from the nature of the organization and its business, that is, that an inherent legal requirement of a building and loan is that it be mutual.

We have not found any Maryland case which directly decides this question. There have been a number of judicial decisions in other states which have considered the general problem of a building and loan issuing different classes of capital stock. In the absence of any clearly controlling statute, these courts have reached opposite conclusions.

Some review of the historical evolution of building and loans is helpful to an understanding of these cases. The original plan of these associations was the terminating one. All of the members joined together at one time to form a mutual association and promised to purchase the shares thereof through a series of installment payments. Usually each member also anticipated becoming a borrower. When sufficient funds were accumulated from the installment payments to make the first "loan", the members bid for the loan and paid a premium for this privilege. The shares of the successfully bidding member were then "redeemed". Theoretically, all of the members would have received advances for the purchase of their homes by the time the subscription obligations or installment payments of each member were fulfilled. Thus, the amount received by way of dues, premiums, and delinquency penalties would be cancelled out by the amounts loaned and the dividends paid so that, when the plan had run its course, the society would be terminated.

In order to embark on a new plan, a new society would have to be formed. This handicap on the continued operation of a society was at first modified by the use of the so-called "Serial Plan". Under this plan all of the authorized capital of the association was not originally subscribed. A portion of the capital would be subscribed for as under the terminating plan, and, as a new group of members

banded together, a second portion of the capital would be subscribed for, or a second series started. Each series would then run its course and terminate within the series as under the terminating plan.

A weakness in these earlier forms of organization, which relied for capital investment upon installment payments for shares, was the length of time necessary to accumulate a substantial fund from which the loans could be made. Toward the end of the Nineteenth Century a number of building and loan associations began to turn to the issuance of a class of prepaid stock. Under this approach all, or a substantial portion, of the matured value of this class of shares was paid for in advance. As an inducement to investment by the prepayment method, various features thought to be attractive to capital were added to these prepaid shares, such as fixed, regular dividends and in some cases also priority on liquidation, similar to types of modern preferred stock. As cases involving these issues reached the courts, the diversity of judicial conclusions, above mentioned, concerning the validity of such issues developed.

Some of the cases concluded that such stock issues were illegal because of the violation of principles inherent in the building and loan concept. Illustrative of the reasoning of these cases is *Sumrall v. Commercial Building Trust's Assignee*, 106 Ky. 260, 50 S.W. 69 (1899), where the court stated at page 71:

“When we bear in mind that the corporation we are dealing with is a building and loan association with certain underlying principles of co-operation, equality, and mutuality in its make-up not common to ordinary corporations, and which may be termed the ‘common law of its existence’, the objection to upholding preferential contracts among its members becomes apparent. All such attempts are absolutely void, as contrary to the natural law of such associations. If their managers may attract investors by selling them preferred stock—preferred either as respects dividends or capital—the bur-

dens of maintaining the organization, and in all probability all the losses of the concern, in case of embarrassment or insolvency, will fall on the very class of members who were primarily intended to be benefited by such associations.”

To the same effect see also *Intermountain Building & Loan Association v. Gallegos*, 78 F. 2d 972 (9th Cir., 1935) Cert. den'd 296 U.S. 639, 80 L. ed. 454, 56 S. Ct. 172 (1935); *White v. Wagaman*, 47 Ariz. 195, 54 P. 2d 793 (1936) (statute held to incorporate pre-existing essential principles).

Other cases concluded that the issuance of a class of pre-paid stock, which carried a fixed dividend but no priority on liquidation, was valid and consistent with building and loan principles. *Folk v. State Capital Savings & Loan Association*, 214 Pa. 529, 63 At. 1013 (1906); *People ex rel. Fairchild v. Preston*, 140 N. Y. 549, 35 N.E. 979 (1894); *Johnson v. National Building & Loan Association*, 125 Ala. 465, 28 So. 2 (1900).

Other cases have recognized the propriety of the issuance by building and loan associations of prepaid stock containing dividend and dissolution preferences. Illustrative of the reasoning of these cases is *Wilson v. Parvin*, 119 Fed. 652 (6th Cir. 1903). This case arose under a Tennessee statute which expressly authorized the issuance of prepaid stock, as does Maryland Code, Article 23, Section 149. At 119 Fed. 652, 659, the court stated:

“To issue preference shares is within the implied authority of every corporation, unless prohibited by some positive provision or repugnant to the general object and purposes of the organization. Now, if the organic law of this association has been so amended as to invite a class of shareholders solely for the purposes of enlarging the fund accessible to the installment or borrowing members, we are wholly unable to see how it can be said that associations having not only the express power to borrow money for corporate purposes, and to

secure same by mortgage, but the power to issue prepaid shares bearing a fixed dividend payable out of the profits, may not prefer such shares both in principal and dividends. There is no public policy against it, and the preference is neither unjust nor immoral. It is, after all, but a form of borrowing; the lender receiving a limited dividend in place of interest and having no further interest in the association."

To the same effect see *Rooney v. Southern Building & Loan Association*, 119 Ga. 941, 47 S.E. 345; *Hogsett v. Aetna Building & Loan Association*, 78 Kan. 71, 96 P. 52 (1908); *Fisher v. Intermountain Building & Loan Association*, 55 Idaho 326, 42 P. 2d 50 (1935); *In re Guardian Permanent Benefit Building Society*, 23 Ch. Div. 440 (1882), affirmed *sub nom.*, *Murray v. Scott*, 9 App. Cas. 519 (1884).

Illustrative of the contrariety of opinion in this area are *Intermountain Building & Loan Association v. Gallegos*, *supra*, and *Fisher v. Intermountain Building & Loan Association*, *supra*. In these cases, neither of which cites the other, since both were decided in 1935, the Ninth Circuit and the Supreme Court of Idaho reached different results when considering the stock of the same corporation.

The text writers are also in conflict. Thompson *Building Associations* (1892) states at page 60 that any preferential stock should not be permitted. Sundheim, *Law of Building and Loan Associations*, 3rd Ed. (1933), Sec. 21 states:

"One of the principal and distinctive features of a building association is mutuality. However, mutuality does not mean that every member or shareholder should receive the same return on his investment, or have the same rights. It means that every member in the same class, or holding the same kind of stock, or certificate, must have the same benefit or liability or right, whether the stock be free, or whether an advance has been made upon its security."

The situation, in the absence of express statute, is probably aptly summarized in 9 Am. Jur., *Building and Loan Associations*, Sec. 17, as follows:

“Preferred Stock. There is a difference of opinion as to whether a building and loan association may issue preferred stock. One line of cases holds that the issuance of preferred stock is violative of the principles of co-operation, equality, and mutuality upon which such associations are based and against public policy, since if these associations were permitted to issue stock preferred either as respects dividends or capital, then the burden of maintaining the organization, and in all probability all the losses of the concern, would, in case of embarrassment or insolvency, fall on the very class of members who were primarily intended to be benefited. Another line of cases, however, sustains the right to give a preference to certain classes of stockholders, usually those holding prepaid stock, either by way of a fixed dividend payable before any distribution of profits to the other stockholders or in the redemption of the stock or the distribution of the funds of the association.”

The strongest statement by the Court of Appeals of Maryland concerning the concept of mutuality as applied to a building and loan is contained in a *dictum* statement in *Baltimore Building & Loan Association v. Powhatan*, 87 Md. 59 (1898). The question involved in that case was whether a withdrawing member was required to contribute to the expense fund. At page 64, in a preliminary discussion, the court stated:

“Its (the association’s) primary object is the investment of money for profit and gain while its secondary effort should be its division and distribution in such manner as to secure to each shareholder his just and fair proportion of its profits. As a mutual association based on the mutual plan it is bound to treat its members equally, and any

by-law or contract made by it in contravention of such mutuality would be ultra vires and void.”

The record before the court in that case, however, set forth Article 9 of its by-laws which provided for a class of paid-up stock which paid a fixed annual dividend, apparently before any distribution of profits to the other shareholders.

The affairs of that same association were before the District Court of the United States for the District of Maryland in *Coltrane v. Baltimore Building & Loan Association*, 110 Fed. 281 (1901), affirmed by the Fourth Circuit, *sub nom. Coltrane v. Blake*, 113 Fed. 785 (1902). One feature of the proceedings involved the claim by holders of the prepaid stock that they were entitled to priority in the liquidation over the installment stockholders. The District Court adopted the findings and opinion of John C. Rose, later District Judge Rose, who heard the matter as a Special Master. Judge Rose made no holding on the question of the validity of an issue of stock by a building and loan association in Maryland which would attempt to create priorities on liquidation. He rested his decision, denying priority on the ground that the charter, by-laws and stock contract provisions creating the particular prepaid stock under consideration did not purport to grant any preference on liquidation.

Article 23, Section 149, above noted, specifically provides: “such corporation shall have power to issue full paid-up shares of stock to its members upon such terms as may be set forth in its by-laws.” This provision was added to the sub-title on Building or Homestead Associations by the Acts of 1894, Chapter 321. The time of the enactment of this Amendment coincides with the general period in the evolution of building and loan associations during which some associations were turning for more rapid accumulations of capital to the device of issuing prepaid stock with preference features. The language of the Amendment, which provides not only that prepaid stock may be issued, but also that it may be issued upon such terms as may be set forth

in the by-laws, may well have been intended to authorize the issuance of this class of stock on terms providing for a priority in dividend or on liquidation.

The basic difficulty in construing the present statute is that the act is in substantially the form in which it was enacted by the Laws of 1852, Chapter 148, and later incorporated into the general corporation law enacted by the Acts of 1868, Chapter 471. This statute basically contemplated the terminating type of society. Indeed, it was not until the Acts of 1894, Chapter 321, above mentioned, that provision was made for the serial type of plan, at the same time that full paid-up shares were recognized in the statute. Although it is true that capital stock type building and loan associations were unknown at the time of the enactment of the basic building and loan law in Maryland, we do not believe that the Act should receive a construction which, to a considerable extent, would freeze the law to that existing at the time of its enactment except where changed and modernized by amendment. In this connection, see the discussion by Judge Stein in *Lakeview Building & Loan Association v. Byer*, 4 Balto. City Rep. 177 (1923).

Because of the venerable age of the basic statutory law in this area, it is not altogether clear what a building and loan association in Maryland is intended to be. This deficiency was brought to the attention of the Legislature in the *Supplementary Report on Building and Loan Associations*, Research Report No. 18 of the Legislative Council of Maryland (Nov., 1942) in which it was noted at page 30:

“There is needed a clear definition of what a building and loan association is. In Maryland, building and loan associations have for many years enjoyed a very favorable position with respect to taxation; they have been granted much broader exemptions than other types of business corporations. This has been largely on the basis that they perform a public service in promoting thrift and home ownership. * * *

“Other types of business, not true building and loan associations, certainly should not be allowed to avoid taxation or regulation to which they would otherwise be subject by the mere trick of adopting the name of a building and loan association. Yet this very thing has been done by a number of companies which appear to be in reality only small loan companies or real estate holding companies.”

And further at page 33, the report concluded as to this feature:

“In order to prevent this type of abuse, some clear definition should be adopted stating exactly what type of organization may operate under the name of a savings or building and loan association.”

No such clear definition has been adopted subsequent to the Report.

We are also advised by your department that a number of charters, similar to the ones submitted to us, have been accepted for record in the past. This interpretation of the Maryland statute made by the administrative agency charged with the application of the law is also entitled to some weight in the consideration of this question.

In view of the variety of judicial opinion as to where the line should be drawn concerning capital stock features, and in the absence of any clear statutory directions, we are of the opinion that we must rely heavily on the guides furnished in the general rules of interpretation set forth in Article 23. Under Article 23, Section 1 (a), the provisions of that Article apply to all corporations except as otherwise expressly provided by statute. Section 3 provides:

“*General scope.* Corporations other than municipal corporations and banks, may be formed under the provisions of this article for any one or more lawful purposes. Such corporations, other than corporations of any class for which special provision

is made in this article, shall be formed under the provisions of this sub-title. Any corporation formed under the provisions of this article, shall, in addition, comply with all requirements of law applicable to corporations of the class to which it belongs."

Under the general corporation law set forth in Part I of Article 23, there would be no question concerning the validity of the provisions in the proposed Articles of Incorporation. Since we feel that there is not any clear inconsistency between these general provisions and the special provisions relating to building and loan associations, we are of the opinion that the creation of various classes of stock with direct and indirect priorities as those set forth in the proposed articles is not prohibited by present Maryland law.

This result would appear consistent with the interpretation placed upon the existing statute by the Legislature, which in the 1960 Session enacted House Bill No. 93, subsequently vetoed by Governor Tawes. The Bill contained an Amendment to the present law intended specifically to prohibit capital stock type building and loan associations. That feature of the Bill would seem to indicate a recognition that capital stock building and loan associations are either permitted under the present law or, at least, that any implied prohibition is doubtful and in need of clarification for enforcement.

The next question raised by the proposed Articles you submit is the extent to which voting rights may be restricted, or denied entirely, as a feature of some of the classes of stock sought to be authorized. Article 23, Section 157, provides as follows:

"All shareholders of associations incorporated under Sections 144 to 155, both inclusive, of this article, or heretofore incorporated under any special act, and all borrowers from such associations, and all persons assuming or obligated upon loans made or held by such association shall be members thereof, and all persons buying the property secur-

ing loans made by such association subject to such loans shall have the privilege of such membership at all meetings of the members of such associations, each borrower and each obligor upon a loan and each owner of property subject to a loan shall be entitled to one vote as such borrower, obligor or owner. Shareholders, whether borrowers or not, shall be entitled to vote as heretofore provided by law or the charter and by-laws of such associations."

This statute was enacted by the Acts of 1945, Chapter 875. The descriptive title of the Act stated it was a bill "providing who shall be members of building and loan associations and relating to their privileges". While the purpose of the Act is not altogether clear, it may well have been intended to aid State chartered building and loan associations in complying with the definition of a domestic building and loan association under the Federal Internal Revenue Acts which had, since the Act of November 23, 1921, 42 Stat. 227, Chapter 136, included the element that substantially all of the business of the association be confined to making loans to members. Thus, the Act makes borrowers members, but limits a borrower's voting to one vote, regardless of the number of shares theoretically involved in the loan transaction.

Russell, *Savings and Loan Associations* (1956), in commenting on qualification as a domestic building and loan under the I.R.C. states at page 227, n. 3:

"It is also apparent that the right to vote is not a requirement *per se* of membership under the Internal Revenue Code—provided the state statute, charter and by-law requirements of membership have been fully complied with."

Section 157, after providing that shareholders shall be members, also provides that they "shall be entitled to vote as heretofore provided by law or the charter and by-laws of such associations". This clause indicates that shareholders in a building and loan association do not necessarily

become entitled by virtue of membership to one vote for each share owned. The provision was probably prompted, at least in part, by a recognition of the practice mentioned in Endlich, *The Law of Building Associations*, 2nd Ed. (1895), Section 86, page 72, where the author states:

“It has been a custom in building associations, since their inception, and one, it seems, very generally followed, to allow every member but one vote, irrespective of the number of shares he may hold. Sometimes this rule is established by the constitution or statute, and again it is followed by a sort of tacit understanding and general consent.”

It is our understanding that some state chartered building and loans in Maryland do place a maximum limitation on the number of votes per shareholder, although not necessarily fixed at one vote. Such a limitation is probably designed to preserve a sort of fraternalism or rough voting equality *per capita* among the members. However, the language of Sec. 157 which permits charter provisions respecting voting rights does not in terms support an interpretation limited solely to a maximum per person type of restriction.

The types of restrictions set forth in the proposed articles are designed to preserve control of the corporation in the substantial investors and promoters, and are but another feature of the methods of attracting substantial initial investment. Thus, the voting problem is essentially another aspect of the one discussed above concerning priorities in dividends and on liquidation. Since the Legislature has recognized that some restrictions or limitations on voting in building and loan associations may be made, we are faced with the question of where the Legislature intended to draw the line. Once again, we are of the opinion that reliance must be placed on the rules of interpretation set forth in Article 23. Since voting restrictions on stock classes, or the creation of a class or classes of non-voting stock, are permitted under the general corporation law, and since we do not believe there is any clear inconsistency between these provisions and those under the sub-title “Building or Home-

stead Associations”, we are of the opinion that the voting restriction features of the stock sought to be created under the proposed articles are permissible.

The final question remaining open is presented by the proposed Articles of Incorporation of Company I which provide for an unlimited number of free shares. Article 23, Section 144 (a), provides:

“Any homestead or building association formed under this article shall state in its certificate of incorporation the par value of its shares, and any such association heretofore or hereafter formed shall have power to accept subscriptions to and payments on account of any number of shares without limit and without other corporate action, notwithstanding any limitation on the number of shares authorized by the existing charter of such association.”

This statute appears to be premised on the assumption that the charter will provide a specified number of authorized shares, as required by Article 23, Section 4 (b) (5). It is true that, to require the total number of authorized shares to be specified, will, at the present time, apparently require the doing of a useless act, since the charter authorized amount is not a limitation on building and loan associations. Nevertheless, we are of the opinion that it is desirable that an amount be specified for purposes of uniformity of practice in this respect. A deviation such as that sought by the proposed articles is not specifically authorized by Article 23, Section 144, and may result in future complications should the Legislature amend the bonus tax so as to have it apply to building and loans on the same basis as ordinary business corporations.

You have also noted that Section 154 of Article 23, headed “Land Companies”, after providing that redeemed shares shall be cancelled, states, “. . . and it shall be lawful for such corporation to issue an equal number of new shares in their stead, so that the number of unredeemed shares may always equal and never exceed the number of shares fixed

by the certificate of incorporation of such corporations; . . .". In view of the conclusion which we have reached concerning Section 144, it is unnecessary to express any opinion as to the applicability of Section 154 or on the question of the type of corporation to which its provisions are intended to apply. See *Geiger v. Eighth German Building Association*, 58 Md. 569 (1882).

For the reasons above set forth, the proposed Articles of Incorporation which you have submitted to us, with the change in those of Company I above mentioned, may, in our opinion, be accepted for record.

C. FERDINAND SYBERT, *Attorney General*.

LAWRENCE F. RODOWSKY, *Asst. Attorney General*.

COUNTY COMMISSIONERS

STATE PROPERTY—TRANSFER OF MINERS' HOSPITAL BY BOARD OF PUBLIC WORKS TO COUNTY MUNICIPALITY OR PRIVATE OWNERSHIP BY AUTHORITY OF ACTS OF 1959, CHAPTER 475—EFFECT OF TRANSFER ON STATE MERIT SYSTEM STATUTES AND PENSION RIGHTS OF HOSPITAL EMPLOYEES.

January 15, 1960.

Mr. Leslie J. Clark,
County Commissioners of Allegany County.

We have your letter of January 12, 1960, requesting interpretation of Chapter 475 of the Laws of 1959.

Section 1 of this Act authorizes the Board of Public Works of the State of Maryland to transfer from State ownership, without consideration, Miners' Hospital in Frostburg, including all property thereof, real, personal or mixed, whether in possession or expectancy, and all liabilities, to the County Commissioners of Allegany County, or to a local municipal corporation, or to a responsible non-profit corporation which would undertake to continue operation of the hospital.

In answer to your first inquiry, which relates to this Section, it is our opinion that no implementing legislation will be required for the Board of Public Works to effect the transfer contemplated by this Section.

You have also asked whether Section 1 is broad enough to include, as property contemplated in the transfer, accounts receivable due Miners' Hospital upon the effective date of the transfer. In our opinion, accounts receivable of Miners' Hospital (debts owing to it for hospital services rendered) falls squarely within the intended legislative meaning of personal property in expectancy. As such, it will pass at the time of the transfer.

You further asked: "Assuming that the hospital should be transferred to any one of the three agencies designated

in Section 1 of the Act, will any further legislation be necessary to authorize the payment from the general fund provided for in the act to any of the designated agencies, since the control of the funds will be passing from the State of Maryland to the designated agency?" This question has reference to Section 2 of the Act, which reads as follows:

"That no general funds shall be included in the budget request submitted to the General Assembly as a direct appropriation to the Miners' Hospital for the fiscal year ending June 30, 1961; but the 1961 fiscal year general fund appropriation request shall include an item for payment to Miners' Hospital of State aid for the In-Patient and Out-Patient Programs; provided that if the amount included in such budget request for the 1961 fiscal year be less than an amount equal to 50 per centum of the general fund appropriation to Miners' Hospital for the 1958 fiscal year, the budget request for the State Department of Health for the 1961 fiscal year shall include an item for a payment to Miners' Hospital equal to the amount by which 50 per centum of the 1958 fiscal year appropriation to Miners' Hospital exceeds the amount requested for State aid under the hospital In-Patient and Out-Patient Programs."

This Section, of course, reflects the intention of the Legislature at its 1959 Session to cease making direct general fund appropriations to Miners' Hospital beginning with the fiscal year July 1, 1960 to June 30, 1961. It further reflects the intention of the Legislature to provide in the fiscal year 1961 an appropriation to the State Department of Health for participation by Miners' Hospital in the In-Patient and Out-Patient Programs administered by the State Department of Health. While the provisions of this Section purport to project the intention of the Legislature in connection with a future year's appropriations, it is fundamental that one Legislature cannot bind its successor. Accordingly, the appropriations contemplated by this Section must actually be made in the applicable budget year, and if so made, under

authority of Chapter 475 of the Acts of 1959, no other legislation will be necessary to authorize the payments in question to Miners' Hospital.

Finally, you asked: "Assuming that the hospital is transferred by the Board of Public Works to a local municipal corporation, or to the County Commissioners of Allegany County, will the employees of the hospital be considered as State employees, so as to retain the rights referred to in Section 3 of the above Act?"

Section 3 of the Act provides :

"That nothing in this Act shall be construed to impair or change in any particular the merit system status of employees of Miners' Hospital, so long as they remain employees of the State of Maryland, under the provisions of Article 64A of the Annotated Code of Maryland, title 'Merit System', and also under the provisions of Article 73B of said Code, title 'Pensions'. *All rights and privileges belonging to any said employees under Articles 64A and 73B shall be retained by them so long as they hold their status as State employees in active employment.*" (Emphasis supplied.)

It is evident that the employees of the Miners' Hospital will not continue as State employees if the control and ownership of this institution is transferred either to the county, a municipality or a private organization. Accordingly, all rights and benefits presently conferred upon such individuals as State employees under the Merit System provisions of Article 64A of the Annotated Code of Maryland (1957 Edition) will cease to exist effective with the contemplated transfer.

As to continuation by these employees under the Retirement System of the State of Maryland (Article 73B, Code), it is our understanding that Allegany County now participates in the State Retirement program. Should the hospital be transferred to the county, the employees of the institution will remain in the retirement system without loss of benefits.

In the event that the hospital should be transferred to the City of Frostburg or other municipality, which does not now participate in the State Retirement program, the employees of the institution will be faced with this situation: Under Sections 21-22 of said Article 73B, any municipality, as therein defined, may by action of its legislative body approve participation by *all* employees of the municipality in the Retirement System. If this is not done within two years following the transfer of the institution to the municipality, the employees of the Miners' Hospital will forfeit all retirement benefits previously held during their tenure as State employees, and would be required after that time to withdraw their accumulated contributions, plus interest, from the retirement program. Should the institution be transferred to private ownership, the employees would forfeit all rights to continuing in the State Retirement System and, as above stated, would be obliged within two years to withdraw the amounts of their accumulated contributions, plus interest.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

CRIMINAL LAW

LAUNDRY AND LAUNDROMAT DISTINGUISHED—STATUTORY CONSTRUCTION—A LAUNDROMAT IS NOT A LAUNDRY WITHIN THE MEANING OF THE STATUTE.

April 4, 1960.

Mr. Frank H. Newell, III,
State's Attorney for
Baltimore County.

In your recent letter you ask whether or not laundromats which contain coin operated washing and drying machines used exclusively by the public come within the purview of Article 55, Section 8, of the Annotated Code of Maryland (1957 Ed.), which requires laundries to close daily between the hours of 12 o'clock midnight and 6 o'clock A. M.

Article 55, Section 8, provides that no person, firm or corporation operating or maintaining a laundry or any employee thereof shall operate said laundry or collect wearing apparel or articles of any kind whatsoever to be washed or laundered, or deliver the same after having been washed or laundered, between the hours of 12 o'clock midnight and 6 o'clock A. M. of each and every day. Article 55, Section 1, defines a laundry as follows:

“Any place, building, structure, room, establishment or portion thereof which is used for the purpose of washing, drying, starching, ironing or laundering wearing apparel of any description, table, bed or other household linens, or any other washable fabrics or materials, *such work being done for the general public*, shall be deemed a laundry, and subject to the provisions of this article.” (Emphasis supplied.)

At the time Article 55 was enacted, in the year 1927, laundromats did not exist. The language of the statute defines a laundry as a place where work is being done for the general public. A person who takes his own wash into a

laundromat and operates the machines for himself is not doing it for the general public. He is literally washing his own dirty linen, but is not performing the same chore for others. It is therefore our opinion that a laundromat clearly is not a place where the laundering of clothing is being done for the general public.

In *Thrift Wash, Inc. v. O'Connell*, 174 N.Y. Supp. 2d 70, an action was brought for a declaratory judgment and injunctive relief to declare invalid a regulation of the New York City Commissioner of Licenses. The regulation provided that the premises of licensed laundromats must be adequately attended at all times. The administrative act defined a laundry as "any place which is used for the purpose of washing, drying . . . for the general public." Plaintiffs were the owners and operators of laundromats with washing and drying machines which were coin operated. The court there said:

"It can hardly be that the Legislature intended to regulate a service which, at the time of the legislative enactment, was in its infancy, if it existed at all. Public acceptance of laundromats came after the enactment of this statute, which argues strongly against any specific legislative intent to regulate them."

"Despite the fact that laundromats offer a service for the general public, they are not considered to be laundries within the statute when no employer or attendants are necessary to the operation of the automatic machines, their operation being subject only to the will of the one deciding to use it."

In *Campbell Cleaning & Dye Works v. Porter*, (Tex.), 183 S.W. 2d 253, the Court said:

"Whatever may be the etymological derivation of the word, in the social and domestic life of today the popular and ordinary meaning of the term 'laundry', used in connection with the word 'pub-

lic', is that of a place to which the public are invited to deliver soiled clothes to be washed, dried, starched, ironed, and subjected to the processes ordinarily employed to render soiled clothes suitable for further use.' ”

In *Handfinger v. Stevelaw Realty Corp.*, 102 N.Y.S. 2d 688, the court distinguished between a laundry and a laundrette.

In *Doyle v. Gordon*, 158 N.Y.S. 2d 248, 257, the court stated:

“It is a fundamental principle in the interpretation of statutes that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded.”

Therefore, it seems apparent that laundromats do not come within the Maryland statutory definition of a “laundry” because work is not being done for the general public; rather, it is being done by them. *Expressio unius est exclusio alterius*. *Graham v. Joyce*, 151 Md. 298; *Kirkwood v. Provident Savings Bank*, 205 Md. 48.

Certainly, there are no policy reasons for extending the definition of a laundry to include laundromats, for the problems of laundries would be peculiar unto themselves and would not carry over to laundromats. As stated in 2 Sutherland, *Statutory Construction*, Section 5102, pp. 511-512:

“Where the language of a statute is expressly made applicable to a particular situation or thing or to one species of a larger group, subsequent events will have no effect to enlarge the meaning of the statute. . . . Likewise, special acts are made with reference to particular persons and localities, and are usually confined to existing situations. The term ‘motor vehicle’, as used in the National Motor Vehicle Theft Act, was held not to include aircraft

on the theory that the act was directed towards objects propelled on land.”

Since laundromats were not in existence when the Maryland statute was enacted in 1927, and since it is expressly applicable to a particular situation, the advent of the laundromat would not have the effect of enlarging the plain meaning of the statute. We are therefore of the opinion that Article 55, Section 8, does not apply to laundromats.

C. FERDINAND SYBERT, *Attorney General*.

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

DEFECTIVE DELINQUENTS

REDETERMINATION—COURTS ARE AUTHORIZED TO PAY COST OF PSYCHIATRIC EXAMINATION OF DEFECTIVE DELINQUENTS.

May 17, 1960.

*Mr. Frederick W. Invernizzi, Director,
Administrative Office of the Courts.*

This will acknowledge receipt of your recent letter requesting an opinion on the issue of whether the State of Maryland is responsible for the payment of reasonable fees for psychiatrists who have examined and testified on behalf of a defective delinquent seeking a review of his status under the provisions of Article 31B, Section 10, Annotated Code of Maryland (1957 Edition). Article 31B, Section 7 (a) provides that after the Court commits a person to Patuxent Institution a complete examination shall be made by three persons (a physician, a psychiatrist and a psychologist) on behalf of the Patuxent Institution to determine whether the individual is or is not a defective delinquent. After the examination is completed, a determination is made as to whether or not the individual is a defective delinquent and the findings are incorporated in a written report addressed to the Court.

Section 7 (b) provides as follows:

“In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency by the State’s attorney or assistant State’s attorney, or by the court on its own initiative, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judi-

ciary, in such amounts as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court."

Section 8 provides for a court hearing, appointment of counsel to represent the individual, etc. Section 9 (b) provides that if the court or jury shall find the individual is a defective delinquent, the court shall order the individual to be committed or returned to the Patuxent Institution for an indeterminate period without either maximum or minimum provisions. Subsections (a) and (b) of Section 10 provides as follows:

"(a) After any person shall have been confined for two years as a defective delinquent under an indeterminate sentence in any institution for defective delinquents, he, or anyone in his behalf, including the director or any officer or employee thereof, may file a petition in the law courts of the county, or Baltimore City, as the case may be, either where such person was originally sentenced, or which was the bona fide residence of the petitioner at the time of such sentence, requesting that the person so confined be brought before said court for the purpose of having the defective delinquency of such person *redetermined*. Provided, however, that if the law court of the county or Baltimore City, as the case may be, from which he was originally sentenced or in which he was a bona fide resident at the time of such sentence are one and the same, the petitioner shall have an absolute right to file his petition in the law court of any other county or in Baltimore City. The court shall forthwith proceed to hear and determine the matter. If the person so confined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance

at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case may be, shall determine that such person is a defective delinquent, the court shall order said person re-committed to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or elsewhere within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of Section 688 of Article 27 of the Code.” (Emphasis supplied.)

“(b) After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.”

The General Assembly has provided in Section 10, *supra*, that any individual confined in the Patuxent Institution may file a petition for the purpose of having the question of defective delinquency “*redetermined*”. We think that the word “*redetermined*” has special significance. It indicates that the General Assembly desires to give the petitioner a right to have the question of whether he continues to be a defective delinquent fully presented and considered. *A fortiori*, does not this require that testimony, including expert medical and psychiatric opinions, be produced to fully determine the issues? Since it is clear that a full and complete hearing on the issue of defective delinquency is required, it is a fair inference that the General Assembly intended to allow the confined individual the right and opportunity to

refute the opinion of the staff of the Patuxent Institution. If the confined individual is to be given an opportunity to attempt adequately to refute the opinion of the staff, it is only logical that he should be able to have an examination by a psychiatrist of his own choosing. If this opportunity is not afforded, it could result in a hearing with only the opinion of the staff of the Patuxent Institution expressed.

In passing upon the constitutionality of the Defective Delinquent Act, the Court of Appeals in *Eggleston v. State*, 209 Md. 504, at page 514 said:

“The appellant contends that the statute violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The argument is not based on any lack of procedural due process, indeed the careful safeguards of the Act for the appointment of counsel, furnishing of reports, election of jury trial, and *redetermination* of the issue at suitable intervals, would seem to preclude such an attack.”
(Emphasis supplied.)

Since it is our opinion that a full and complete hearing is required upon a redetermination, it therefore follows that the confined individual must have the opportunity to obtain an examination by a competent psychiatrist of his own choosing even though the burden of the cost of the examination and subsequent testimony may fall upon the State. Of course, if the individual is financially able to bear this expense it is incumbent upon him to do so.

A persuasive argument can be made that since the General Assembly did not expressly provide in Section 10 for examination and opinion of a psychiatrist of a confined individual's own choosing at State expense, it must not have intended to grant this right as it has in the original determination under Section 7 (b) (*expressio unius est exclusio alterius*). See *Kirkwood v. Provident Savings Bank*, 205 Md. 48. However, such an interpretation, in our judgment, would raise a serious constitutional question under the doctrine set forth by the Supreme Court in *Griffin v. Illinois*,

351 U.S. 12. A confined individual who had sufficient assets could employ a psychiatrist of his own choosing for the purpose of refuting the opinion of the staff of the Institution, whereas an indigent would have no such opportunity. This could deprive the indigent of an opportunity to have a full and complete hearing on the redetermination of the issue of whether he is or is not a defective delinquent. An interpretation which could possibly deprive an individual of some constitutionally guaranteed right should be avoided.

We are, therefore, of the opinion that the General Assembly intended to give the utmost safeguards to persons confined in the Patuxent Institution and that redetermination, being one of those safeguards, must be full and complete, including the opportunity for psychiatric examination by a practitioner of the individual's own choosing if requested, even though the State may be required to bear the expense of such an examination.

C. FERDINAND SYBERT, *Attorney General*.

JOSEPH S. KAUFMAN, *Asst. Attorney General*.

DEFECTIVE DELINQUENTS—PSYCHIATRIST—MUST BE PHYSICIAN LICENSED IN MARYLAND.

November 21, 1960.

*Mr. Frederick W. Invernizzi, Director,
Administrative Office of the Courts.*

We have received your letter requesting an opinion whether a physician who is not legally licensed to practice medicine and surgery in the State of Maryland may be appointed to examine persons for defective delinquency as provided under Section 7 (b) of Article 31B of the Annotated Code of Maryland (1957 Ed.).

Section 7 (b) provides as follows:

“In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency by the State’s attorney or assistant State’s attorney, or by the court on its own initiative, then such person shall be entitled, upon request, to be examined by a *practitioner of psychiatry* of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court. (Emphasis supplied.)

The section provides that a person has a right to be examined by a “practitioner of psychiatry” of his own choice if the State’s Attorney or the Court has requested that the person be examined. You state that a certain physician has been appointed, at the request of the person to be examined, in at least twenty cases and that it has now been brought to your attention that such physician is not legally licensed to practice medicine and surgery in Maryland but is licensed in the District of Columbia. You further advise that the

physician has been paid in a number of cases by your office prior to the discovery that he was not licensed to practice in Maryland; however you are holding some bills pending our opinion in the matter.

The Legislature has provided that a person may be examined by a "practitioner of psychiatry" of his own choice; however, it cannot be implied that the Legislature was amending or repealing the Medical Practice Act, Article 43, Section 119-148. It is, therefore, necessary in determining the meaning of Section 7 (b) to consider it in conjunction with the Medical Practice Act. *Statutory Construction*, Crawford, Section 227.

Section 139 of Article 43, 1957 Code (Medical Practice Act) defines the practice of medicine as follows:

"Any person shall be regarded as practicing medicine within the meaning of this subtitle who shall append to his or her name the words or letters 'Dr.,' 'Doctor,' 'M.D.,' or any other title in connection with his name, with the intent thereby to imply that he or she is engaged in the art or science of healing, or in the practice of medicine in any of its branches. Any person who practices medicine or the art or science of healing shall be considered as a practitioner of medicine or surgery. As used herein the phrase 'art or science of healing' and the phrase 'practice of medicine' shall be construed to include: Operating on, professing to heal, prescribing for or otherwise diagnosing or treating any physical or mental ailment or supposed ailment of another; or for hire or gratuity or compensation, either directly or indirectly paid, undertaking by appliance operation or treatment of whatever nature, to cure, heal, diagnose or treat any bodily or mental ailment or supposed ailment of another; or for hire, gratuity or compensation, either directly paid, by or for any patient, undertaking to treat, heal, cure, drive away or remove any physical or mental ailment, or supposed ailment of another.

by mental or other process, exercised or invoked on the part of either the medical practitioner or the patient or both. . . .”

There is no doubt that a “practitioner of psychiatry” is included within this section. Psychiatry has been defined as “the treatment of diseases of the mind”. Blakiston’s *New Gould Medical Dictionary*. The Medical Practice Act requires that before any person may practice medicine in the State of Maryland, he must be licensed by the Board of Medical Examiners of the State of Maryland subject to penalty. *Hitchcock v. State*, 213 Md. 273.

Section 139 of Article 43 does, however, provide for some exceptions which are in part as follows :

“. . . Nothing herein contained shall be construed to apply to gratuitous services, nor to any resident or assistant resident physicians or interns or students at hospitals in the discharge of their hospital or dispensary duties, or in the office of physicians, or to any physician or surgeon from another state, territory or district in which he resides when in actual consultation with a legal practitioner of this State; . . . nor shall the provisions of this subtitle apply to physicians or surgeons residing on the borders of a neighboring state, and duly authorized under the laws thereof to practice medicine or surgery therein, whose practice extends into the limits of this State; provided, that such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this State without complying with the provisions of this subtitle; provided, that the same privileges be accorded to licensed physicians of this State; . . .”

A physician from another state is excepted from the provisions requiring licensure when in actual consultation with a legal practicing physician of this State. If a physician resides on the borders of a neighboring state and he is duly authorized under the laws of the neighboring state to

practice medicine or surgery, and his practice extends into the limits of Maryland, he also is excepted from licensure provided such practitioner does not open an office or appoint places to meet his patients or receive calls within the limits of the State of Maryland.

We have been advised that this physician does visit Patuxent Institution and makes his examinations there, which is of necessity since the persons examined are generally confined in that Institution. There is nothing presented which would indicate that these persons are former patients of this physician in the District of Columbia (on the contrary, the persons seem to be from various sections of the State of Maryland) nor that the physician is consulting with a physician legally licensed in this State. The material which you have included with your letter indicates that the physician is not merely coming into Maryland to see former patients but that he is appointing places in Maryland to examine these persons and therefore does not come within one of the exceptions in Section 139 of Article 43.

In summary, a physician of the District of Columbia not licensed in Maryland is examining many persons at their request (who were not former patients of the physician) for defective delinquency at the Institution and submitting a report to the Court where such defective delinquency proceeding is pending and in some cases testifying to such examination.

It is our opinion in this case, as presented in your letter, that the physician is practicing medicine and surgery in the State of Maryland without a license. We therefore hold that such "practitioner of psychiatry" must be either licensed in Maryland or be within one of the exceptions allowed by law. The physician in this case is not within one of the exceptions and therefore should not be appointed under Section 7 (b) of Article 31B until properly qualified to practice medicine in the State of Maryland. This opinion is, of course, limited to the appointment under Section 7 (b) and does not pass upon the admissibility of the said physician's testimony since this is a matter within the province of the Court.

You also inquire as to whether the bills, which have been submitted to you for payment after approval by the trial judge for the services of the said physician under Section 7 (b), should be paid. The physician in question has rendered the services for which he has billed the State of Maryland and such bills have been approved by the trial judge as reasonable. It is our opinion that these bills should be paid for the services rendered, however, we suggest that a copy of this opinion be sent to the physician so that he may comply with the law if he wishes to practice medicine in the State of Maryland.

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

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General.*

DENTAL EXAMINERS

DENTISTRY—WORD “DENTIST” MAY BE USED ON SIGN.

April 18, 1960.

*Dr. Frank J. Bryce, Secretary,
Maryland State Board of
Dental Examiners.*

I have your inquiry of April 11th concerning the use of the word “Dentist” on a sign.

Section 16 of Article 32 of the Annotated Code of Maryland (1959 Supp.) contains the law on the subject of signs of persons practicing dentistry. It reads as follows:

“Each person holding a license under this article may exhibit on the door or the wall of the building or on the premises wherein he shall practice dentistry, not more than two signs on which shall be placed the name and title (Dr., D.D.S., D.M.D.) 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 or on the premises of said property. No sign shall be erected with neon or flashing lights. Illumination of any sign shall be of an enclosed lamp design, non-flashing and containing no colored illumination.”

While the statute is silent as to the use of the word “dentist”, this office ruled in 24 Opinions of the Attorney General 259, on a similar question, as follows:

“The word ‘dentist’ would seem to be included within the term ‘title’ appearing in Section 14*, and we, therefore, see no impropriety in the fact that the sign contains the name of the doctor and the word ‘dentist’. . . .”

*Now Section 16 of Article 32, Code.

Therefore, in concurrence with the previous opinion, I find no objection to the use of the word "dentist" on a sign that in all other particulars complies with the statute.

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

BOARD OF DENTAL EXAMINERS—LAW FORBIDS DENTISTS
USE OF SPECIALTY ON SIGNS OR IN LISTINGS IN THE
CLASSIFIED SECTION OF THE TELEPHONE DIRECTORY.

September 22, 1960.

*Dr. Frank J. Bryce, Secretary,
Maryland State Board
of Dental Examiners.*

In your recent letter you ask whether or not the titles "Orthodontist", "Dental Surgeon", "Oral Surgeon", "Oral Surgery", or "Surgeon Dentist" may legally be used on signs and in the classified section of the telephone directory by dentists in the State of Maryland.

Article 32, Section 16, Annotated Code of Maryland (1959 Supp.), contains the law on the subject of signs of persons practicing dentistry. It reads as follows:

"Each person holding a license under this article may exhibit on the door or the wall of the building or on the premises wherein he shall practice dentistry, not more than two signs on which shall be placed the name and title (Dr., D.D.S., D.M.D.) 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 or on the premises of said property. No sign shall be erected with neon or flashing lights. Illumination of any sign shall be of an enclosed lamp design, nonflashing and containing no colored illumination."

Article 32, Section 12 (1959 Supp.) provides that *all advertising* by dentists is prohibited with the following specific exceptions: (1) A dentist may use a personal professional card of not more than $3\frac{1}{2}$ " x 2", upon which may be printed only his name, title, address, telephone number and office hours. If specializing, the name of his specialty may be used. (2) Signs are authorized as set forth in Section

16. (3) Removal notices may be mailed by any dentist notifying any bona fide patient that he is removing his offices from his present address to the address set forth in the notice. Such notice shall not be more than 3½" x 2" and may contain only the name, title, present address, telephone number, office hours and new address of the dentist who is removing his office. If specializing, the name of the specialty may be used. (4) Notices may be mailed to specifically named individuals by any dentist who is about to begin the practice of dentistry notifying the public of this fact. Such notice shall not be more than 3½" by 2" and may contain only the name, title, address, telephone number and office hours of such dentist. If specializing, the name of his specialty may be used.

A general maxim to be applied in the construction of statutes is that if the statute in question enumerates the acts which it permits to be done, then it excludes the doing of all others (*Expressio unius est exclusio alterius.*) Crawford, *The Construction of Statutes*, 1940, Ed., Sect. 195. Applying that maxim to Article 32, Sections 12 and 16, we find there are only four means which a dentist may use to advertise and only three which he may use to advertise a specialty. The classified section of the telephone book is not included among the types of advertisement that a dentist may use.

The titles or degrees that he may use on his sign are restricted by Section 16 to those of "Dr.", "D.D.S." and "D.M.D.". Section 12 does not permit specialty advertising on signs. He may use no others except that in 24 Opinions of the Attorney General 259, and in an opinion in 45 Opinions of the Attorney General 83, it was held that the word "dentist" was included within the term "title", as it appears in Section 16.

In 39 Opinions of the Attorney General 137, it was ruled that Article 32, Section 12, (Code), forbids dentists to place advertisements in the classified section of the telephone directory because only those forms of advertisements included in the statute could be used and no others. There it was said:

“The purpose of the absolute prohibition against advertising is to raise the standards of the profession by eliminating this form of competitive practice. We feel that any exception to such a prohibition must receive a strict construction in order to carry out the purpose of the legislation.”

Thus, construing the statutes strictly and in accordance with the above maxim, we are of the opinion that no specialty titles may legally be used by dentists on signs or in the classified section of the telephone directory.

C. FERDINAND SYBERT, *Attorney General*.

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

DEPARTMENT OF GEOLOGY, MINES
AND WATER RESOURCES

PERMIT REQUIRED FROM DEPARTMENT FOR CONSTRUCTION OF
CABLE IN BED OF POTOMAC RIVER—NO EXCEPTIONS AS
TO TIDAL WATERS.

May 26, 1960.

*Dr. Joseph T. Singewald, Director,
Department of Geology, Mines
and Water Resources.*

We have your letter of May 18, 1960, in which you advise us that your Department is in receipt of an application to lay a cable on the bed of the Potomac River, across the River in the tidal waters of the River, extending from Mason Neck in Virginia to Indian Head in Maryland. You inquire as to whether approval of this proposal by your Department, and issuance of a permit therefor, is a necessary prerequisite prior to the undertaking of this project.

Section 722 of Article 66C, Annotated Code of Maryland (1957 Edition), provides as follows:

“It shall be unlawful for the State or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality or other political subdivision of the State to construct, reconstruct, change, or make an addition to any conduit, pipe line, wire cable, trestle, or other device, structure or apparatus, in, under, through or over the bed or waters of the Potomac River, without obtaining a permit therefor from the Department of Geology, Mines and Water Resources. The obtaining, use and holding of such a permit shall be subject severally to the provisions concerning permits found elsewhere in this subtitle.”

This Section, enacted as Chapter 757 of the Acts of 1957, explicitly requires that a permit be obtained from your Department prior to constructing any apparatus, structure

or device, specifically including a wire cable, in, under, through, or over the bed or waters of the Potomac River. This Section does not distinguish between tidal and non-tidal waters of the Potomac River and hence must be construed as encompassing the River in its entirety from shore to shore.

You cite, however, the provisions of Section 721 which provide *inter alia* that it shall be unlawful for the State or any person to construct or repair any reservoirs, dams or waterway obstructions, or in any manner to change or diminish the course, current or cross-section of any stream or body of water within the State, *except the tidal waters*, without a permit from your Department. While you further point out that Section 722, above quoted, specifies that the obtaining of a permit to lay a cable on the bed of the Potomac River is to be subject to all provisions concerning permits, including those provisions set forth in Section 721, we do not think it is possible under any construction of these Sections to incorporate the exception as to tidal waters contained in Section 721 into the provisions of Section 722. Accordingly, it is our view that a permit must be secured from your Department prior to constructing the cable on the bed of the Potomac River, irrespective of whether such construction is to be made in tidal or non-tidal waters of the River.

C. FERDINAND SYBERT, *Attorney General*.

ROBERT C. MURPHY, *Assistant Attorney General*.

EDUCATION

RESIDENCE OF FEMALE MARRIED STUDENT OF TEACHERS'
COLLEGES DEFINED.

January 22, 1960.

Dr. David W. Zimmerman,
Assistant State Superintendent,
Department of Education.

You have asked our advice in determining the status of a student at one of our teachers' colleges who married a man whose residence and domicile are not in this State.

Section 168, Article 77, Annotated Code of Maryland (1957 Ed.), provides:

“. . . students regularly admitted to or enrolled in any class at the State teachers' colleges *from the City of Baltimore and the several counties*, who shall obligate themselves to teach in the State of Maryland, shall not be required to pay any tuition fees. . . ." (Emphasis supplied.)

On the basis of the underlined phrase, Maryland students pay no tuition, conditioned of course upon their pledge. Out-of-State students are charged tuition. The statute uses neither the word "residence" or "domicile", merely "*from the (State)*"; however, it would seem that the test would have to be one of either "residence" or "domicile". Though these legal terms are somewhat related, they have slightly different meanings in law. An opinion of this office, reported in 21 Opinions of the Attorney General 313, suggests that the test is one of "residence", and this appears to be proper. Beale, *Conflict of Laws*, Vol. I, Sec. 10.13, "Attendance at Public Schools", states: "Residence is interpreted as actual residence, not necessarily domicile, in the school law." (Citing cases.)

The *domicile* of a married woman is that of her husband. Beale, *Conflict of Laws*, Vol. I, Sec. 27.2. This, however, is

not decisive of the question now presented, because here the test is one of *residence*.

“Residence” as used in connection with Sec. 168 can be taken as “indicating a merely factual place of abode” (Beale, *Conflict of Laws*, Vol. I, Sec. 10.3), or the place “at which the party actually dwells” (*Gallagher v. Bd. of Election Supervisors*, 219 Md. 192, 202). When used in this sense it becomes apparent that the *residence* of the student here discussed may very well be here in Maryland at the teachers’ college dormitory where she lives, although her *domicile* is in some other State where her husband has an established domicile. In order to establish this factual question of residence, you should apply the test already set up under Rule No. 3, adopted February 28, 1957.

We further suggest that the State Board adopt an additional rule (No. 5) to this effect:

“The residence of a married student shall be determined by the application of the criteria set out in Rule No. 3.”

We are cognizant of the problem which may arise in these cases in enforcing the pledge required under By-Law No. 67. Students such as these may escape their obligation under the pledge by moving out-of-State upon graduation. We know of no easy remedy for this situation. We suggest that in these cases a new pledge be executed which encompasses a promise to retain residence in this State until the obligation is fulfilled.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O’C. GENTRY, *Asst. Attorney General*.

TEACHERS' PAY BILL, CHAPTER 16, ACTS OF 1960—MONTGOMERY COUNTY "MERIT PLAN"—COUNTY BONUSES.

April 12, 1960.

*Dr. Thomas G. Pullen, Jr.,
State Superintendent of Schools,
State Department of Education.*

Re: Teachers' Pay Bill

At your request we have reviewed Chapter 16 of the Laws of 1960. This law, relating to teachers' salaries, was enacted as Senate Bill 26. It constituted a repeal and re-enactment of Sections 106(b) and 221 of Article 77 of the Annotated Code of Maryland (1957 Ed.).

The only change in Section 221 was to increase the amount of "payment per pupil" from \$20.00 per year to \$28.00 per year. In Section 106(b) the prior State minimum pay scale was carried over into the new law, with the exception of the step shown as "11th and after", which was increased from \$5,000 to \$5,300. This section also provides for a \$300.00 increase for veteran teachers. It is the interpretation of this provision which has caused some controversy. The pertinent language follows:

"In addition, the actual annual salaries paid to teachers in the eleventh year or more of teaching experience, for the school year 1960-1961 and continuing thereafter, shall exceed by at least three hundred dollars (\$300.00) the annual salary for equivalent teaching experience which was in effect in the respective county during the month of November, 1959. However, in any political subdivision in which, under the authority of subsection (i) of this section, the maximum annual salary paid to teachers is equal to or greater than \$7,300., the sum of \$300. which is specified in this paragraph may be applied toward the payment of what are generally referred to as 'merit' increases and also for supplemental increases for the extra

services, for teachers selected on the basis of comparative excellence.”

It is the opinion of this office that this law shall operate in the following manner:

1. Teachers in all of the counties of the State (except those counties defined in #2 below) who have completed ten or more years of teaching are to receive an increase of \$300 over and above that salary which was received at their respective levels in November 1959. The word “teachers”, as used in the first sentence of the above quoted provision, designates those who are to be the recipients of the increase. The word is not qualified in any way except that they shall be “in the eleventh year or more of teaching experience”. We therefore believe the term to be all-inclusive and to embrace the following:

(a) Principals. Since principals are in fact teachers having charge of a school, and since for State minimum pay purposes they are not given separate treatment in the Code, but are merely to be given an increment above that of teachers (Sec. 106(d)), we believe that the law intends that they be included.

(b) Non-degree teachers. Sec. 106(c).

(c) Teachers with bachelors, masters or higher degrees.

(d) Teachers with second or third grade certificates or a provisional certificate. Sec. 106(f), (g).

(e) Visiting teachers. Sec. 159(i).

(f) Teachers with certificates rated second class. Sec. 106(a). The effect of being rated “second class” is to freeze a teacher at a particular level or step, so that salary increments based on *successful* longevity will not be given when he is so frozen. The current increase is not based on *successful* experience, but merely experience. Therefore a teacher who is rated second class at the 8th or 9th step, for instance, but who in fact has 15 years of actual teaching, is to receive the increase.

We believe that supervisors are not included among those eligible for this increase.

2. Giving full weight to legislative intent, we interpret the second sentence, beginning with the word "However", in the above quoted provision, to have this effect: In any county in which the November, 1959, actual salary scale carried at *any* level a maximum pay of \$7,300 or more for teachers, then that county is not bound to pay the \$300.00 increase directly to *any* of its teachers. It *may* give the increase to the teachers *or* it *may* pay this sum out to teachers under either a "merit" plan or in payment for "extra services".

We are advised that Montgomery County has a salary scale, which at the 12th step provides for bachelor degree teachers' salaries of \$7,300. Masters, masters-plus and doctors are paid even more. It therefore follows that since Montgomery County provides a maximum annual salary of \$7,300, it is not compelled to give the \$300 increase to *any* teachers, even those with ten years or more service who earn less than \$7,300. It may use these moneys in its "merit" plan or for "extra services". We understand these "extra services" to mean such as are directly related to teaching, i.e., summer school teaching, recreational project supervision, school program or curriculum planning, etc.

We are also advised that since Baltimore County has a pay scale, for teachers with masters degrees or more, of over \$7,300, it also qualifies for similar treatment. It may therefore inaugurate a "merit" plan and use the funds under it, or for "extra services". On the other hand, if it chooses to ignore these options it must pay the \$300 increase directly to the eligible teachers.

We have also been asked by the county attorney of one of the counties to rule on the question of whether or not a "bonus" paid by the county over and above the State minimum scale is to be included in determining the November 1959 base "annual salary". In other words, is this \$300 increase to be applied on top of the salary plus bonus, or does it apply to the straight or flat salary alone? As we

understand the situation in regard to Somerset County (and we suspect other counties as well), these "bonus" payments come about by reason of an annual grant or payment of a particular sum by the county commissioners to *all* teachers. While we find no express prohibition in the Code as to the payment of a bonus, we do call attention to Sec. 106(i) of Article 77, which provides :

"The county board of education of any county and the Board of School Commissioners of Baltimore City may, in its discretion, pay to teachers and principals annual *salaries* in excess of the salaries provided for in this section. (Emphasis supplied.)

As you will note the authorization for county payments in excess of the State minimum scale relates to an increase by *salary*. There has apparently never been contemplated the payment of compensation to teachers in any form other than as salary. We might also note that there is no difference between salary and bonus insofar as the Federal and State income tax is concerned.

As noted in 41 Opinions of the Attorney General 177, the county commissioners have very limited discretion in regard to appropriations for teachers' compensation. For instance, in a particular year in which a "bonus" was paid, if the county school board submitted a budget request for what amounted to a \$400 salary increase for teachers, and thereafter the county commissioners granted the requested amount but on their own volition designated it as a "bonus", we would have no hesitancy in ruling that such designation was ineffectual and the real effect was to increase the actual salary.

The word "bonus", as used in a connotation connected with services, means not a gift or gratuity, but rather a sum paid for such services in addition to that ordinarily received by, or strictly due to the recipient. *Payne v. U. S.*, 269 Fed. 871, 873; *Pugh v. Scarborough*, 156 S.E. 149, 151, 200 N.C. 59; *Jones v. Loughman*, 288 N.Y.S. 44, 47. While it is true that the new law states that the annual *salary*

shall be increased, and there is no express mention of bonuses being included in "salary", nevertheless it is equally true that it was the intent of the Legislature to increase the pay of eligible teachers by \$300. It therefore follows that this intent cannot be circumvented. It was certainly not intended that a county should be allowed to use this \$300 increase to supplant its own additional compensation for teachers to which it was already committed. Such procedure would produce no increase for the teacher, but would merely serve to relieve the county of an obligation it incurred for itself. Regardless of the label attached to this other compensation paid by the counties, if, in fact, it amounts to salary, then the \$300 increase is to be applied in addition to it.

It becomes important, in those counties which contend that their bonus is not salary, to examine the manner in which it was authorized and the form in which it is paid. If the bonus was awarded by reason of an unforeseen wind-fall in a particular year, it may amount to a bona fide bonus. On the other hand, if a particular source of regularly expected revenue is earmarked for an annual "bonus" to be paid to *all* teachers, it would lead us to conclude it amounted to increased compensation or salary. The form of payment may also be indicative of its true nature. If the "bonus" is paid out on a weekly or monthly basis as part of the teachers' regular salary check, or if it is pro-rated for any teacher leaving the service during a year, it would seem to follow that the "bonus" is really salary.

You should follow this matter closely using the above guides to see that this law is properly administered. If there are any specific questions in regard to the application of the law in any particular situation, we will gladly assist you further.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

BIBLE READING IN PUBLIC SCHOOLS—EXCUSE OF OBJECTORS
—COMPULSORY ATTENDANCE LAW—SELECTION OF
TEXTBOOKS—CONSTITUTIONAL RELIGIOUS FREEDOM.

November 2, 1960.

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

Re: Public School Opening Exercise.

You have brought to our attention a situation which has arisen in one of the public schools of Baltimore City. The matter pertains to the legal obligation of a student, age 14, who professes to be an atheist, to attend school over his objection that the school was enforcing religious training. The specific objections raised are to the morning opening exercise in which a selection from the Bible is read without comment, and to the use of the "Story of Nations" history text in which, according to the student's mother, "distortions and misrepresentations are made, particularly in the areas of religious and political interpretations of events, both historic and current."

I

As to the question of attendance generally, we refer you to the provisions of Article 77, Section 231, Annotated Code of Maryland (1957 Ed.). This law, known as the Compulsory School Attendance Law, makes school attendance of children between the ages of seven and sixteen years mandatory. The exception for children of sub-normal intelligence is not pertinent here. This mandate applies both to the children and their parents. A violation is made a misdemeanor punishable by a \$5.00 fine for each offense. Objection to curriculum, textbooks, exercises, teachers, etc., is not a valid excuse for non-compliance with this law. The only recourse for persons objecting to attendance on grounds similar to the above would be to enroll in a private school. We therefore advise, in the instant case, that if the parent and child refuse to comply with Section 231, for the reasons

they currently advance, they should be prosecuted for truancy as specified in the law. Such action would not be a deprivation of any personal constitutional rights, real or illusory, which they might wish to protect. These rights may be presented and litigated if necessary in other ways, such as a proceeding by the protestants against the School Commissioners for mandamus or injunctive relief.

II

Next we turn to the issue concerning the use of a history textbook, "Story of Nations", by Henry Holt & Co., Inc., edited by Professors Lester B. Rogers and Fay Adams, of the University of Southern California and Walker Brown, of a Los Angeles high school. This text, written for the ninth and tenth grade level, covers the whole span of world history. Obviously, it is not written or intended to be a detailed account. As a matter of academic interest only, we have reviewed the book and in particular the portions cited as objectionable, and we find it to be an accurate, objective and intellectual history book. However, it is not our duty or prerogative to review textbooks used in the schools of this State. This is a matter wisely left to the discretion of the school authorities.

Section 145 of Article 77, Code, provides :

"Freedom from sectarianism or partisanship.

School books shall contain nothing of a sectarian or partisan character."

This, of course, does not mean that in a history text there may be no reference to religion generally or to roles played by various religious figures or denominations in the development of history. Such a contention would be illogical and unsupported in law. Article VI, Section 7 (Textbooks) of the Rules of the Board of School Commissioners, relating to approval of a majority of the Board in the selection of books, has been reviewed by us, and it appears to adequately cover this matter.

No right exists in a student or his parents to object to the use of any particular textbooks or in a student to legally absent himself from a class using a book he disfavors. If the latter event occurs the student should be disciplined in such manner as the teacher and school principal see fit. The provisions of Section 131 of the Public School Laws authorize suspension and expulsion in proper cases.

III

The final question relates to validity of Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City. This rule provides as follows :

“Section 6—*Opening Exercises*. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer. The Douay version may be used by those pupils who prefer it. Appropriate Patriotic exercises should be held as a part of the general opening exercises of the school or class.”

The uniform practice under this rule in the public schools of Baltimore City has been to read from the King James Version of the Holy Bible. No question has been raised concerning the “patriotic exercise”, the use of the particular version of the Bible, or the recitation of a prayer; therefore, these matters are not discussed here. The sole issues can be reduced to two: Is Bible reading in public schools constitutional *per se*, and, if so, must the rule providing for such an exercise, further provide for the excuse of those who object? We answer both questions in the affirmative.

A

The objections to Bible reading, or any devotional exercise, in the public school have been based upon the initial prohibition of the First Amendment to the United States Constitution as made applicable to the States through the Fourteenth Amendment. The provision prohibits State “es-

tablishment of religion". In the landmark case of *Zorach v. Clauston*, 343 U.S. 306, 96 L. Ed. 554, the Supreme Court held that the New York "released time" program was not a violation of constitutional "establishment" clause. Justice Douglas reviewed our fundamental policy toward religion at page 313, as follows :

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * *"

It would seem reasonable to conclude that the "establishment" clause dictates that there be a separation between church and state, but not that the state need be stripped of all religious sentiment. It would be tragic if the State of Maryland, whose history, traditions, founding, and its early laws are steeped in religious connotations, would be compelled to forbid to its children as a part of their education the right and duty to bow their heads in humility before the Supreme Being. It is interesting to note that the State Seal bears a Biblical inscription: "Scuto Bonae Voluntatis Tue Coronasti Nos"—Thou hast crowned us with the shield of Thy good will. (Psalm 5:12)

As was said in *Engel v. Vitale*, 191 N.Y.S. 2d 453, at 486:

“The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.”

Such accommodation, if properly qualified as hereinafter mentioned, does no violence to the First Amendment of our Federal Constitution. Of the cases we have found dealing with the reading of the Bible, ten have upheld and only three have struck down the practice. (Upheld: *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, 1950, app. dism. 342 U.S. 429, 96 L. Ed. 475; *Donahoe v. Richards*, 1854, 38 Me. 379; *Hart v. School District*, 2 Lanc. L.R. 346; *Nessle v. Hum*, 1 Ohio N.P. 140; *Stevenson v. Hanyon*, 4 Pa. Dist. R. 395; *Curran v. White*, 22 Pa. Co. Ct. R. 201; *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250; *Kaplan v. Independent School District*, 171 Minn. 142, 214 N.W. 18; *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610; *Lewis v. Board of Education*, 285 N.Y.S. 164;—Struck down: *Schempp v. School District of Abington*, 177 F. Supp. 398, Pa. - 1959, remanded by U.S. Supreme Ct. 10/24/60, 29 L.W. 3120; *State ex rel. Weiss v. District Board*, 76 Wisc. 177, 44 N.W. 967; *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35.)

Two recent holdings, supporting the position we now adopt have undertaken to review the whole field of state-church relationship and the history of religious freedom in the light of our First Amendment, *Engel v. Vitale*, *supra*, and *Doremus v. Board of Education*, *supra*.

The principle thus adduced does not belittle the parents' primary right of control over their children. However, the State, when acting in the general welfare of all its citizens, has a paramount right of control if there can be

shown to be a substantial nexus between the action required and the end sought to be attained.

Among the many instances of legal regulation of religious acts are the use of fluorinated water, *Baer v. City of Bend* (Ore.), 292 P. 2d 134; the sale of Watchtower magazine by minors, *Prince v. Mass.*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645; observance of the Sabbath, *Scales v. State*, 47 Ark. 476, 1 S.W. 769; vaccination, *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677; physical examination of school children, *Streich v. Board of Education*, 34 S.D. 169, 147 N.W. 779; salute to flag, *Minersville School Dist. v. Gobitis*, 108 F. 2d 683.

As applied to this case, we believe that while every individual has a constitutional right to be a non-believer, that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude.

B

Having ruled that it is constitutional to require the reading of the Bible as a morning exercise in our public schools, we turn to the matter of compulsion in joining such exercise. The second tenet of the First Amendment, as made applicable to the States through the Fourteenth Amendment, prohibits restriction of the "free exercise" of religion. The *Zorach* and *Engel* cases, *supra*, as well as other cases in this area, uniformly hold that despite the basic principle, a school devotional exercise would nonetheless be objectionable if there were any direct compulsion. Any coercion would be an abridgement of one's individual right to the "free exercise" of religion. As noted in *Hopkins v. State*, 193 Md. 489, the sole qualifications to religious freedom relate to acts rather than to beliefs. See also *Reynolds v. U.S.*, 98 U.S. 145, 25 L. Ed. 244. Freedom of belief is absolute. The Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, and *Illinois ex rel. McCullum v. Board of Education*, 333 U.S. 203, 92 L. Ed. 648, recognizes that freedom to believe includes freedom not to believe at all. That is to say, an atheist has equal rights with those who are theistic. The *Zorach* case, *supra*, represented a retreat from the prior

views only to the extent that the Court refused priority to the non-believer's right.

For the reasons stated, we are of the opinion that the present rule regarding Bible-reading must be amended to provide a procedure to protect the rights of those who choose not to participate. The exact provision to be made is best left to the discretion of the Board. We do suggest that non-participation be allowed to take the form of either remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise. The latter course should be handled discreetly without comment or punishment. You may wish to allow non-participants to arrive at the conclusion of the exercise. We further caution that the exercise should be conducted without requirement or restriction as to the specific posture, language, dress or gestures to be used by individual participants, so as not to interfere with personal religious customs.

We recognize it may be contended that even such a provision for non-participation will not cure an alleged compulsion through the subtle pressure of embarrassment. On this issue we concur in the reasoning of the *Engel* case, *supra*, at 492:

“To recognize ‘subtle pressures’ as compulsion under the amendment is to stray far afield from the oppressions the Amendment was designed to prevent; to raise the psychology of dissent, which produces pressure on every dissenter, to the level of governmental force; and to subordinate the spiritual needs of believers to the psychological needs of nonbelievers (is unnecessary).”

The *Engel* case was affirmed by the New York Supreme Court of Appeals Division 2d Dept. on October 17, 1960 (29 L.W. 2178). Justice Beldock aptly stated:

“It may well be that, despite all these safeguards, some vestige of compulsion due to embarrassment may still remain. Such embarrassment, however, is the inevitable consequence of dissent. It is the price that every nonconformist must pay.”

It is our conclusion that while the Board may properly provide for a morning devotional exercise, it must further provide that those so desiring should be excused from attendance at this exercise.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

ELECTIONS

HOUSE-TO-HOUSE CANVASS IN BALTIMORE CITY—EVIDENCE OF RESIDENCE REQUIREMENT FOR VOTING—TEMPORARY CERTIFICATE OF REGISTRATION—MARYLAND CONSTITUTION, ARTICLE I, SEC. 1.

February 1, 1960.

*Mr. E. Paul Mason, Jr.,
Chief Clerk,
Board of Supervisors of Elections
of Baltimore City.*

You have inquired whether information received during the recent house-to-house canvass (pursuant to Sec. 53, Art. 33, 1957 Code) to the effect that a voter moved out of the city more than six months ago is sufficient ground for denying him a temporary certificate to vote in the city.

The general qualifications of voting are contained in Article I, Section 1, of the Constitution, which provides as follows:

“All elections shall be by ballot; and every citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the State for one year, and of the Legislative District of Baltimore City, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this State; and in case any county, or city, shall be so divided as to form portions of different electoral districts, for the election of Representatives in Congress, Senators, Delegates or other Officers, then, to entitle a person to vote for such officer, he must have been a resident of that part of the county, or city, which shall form a part of the electoral district, in which he offers to vote, for six months next preceding the election; *but a person, who*

shall have acquired a residence in such county or city, entitling him to vote at any such election, shall be entitled to vote in the election district from which he removed, until he shall have acquired a residence in the part of the county, or city, to which he has removed." (Emphasis supplied.)

As you will note, the final provision above allows continued voting at the old residence until a new residence shall have been acquired. Courts have always maintained that laws relating to voting rights are to be liberally construed in favor of voters. *Kemp v. Owens*, 76 Md. 235. Under the provision referred to, it is our opinion that the right to vote at the old residence continues until it is shown that the voter has resided in a different city or county for at least six months.

In the situation which you describe, it would seem that a temporary certificate cannot be denied to a returning voter who moved out of the city, even more than six months prior to the election, unless you are satisfied that the person has definitely established a new residence, that is, lived for six months, in some county. Once the person has resided for six months in some certain county, he has then acquired a new voting residence, but until such time he may continue to vote at his old residence.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O'C. GENTRY, *Asst. Attorney General*.

HEALTH

STATE DEPARTMENT OF HEALTH—CHRONIC DISEASE HOSPITALS—PAYMENT FOR PATIENT'S CARE—SUBDIVISION'S RESPONSIBILITY THEREFOR AND AS COLLECTING AGENT FOR STATE—PAYMENTS ALLOCATED BETWEEN STATE AND SUBDIVISION ON CURRENT BASIS—APPLICABILITY OF STATUTE OF LIMITATIONS TO COLLECTION OF PATIENTS' ACCOUNTS—APPROVAL FOR WRITE-OFF OF PATIENTS' ACCOUNTS—BOARD OF PUBLIC WORKS.

May 27, 1960.

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

We have your recent letter requesting interpretation of Sections 598-603 of Article 43, Annotated Code of Maryland (1957 Edition) relating to the State's chronic disease hospitals under the general jurisdiction of the State Department of Health.

Section 598 provides that the cost of operating the chronic hospitals shall be paid out of appropriations in the State Budget. Section 602 provides that the County of the patient's residence, or Baltimore City, as the case may be, shall pay into the State Treasury the sum of 75c per day as long as the patient remains in such hospital. Section 600 provides that in all cases admitted to the State's chronic hospitals the patient or his family shall bear as much of the cost of the care as reasonably possible, not to exceed actual per diem cost.

By Section 601(a), the county welfare boards or the Department of Welfare of Baltimore City (depending upon residence of the patient) is directed to investigate the financial condition of patients admitted to these institutions, as well as the financial circumstances of relatives or other persons legally chargeable with the cost of the patient's care. Section 601(b) provides that in those instances where the welfare agency determines that financial means are present

it shall specify the amount to be paid and the time when payments are to be made. The welfare agency is vested with authority under this Sub-section:

“ . . . to require the relatives of any such person or others legally chargeable with his or her care, to enter into appropriate and binding agreements with respect to the making of such payments, and may from time to time modify or change the terms thereof, as the circumstances may justify”.

Section 601(c) provides that the aforesaid payments be made to and collected by the County Treasurer, or Treasurer of Baltimore City, as the case may be, who is required to account for the same. This Sub-section further specifies:

“ . . . Any amounts so collected shall first be applied against the seventy-five cents (\$.75) per day which the county or Baltimore City are required to pay. Any amount collected over and above seventy-five (\$.75) cents per day from or on account of any patient shall be paid by the County or Baltimore City to the State Treasurer”.

You ask the following questions with relation to the application of the subdivisions 75c per day credit:

1. In some cases a sponsor may make one or two payments as certified and then discontinue payments. Under current billing procedures the subdivision is given credit for 75c a day for the hospitalization covering the period of the payment and the excess is paid the State Comptroller. In the event there are no more payments, can the subdivision claim credit at 75c per day for hospitalization subsequent to the period of payment?
2. In other cases a sponsor may be certified to pay nothing or an amount less than 75c per day; later the sponsor may be recertified to pay more than 75c per day. Can the subdivision claim credit for the period the sponsor was certified to pay less than 75c a day?

It is our opinion, with two qualifications, that both questions must be answered in the negative. As heretofore noted, Section 601 directs the local welfare agency to enter into binding agreements with patients and others responsible for their care, and to determine the amounts of, and time when payments are to be made; and further provides that any amounts so collected shall first be applied against the 75c per day which the subdivisions are required to pay, with the excess thereover to be paid to the State Treasurer. We think the legislature intended by these provisions that payments received pursuant to such agreements were to be allocated in their entirety between State and subdivision on a current basis, namely, immediately upon receipt thereof, with the subdivision's credit being computed finally and ultimately as of that time, with reference to the period of hospitalization which the payment was made to cover, and the excess if any, paid to the State. Unless, therefore, the payment was made to cover a period of hospitalization in advance of treatment, there would be nothing remaining from any particular payment which the subdivision could properly claim for hospitalization subsequent to the period of payment. This reasoning would likewise be applicable in those instances where a sponsor, originally certified to pay an amount less than 75c per day, is recertified to pay an amount greater than 75c per day. Payments made pursuant to such recertification would, in the absence of fraud or misrepresentation in the original certification, have prospective application only; and would be completely allocated between State and subdivision at the time they are received. Consequently nothing would remain from any particular payment made under the recertification which could be applied to a precedent period of hospitalization during which the sponsor paid less than 75c per day. If, however, the sponsor under the original certification gave false information concerning his finances, and the recertification is made to have retrospective, as well as prospective application, we think the subdivision can claim credit up to 75c per day with reference to such precedent periods of hospitalization within the current admission as are specifically attributable to the

retrospective application afforded under the recertification agreement.

You also inquire: What is the statute of limitations on this type of account? Article 57, Section 1 of the Code relates generally to limitations of actions in simple contract claims and provides that the same must be commenced within three years from the time the cause of action accrues. This statute does not, either expressly or by necessary implication, include the State within its terms. It does not, therefore, apply to the State in its sovereign or governmental capacity. See 16 and 32 Opinions of the Attorney General 309 and 153, respectively; 53 C.J.S., *Limitations of Actions*, Sec. 15. The investigatory and collection duties imposed by the aforesaid Sections 598-603 upon the welfare agencies and treasurers of the subdivisions are such as they exercise as agents of the State government; hence, as to the amount of the State's interest in such accounts, the provisions of Section 64 of Article 43 of the Code, providing a three-year period of limitations on actions brought by subdivisions to recover debts due from patients on account of the expenses incurred by the subdivisions in maintaining them in a hospital, would not be applicable. Limitations would, however, apply against the county under this Section as to the amount of its financial interest in the account sued on. More specifically, in this latter connection, the county may recover its interest only if it does so within three years after discharge of the patient from the hospital or from his estate, should the patient die in the hospital.

Finally, you ask by what authority account balances of patients or sponsors may be written off as uncollectible. Section 15 of Article 78A of the Code provides that the Board of Public Works shall approve disposition of legal or equitable rights or interests in State property. It is our opinion that as to the excess over 75c per patient day of hospitalization, the Board of Public Works must approve bad debt write-offs. It is our further view that the subdivision, acting through its appropriate officials, may for

its own purposes, and without Board approval, write off any sum less than 75c per patient day of hospitalization which at any time they deem uncollectible.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

INSURANCE

FOREIGN INSURANCE BROKERAGE CORPORATIONS DOING BUSINESS IN MARYLAND ARE REQUIRED TO QUALIFY UNDER PROVISIONS OF ARTICLE 23.

January 4, 1960.

*Judge R. Bowie Claggett,
Substitute Trial Magistrate for
Prince George's County.*

You inform us that in a case now pending in your court an issue has been raised concerning the necessity of a District of Columbia insurance brokerage corporation qualifying under the provisions of Article 23 of the Annotated Code of Maryland (1957 Ed.). The District of Columbia brokerage corporation admittedly does business in this State since it solicits and writes insurance here. The Company is licensed under Article 48A, Section 119, of the Code as a foreign broker by the State Insurance Department, although it has not qualified under Section 90 of Article 23. For this latter reason the Company's right to bring suit in Maryland courts has been challenged.

The principal reason for the requirement of having foreign corporations qualify when they do business in this State is to compel the company to appoint a resident agent here. The State can thereby exercise some control and the company can be subjected to jurisdiction of our courts through service on the resident agent. All of this is set out in Section 90 of Article 23. Foreign insurance companies are specifically exempted from the provisions of Section 90. This exception is logical in that foreign insurers are already required under Article 48A to appoint the Insurance Commissioner as their resident agent. Neither this latter requirement nor the exception referred to applies to insurance brokers.

We conclude, therefore, that foreign insurance brokers who do business in Maryland must qualify as specified in

Section 90, of Article 23, in order to enable them to bring suit here. Section 91(c) specifically provides:

“No suit shall be maintained in any court of this State by any such foreign corporation or by anyone claiming under such foreign corporation if such foreign corporation is doing or has done intrastate or interstate or foreign business in this State without having complied with the requirements of Section 90 of this article, until such foreign corporation or the person claiming under it has shown to the satisfaction of the court

(1) That such foreign corporation, or a foreign corporation successor thereto, has complied with the requirements of Section 90 of this article, or

(2) That neither such foreign corporation, nor any foreign corporation successor thereto is continuing to do intrastate or interstate or foreign business in this State, and

(3) That such foreign corporation or the person claiming under it has paid to the commission the penalty provided for in subsection (d) hereof.”

It is our opinion that the license granted under Section 119 of Article 48A is not meant to exonerate brokers from the duty of qualification in Maryland under Article 23, Section 90.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O’C. GENTRY, *Asst. Attorney General*.

TITLE COMPANIES—"CERTIFICATES OF TITLE" ARE CONTRACTS OF TITLE INSURANCE AND AS SUCH ARE SUBJECT TO INSURANCE PREMIUMS TAX. ART. 81, SEC. 136, ANNOTATED CODE OF MD. (1957 ED.).

January 8, 1960.

Mr. F. Douglass Sears,
Insurance Commissioner
of Maryland.

Re: Suburban Title and Investment Co.

Question has been raised by your department as to the taxability of premiums charged by title companies for "certificates of title" issued by them. There is no question that the full premium tax applies to title coverage premiums. The issue to be decided is whether the issuance of "certificates of title" constitutes insurance business.

The pertinent portion of these certificates reads as follows:

The title company "for a valuable consideration, hereby *certifies* that an examination of the *title* to the property described above among the Land Records of said County, to the date hereof, shows the same to be, according to said Records, as indexed in the office of the Clerk, *good* in fee simple in _____, subject to . . . etc. . . .

"This Certificate is issued to _____ and for his benefit only and upon condition that the liability of this Company shall be limited in any event to the to the sum of _____ dollars."
(Emphasis supplied.)

The title company contends that this certificate is comparable to an abstract of title and that the premium charged therefor is not taxable, and distinguishes it from its regular title policies in that the latter insure against things of record and not of record, whereas the certificate relates only to matters of record and indexed.

The insurance premium tax is imposed under Article 81, Section 136, of the Annotated Code of Maryland (1957 Ed.). Section 135 defines "premiums" as including "so much of the gross receipts of title insurance companies as is derived from the business of insurance or guaranty." If the certificate here discussed constitutes "insurance or guaranty", then it follows that the consideration charged therefor is taxable.

9 Appelman, *Insurance Law and Practice*, (1943) Sec. 5201, adopts the definition for title insurance given by the court in *Beaullieu v. Atlantic Title & Trust Co.* (1939), 60 Ga. App. 400, 4 S.E. 2d 78, 80:

"A contract of title insurance is an agreement whereby the insurer, for a valuable consideration, agrees to indemnify the assured in a specified amount against loss through defects of title to real estate, wherein the latter has an interest, either as purchaser or otherwise."

A policy of title insurance is further defined by Appelman, in Sec. 5201, as "the opinion of the insurer concerning the validity of the title, backed by an agreement to make that opinion good if it should prove to be mistaken and a loss should result in consequence."

Under both of these definitions it appears to be clear that the "certificate of record title" as set out herein is in fact title insurance. The fact that it does not insure against things not of record means merely that its coverage is not as extensive as the regular title policies. The broader coverage of these regular title policies justifies the higher rate of premium charged therefor.

In *Title Insurance & Trust Co. v. City of Los Angeles* (1923), 214 P. 667, 61 Cal. App. 232, the court held that a guarantee certificate is not deprived of its character as an insurance contract merely because it did not specify the rate, the insured's interest, the exact risks, and the term.

For the reasons stated, we hold that "certificates of title" issued by title insurance companies as have been described are in fact policies of title insurance, and as such the consideration charged therefor is subject to the insurance premium tax.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O'C. GENTRY, *Asst. Attorney General*.

RECIPROCAL—POWER OF ATTORNEY OF SUBSCRIBERS TO RECIPROCAL REQUIRED.

January 29, 1960.

Mr. F. Douglass Sears,
Insurance Commissioner of Maryland.

In an unpublished opinion dated September 28, 1956, Deputy Attorney General Ramsey advised the Insurance Department that under Article 48A, Sections 257, *et seq.*, Annotated Code of Maryland (1957 Ed.), reciprocal exchanges are required to obtain duly executed powers of attorney from each subscriber (or member) of the exchange. As far as we can ascertain, other reciprocals and interinsurers operating under the Maryland law comply with this requirement; however, one exchange contends that a separate power of attorney, signed by the subscriber, is not recognized under Article 48A, and this exchange has requested that we reverse our previous opinion in the matter.

Briefly, reciprocal or interinsurance is a system of insurance whereby several individuals, partnerships and corporations, designated as subscribers, underwrite each other's risks against loss by fire or other hazard. This is accomplished through an attorney-in-fact, common to all subscribers, under an agreement that each underwriter acts separately and severally and not jointly with any other. Each member who is a subscriber, by power of attorney, authorizes the attorney-in-fact to represent him individually in exchanging insurance with others, and to do every act that he could do in relation to suits or other proceedings. See 141 A.L.R. 767; 18 Appleman, *Insurance Law and Practice*, Sec. 1012; Article 48A, Sec. 258, Annotated Code of Maryland (1957 Ed.). For full discussions on the subject of reciprocal insurance, see 94 A.L.R. 842; 141 A.L.R. 765; and 145 A.L.R. 1121.

The protesting exchange contends that the policy of insurance issued by it to the subscribers, which contains a power of attorney appointing a Maryland corporation as the subscriber's attorney-in-fact, is an executed contract

upon acceptance by the subscriber and payment of the premium, and that this is tantamount to an execution of the power of attorney by the subscriber. This exchange further contends that the power of attorney need not be signed by the subscriber and that the power need not be executed on renewals of policies. The power of attorney contained in the body of this exchange's policy refers to "We, the *undersigned* individuals, partnerships and corporations, hereinafter designated 'Subscribers' * * *", and reference is also made to the "execution of this power of attorney". Sections 257, *et seq.*, of Article 48A, titled "Reciprocal Exchanges and Interinsurers", refer in several places to "duly authorized" attorneys-in-fact, and Section 259(d) requires that there shall be filed with the Insurance Commissioner a copy of the form of power of attorney or other authority of such attorney. We previously held that the entire scheme of statutory control and representation of reciprocals is founded upon the existence of an attorney-in-fact, and that the statute intended and contemplated the actual execution of powers of attorney designating the particular attorney and the duties thereof. Our present review of the law and theory of reciprocals leads us to the same conclusion enunciated in our previous opinion.

The protesting exchange strongly relies upon *Insurance Commissioner v. Wachter, etc.*, 179 Md. 608, but we cannot agree that the ruling of the Court in that case is controlling upon the present question. In that case the Court of Appeals was not called upon to decide whether or not a power of attorney must, under the Maryland statute, be signed by each subscriber. The case involved a foreign reciprocal which had become insolvent, and the question pertained to assessments against the subscribers to meet the obligations of the defunct exchange. The Court merely pointed out that there was no written power of attorney found and, therefore, it could not be said that one was executed, but in any event "the possible lack of a separate written power is taken by both parties to be immaterial in the case". 179 Md. 608. Later, at page 617, the Court indicated that for the purposes of the case before it, having to do with the dis-

solution of the reciprocal and the distribution of its funds, it was not necessary to refer to the nature of proper description of the organization of the exchange and its relationships. The Court obviously was not called upon to decide whether under the Maryland statute an executed, signed power of attorney is required, and its reference to a written power of attorney was no more than dictum.

All authorities on powers of attorney which we have found, and particularly those pertaining to reciprocals, show that a written instrument, signed or executed by the principal (or subscriber in this instance), is contemplated. 94 A.L.R. 843, 844; 141 A.L.R. 770; 2 Am. Jur., *Agency*, Sec. 27. Execution of the power is required, but as 2 Am. Jur., Sec. 28, points out, no particular *form or method* of execution is required unless a statute specifically so provides. While the Maryland statute does not specify the method or form of execution, and there is no requirement of an acknowledgement of witnesses, etc., it is basic that the power must be executed by each subscriber. As pointed out in 141 A.L.R. 770, the powers of attorneys-in-fact through which subscribers exchange their contracts of insurance are derived from the power of attorney executed by each subscriber. See also 18 Appleman, Sec. 10123, which refers to "executed" powers of attorney. The word "executed" may be synonymous with the words "sign" and "subscribe", and subscribe means to write one's name beneath or at the end of an instrument. See collection of cases in *Words and Phrases*, Vol. 15A, pages 244-246.

In confirming our prior opinion that a signed power of attorney must be obtained from each subscriber, we point out that since that opinion the Legislature has met several times. It has not deemed it necessary to change the statute governing reciprocals, and we must assume that it has been aware of our interpretation thereof with regard to powers of attorney.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O'C. GENTRY, *Asst. Attorney General*.

VARIABLE ANNUITIES—REGULATION OF VARIABLE ANNUITY COMPANIES BY STATE INSURANCE DEPT.—COMPLIANCE OF FOREIGN LIFE COMPANIES WITH INVESTMENT REQUIREMENTS IMPOSED UPON DOMESTIC LIFE COMPANIES—ADMISSION OF FOREIGN COMPANIES DEPENDENT UPON FINDING OF INSURANCE COMMISSIONER AS TO PUBLIC INTEREST OF STATE.

November 2, 1960.

Mr. F. Douglass Sears,
Insurance Commissioner of Maryland.

Re: Variable Annuities

You have advised us that the Variable Annuity Life Insurance Company (VALIC) has renewed its application for admission to carry on its "insurance business" in Maryland. Questions relative to "variable annuities" have been before your department and this office for the past several years. Some review of the matter may be in order.

The variable annuity is in essence a variation of the life annuity. Consider the three basic elements of an annuity, (1) the mortality risk is assumed by the company in each case, (2) the expense factor is guaranteed by the company in each instance, but (3) as to the third factor, the interest or investment earning is not guaranteed as to variable annuities as it would be in the case of the fixed dollar annuity. That is to say, while the conventional annuity pays the annuitant specified dollar amounts for life, the variable annuity provides payments over a like period based upon the company's investment program experience. Since those insurers offering the conventional annuity are committed to a pre-set interest rate, their portfolio consists principally of the more conservative, guaranteed indebtedness investments such as bonds and mortgages. On the other hand the variable annuity program is designed to guard against inflation thereby protecting its contract holders by keeping pace with the cost of living index. The designers contend that economic history has shown that equity investments, principally common stocks, tend to best reflect changes in

the general price level. Companies offering this plan purposely invest principally in equities in the expectation that their contract holders will benefit by capital appreciation. In all other material respects the traditional and the variable annuity are alike.

In 44 Opinions of the Attorney General 203, this office ruled you should not issue a license to companies intending to sell variable annuities. Our ruling was based entirely upon a decision of the Supreme Court in *S.E.C. v. VALIC* (3/23/59), 359 U.S. 63. We believe that a close scrutiny of that opinion will disclose that the Court did *not* hold, as often stated, that the variable annuity was not properly an insurance product. The question before the Court was whether or not variable annuity contracts were entitled to exemption from regulation by the Securities and Exchange Commission because of the provisions of 59 Stat. 33, 15 USC 1011, 2 (b). The latter law prohibits Federal statutory impairment of state laws regulating insurance. The Supreme Court in a 5-4 decision held that the respondent companies were subject to S.E.C. regulation. For our purposes, we note the opinion carried an important qualification. Justice Douglas stated, "We deal, however, with a federal statute where the words 'insurance' and 'annuity' are federal terms." The ruling did not, except by uncertain interpretation, remove variable annuity companies from the jurisdiction of the various state insurance departments. The Attorneys General of Utah, North Dakota, Florida (6/16/59) and Pennsylvania (9/20/60) have ruled since the Supreme Court decision that variable annuity companies are nevertheless subject to regulation by their State insurance departments. The Attorney General of Florida ruled:

" . . . As I read the Supreme Court decision, it simply makes insurance companies which offer variable annuities subject to Securities Exchange Commission regulation. There is no suggestion of Federal pre-emption of the field. As a result of the decision there is now regulation of the investment aspects of variable annuities by the Federal

Government and regulation of the insurance aspect by the state governments . . .”

The only ruling to the contrary of which we are aware was made by the Attorney General of South Carolina (3/18/58). There “insurance” has a different meaning than here.

Aside from the aspects of the variable annuity here discussed, the contracts now being offered include five-year decreasing term life insurance, which gives coverage during the initial pay-in period and until an adequate investment is accumulated. However, in addition to this we find that the *variable annuity itself is insurance*, within the meaning of our law. Art. 48A, Sec. 152 of the Annotated Code of Maryland (1957 Ed.) provides that *any contract* which bears a mortality contingency is life insurance. (The other elements which we omit are not material here.) Certainly the company offering a variable annuity assumes a mortality risk. Variable annuities are likewise within the definition of “annuities” as set out in Section 156 (b), since that definition does not require that the payments made be of a certain or fixed amount. A similar ruling under an identical definition of “annuities” (N.Y. Ins. Law Sec. 46) was made by the New York Attorney General in 1947 Reports of Attorney General, page 214. This was upheld in *In re Supreme Council of the Brotherhood*, 193 Misc. 996, 86 NYS 2d 127 (1949). Other jurisdictions have held similarly. *In re Brown's Estate*, 25 Cal. App. (2d) 590, 78 Pac. 2d 193 (1938), *Succession of Cotton*, 172 La. 819, 135 So. 368 (1931), *Einbecker v. Einbecker*, 162 Ill. 267, 44 N.E. 426 (1896), and *Arkansas Nat'l Bank*, 216 Ark. 255, 225, S.W. 2d 331 (1950).

We do not mean to infer that the authorities are uniform in the view stated above, for as stated in 3 CJS 1373:

“The legal definition of the word ‘annuity’ has been the cause of puzzlement of mind, and there is a wealth of embarrassment in the decisions of the courts.”

However, we do find the definition in our Maryland law is sufficiently broad and expanding to accommodate this newly created commodity. As Justice Oliver Wendell Holmes stated in *Towne v. Eisner*, 245 U.S. 418 (1918) at p. 425:

“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”

To the extent noted, we are constrained to overrule our prior opinion in 44 Opinions of the Attorney General 203.

Having thus decided variable annuities to be within the purview of the Maryland insurance laws, we now consider whether our law contains any collateral restriction or prohibition which would preclude companies offering variable annuities from operating in Maryland. As discussed at the outset, variable annuity companies by their very nature are committed to an investment policy which requires that most, if not all, of their investments be in common stocks or other equities. To do otherwise would destroy the salient and distinguishing feature of this plan.

Section 28 (1) (f) Art. 48A provides, insofar as is here pertinent, as follows:

(1) “*Enumeration of investments.*—Every *domestic* stock and mutual life insurance company must have and continually keep to the extent of an amount equal to its entire reserves, as hereinafter defined, and its capital, if any, invested in:

“(f) Dividend paying stocks of any corporation . . . provided, that, to the extent necessary to satisfy the investment requirements hereunder, no company may invest . . . *more than 10% of its total admitted assets in common stocks; . . .*” (Emphasis added.)

Enforcement of the above law obviates any possibility of a *domestic* life company entering the field of variable annuities. Adherence to the above restriction contradicts in-

exorably the very nature of a variable annuity. The sole question is therefore may a *foreign* life company do such business in Maryland? Or more specifically stated, must a *foreign* life company comply with the investment requirements imposed by Section 28 upon domestic companies as a prerequisite of licensure in Maryland?

At the outset, it is recognized that for many years the Maryland Insurance Department, by unwritten rule, has consistently required that a foreign life company seeking to do business here must demonstrate at least "substantial compliance" with the investment requirements imposed upon domestic companies. This can undoubtedly be said to be a well-established administrative policy. As such, it is entitled to considerable weight. It was stated in *Pierce & Hubner v. State Tax Commission*, 194 Md. 254, at 261:

" . . . the unvarying construction of a statute for a long period of time should not be disregarded except for the most imperious reason. (citing cases) However, this Court has also frequently stated that even if there has been an unvarying practice we will not sanction a method of calculation which would tolerate an evasion of taxes." (citing cases)

The Court there held that an administrative interpretation and practice, even of long standing, cannot be upheld if it is expressly contrary to the law.

In looking at the legislative history of Section 28, we note that this section had not always been limited to domestic companies, as it now is by its express terms. Originally the law had imposed on foreign life companies doing business in Maryland the same investment requirements which applied to companies incorporated here. The forerunner of the present Section 28 (Section 25 in the 1939 Code) began as follows:

"Every insurance company, *domestic or foreign*, . . ." (Emphasis supplied.)

In 1943 the Legislature reversed this legislative policy by the adoption of the two following Acts:

1. Chapter 692 repealed and re-enacted Section 25 of the 1939 Code, now Section 28, limiting its application to *domestic life companies only*. The express provision that foreign companies licensed in this State comply with all the investment restrictions imposed on domestic companies thus disappeared from Maryland law.

2. Chapter 985 was adopted for the regulation of the investments of casualty companies. For the first time, different standards were established for the investments of life companies and of other insurance companies. It is quite significant, however, that with regard to these other companies covered by Chapter 985, the investment restrictions on foreign companies were retained, at least as to "substantial compliance," and still appear in Section 29, subsection 7. The investment restrictions on foreign life companies had been removed by Chapter 692, and Chapter 985 by its express terms became applicable only to companies "other than a life insurance company."

The requirement of substantial compliance in Article 48A, Section 28 (3), which pertains to investment in property *situated in Maryland*, is limited in its application to the "*grade and quality as to security*" of such investments. This is manifestly a qualitative rather than a quantitative test. Thus, even if VALIC's investment were "situated in Maryland" (and its common stocks are not), the provisions of Section 28 (3) would not extend to the 10% limitation imposed on domestic companies by Section 28 (1) (f). The qualitative test that such stocks must be "dividend paying" might still apply because that requirement may be said to affect their "*grade or quality as to security.*" The 10% quantitative test, however, has nothing to do with "grade or quality as to security" and would be inapplicable.

For the reasons stated, it is apparent to us that the clear meaning of Section 28 (1) (f), in the light of its legislative history, is to impose various restrictions on the investments of domestic life companies only, and not upon foreign

companies. We therefore find no competent authority for your practice of requiring foreign life companies to show "at least substantial compliance" with Section 28.

We are not unmindful of the fact that this results, at least as to variable annuities, in some discrimination against our own domestic companies. As we noted, a domestic company cannot offer this plan and still comply with Section 28, which prohibits an investment of more than 10% in common stocks. However, this is a matter which may be corrected by the Legislature.

The New York law requires that investments of foreign companies must be of the same "general character" as those of a domestic one. This law withstood an attack by a New Jersey company seeking admission without compliance, which argued that it was an attempt to exercise extra-territorial power. In *Firemen's Ins. Co. of New Jersey v. Beha*, 30 F. 2d 539 (1928), Judge Learned Hand held this law valid though it has extra-territorial results because those are "ancillary to the accomplishment of genuinely local purposes connected with the company's prospective business." Therefore if you deem it advisable to tie foreign companies down to investments which are proper for Maryland companies, such a bill can be presented to the Legislature. On the other hand, an amendment to our law as to permissive investments, reserve basis and possibly as to contract provisions, would allow our domestic companies to enter this field of variable annuities for themselves.

It would seem in the present case at least that the release of this variable annuity company from the 10% restriction on investment in common stocks will not be contrary to the real purpose of this law. Statutory control on insurance company investments is intended as a compulsory protection of insurers from themselves, in the interest of their policy holders. That is to say, the law, recognizing that insurers are committed to certain fixed dollar future payments, provides that the company's investments must be of a type which will guarantee payment of those commitments. Hence stress is placed upon indebtedness investments. Such an analogy is not true in the case of variable

annuities. Since there is no binding commitment of future payment, we do not find the same need for restraint upon the company's investment policy.

In regard to the investments of foreign companies, the provisions of Section 24 of Article 48A, imply that the Maryland Insurance Department need only verify that the company's securities are ". . . in an *amount* not less than that required of companies" of this State, if those securities are first shown to have been . . . *authorized by the insurance laws of the State where incorporated* or organized, and approved by the proper official thereof. . ." Section 33 is to the same effect.

Having thus ruled on the matter of your lack of authority to require compliance by a foreign company with Section 28 (1) (f), we advise that your sole rights and duties in reviewing the application for admission by a foreign company are set out in Section 33. In addition to the formal requirements of filing its charter, power of attorney, annual statement of condition, and a certificate of deposit, the Commissioner has the duty to determine to his satisfaction:

1. "that the character, responsibility and general fitness (of the officers and directors) are such as to command confidence and warrant belief that the business of the company will be honestly and efficiently conducted in accordance with the intent and purposes of this article," and
2. "that the public interest will not be jeopardized by admitting said company to engage in business in this State."

We express no opinion as to whether or not variable annuities are in the public interest of the citizens of this State. This is a matter you must decide, exercising your sound discretion, after thorough investigation. In making this decision you may wish to consider all or some of the following points:

1. Whether or not there has been demonstrated a sufficient demand by Maryland citizens to warrant its offering.

2. Whether or not it may be advisable to have additional regulatory legislation to control the various new aspects of this field.
3. Whether or not the general reputation and understanding of the life insurance industry will be preserved.
4. Whether or not the manner of custody and ownership of company investments sufficiently protects the interests of annuitants.
5. The views and recommendations of the National Association of Insurance Commissioners.
6. The pitfalls and dangers to prospective purchasers in misleading advertising and/or sales practices.
7. The general soundness of an insurance program geared to uncertainties of the "stock market."

There are, of course, other features which you may wish to consider. Your determination must be reasonable and factual.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

MARYLAND PORT AUTHORITY

BOOKS AND RECORDS NOT SUBJECT TO AUDIT BY STATE AUDITOR UNDER SECTION 30, ARTICLE 19 OF THE ANNOTATED CODE OF MARYLAND (1957 ED.). STATE AUDITOR—SCOPE OF RESPONSIBILITY FOR AUDITING MARYLAND PORT AUTHORITY BOOKS—NO RESPONSIBILITY UNDER SECTION 30, ARTICLE 19.

January 4, 1960.

Mr. Leo J. Parr,
State Auditor.

You have asked our advice as to the responsibility of your office for auditing the accounts and records of the Maryland Port Authority. For the reasons stated hereinafter, we are of the opinion that your office has no such responsibility.

Section 30, Article 19, Annotated Code of Maryland (1957 Ed.), provides for the examination of the books and accounts of certain enumerated State institutions by the State Auditor, and then provides that he shall also audit the records "of such other State officers, departments, boards, commissions or institutions not herein enumerated as the Comptroller may direct". Acting pursuant to this authority, the Comptroller has directed your office to examine the accounts and records "of all other State offices, departments, boards, commissions, institutions or agencies without exception", not specifically enumerated in Section 30. We think it clear that the Comptroller's directive meant to include only such agencies as are within the area of your responsibility. Since we do not believe the Authority to come within that area, we think the Comptroller's directive should not be construed so as to include that agency.

The Maryland Port Authority was created in 1956 by the enactment of Article 62B of the Maryland Code. Although Section 3 of that Article makes it clear that the Authority is a State instrumentality, the broad powers granted to it make it equally clear that a high degree of autonomy

was intended. 41 Opinions of the Attorney General 301. This grant of powers was in keeping with the current thinking of many other States concerning the need for special agencies to handle special problems. It has been recognized throughout the country that there are certain functions which can be better handled by a public corporate body acting pursuant to broad powers, than by a branch of the State government itself. In like manner, it has been realized that many of the ordinary State procedures and policies would not be consistent with the most efficient operation of such agencies. Recognizing these factors, we have previously ruled that the Legislature did not intend the Port Authority to be bound by many of the standard requirements applying to other State agencies. Thus, the Authority has been held not to be subject to: (a) preliminary budget requirements and supervision by the Department of Public Improvements in connection with certain projects, 41 Opinions of the Attorney General 301; (b) purchasing procedures of the Purchasing Bureau of the Department of Budget and Procurement with respect to certain purchases, 43 Opinions of the Attorney General 106; to James G. Rennie, Director, Department of Budget and Procurement; (c) Standard Salary Board Rules as to certain employees, informal opinion of May 1, 1956 to State Commissioner of Personnel; (d) control by the Board of Public Works insofar as the construction of certain piers is concerned, 43 Opinions of the Attorney General 239.

We think that when Section 20, Article 62B, Code, is read in light of the above factors, it is clear that the auditing of the books and records of the Port Authority is not the responsibility of the State Auditor under Section 30 of Article 19. Section 20 of Article 62B, reads as follows:

“On or before the first day of December in each year the Authority shall make an annual report of its activities for the preceding year to the Governor and to the General Assembly. Each such report shall include a complete operating and financial statement covering its operations during the year. The Authority shall cause an audit of its books

and accounts to be made at least once in each year by certified public accountants, and the cost thereof shall be treated as an item of current expenses.”

Thus, the auditing scheme of the Port Authority seems to be simply this: certified public accountants audit records on an annual basis and the Authority makes an annual report of its fiscal affairs directly to the Governor and to the General Assembly. Had the Legislature intended the Port Authority to be subject to an additional audit by your office, we think that it would have so stated.

We might state in passing that you pointed out during our recent conference that you have no criticism of the auditing procedures being used by the certified public accountants presently auditing the Port Authority.

C. FERDINAND SYBERT, *Attorney General*.

JOHN MARTIN JONES, JR., *Asst. Attorney General*.

MENTAL HYGIENE

DEPARTMENT AND INSTITUTIONAL PSYCHIATRISTS HAVE SEPARATE FUNCTIONS — DEPARTMENT PSYCHIATRIST SHOULD NOT BE ATTACHED TO HOSPITAL WHERE PATIENT HE EXAMINED IS COMMITTED—ONLY DEPARTMENT PSYCHIATRIST MAY EXAMINE IN DEATHS AND PENITENTIARY CASES.

April 22, 1960.

*Dr. Rudolph J. Depner,
Assistant Commissioner,
Department of Mental Hygiene.*

In your recent letter you ask whether or not a psychiatrist who examines a convict confined in the Penitentiary or House of Correction, at the request of the Board of Correction, to determine whether or not he should be removed to a State mental institution may be a member of the staff of the hospital to which the incompetent convict will be removed.

Article 59, Section 43, Annotated Code of Maryland, provides that whenever the Board of Correction deems it necessary, it may request the Department of Mental Hygiene to examine and pass upon the mental condition of convicts confined in the Penitentiary or House of Correction, and if the convicts be adjudged insane or feeble-minded and their removal to a State mental institution is deemed advisable, the Department of Mental Hygiene may order the Board of Correction to remove the convicts to some insane asylum within the State as designated in the order of removal.

Article 59, Section 33, Code, reads as follows:

“It shall not be lawful for any physician to certify to the insanity of any person for the purpose of committing such person to confinement in an asylum or other place where the insane are kept with which said physician may be in any manner connected or in which he may be in anywise interested.”

The language contained in Section 33 is quite clear and it is my opinion that any psychiatrist employed at a State hospital where a convict will later be confined may not make an examination of that convict.

It is also to be noted that Article 59, Section 43 specifically provides that the examination shall be made by the Department of Mental Hygiene. It does not provide for the examination to be made by the Superintendent or any member of the staff of one of the State hospitals.

Looking at Article 59, Section 11, it can be seen that the Legislature intended to and did clearly distinguish between examinations that were to be made by the Department of Mental Hygiene and those that were to be made by the Superintendents of State institutions.

You also ask whether or not it is necessary that a psychiatrist from the Department of Mental Hygiene, rather than one of the Superintendents of a State institution, examine a patient in all cases punishable by death or by confinement in the Penitentiary.

Article 59, Section 11 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 await 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 of 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 Secs. 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.” (Emphasis supplied.)

The language used by the Legislature in Section 11 shows a clear intent that only a psychiatrist of the Department of Mental Hygiene may make an examination of one charged with a capital offense or with an offense which is punishable by confinement in the State Penitentiary. Under Section 11,

a Department of Mental Hygiene psychiatrist may examine all persons referred to him, no matter what the crime with which they are charged, whereas Superintendents of State institutions are only authorized to examine persons in cases where the death penalty or confinement in the Penitentiary are not involved.

You further ask if a Superintendent may have a qualified psychiatrist on his staff make the examinations required by Section 11. I am of the opinion that Section 11 imposes that duty upon the Superintendent of the institution. He, of course, may call upon his staff members to assist him in any way he desires in making the examination, but I am of the opinion that it must in the final analysis be his examination and report under the statute rather than that of a member of his staff.

You also ask how could the examining psychiatrist of the Department of Mental Hygiene be attached to the staff of the Maximum Security Hospital and still comply with the provisions of the law requiring the Department of Mental Hygiene to examine a person to determine his mental condition. I am of the opinion that it is not possible for the psychiatrist of the Department of Mental Hygiene to be assigned to any of the State institutions where patients whom he will examine will be confined. I believe that he should be attached to either one staff or the other, but not to both.

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

MOTION PICTURES

SHOWN IN RESTAURANTS, TAVERNS, ETC., SUBJECT TO PROVISIONS OF ARTICLE 66A.

June 9, 1960.

*Mr. C. Morton Goldstein, Chairman,
Maryland State Board of Motion Picture Censors.*

Your recent letter asks whether films shown without charge to patrons in public places such as restaurants, taverns, etc., must be submitted to your Board for licensing under Article 66A, Maryland Code (1957 Ed.).

Article 66A provides that it shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view unless it has been duly approved and licensed by your Board. The only exception appears in Section 23 of Article 66A, which provides that the article "shall not apply to any noncommercial exhibitions of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning". The section further provides that your Board may in its discretion, without examination of the film or view, issue a permit provided the owner of the film or his duly authorized attorney or representative shall file a sworn description of the film. No fee is charged for this permit.

It is our opinion that the noncommercial exhibitions excluded from Article 66A are limited to those exhibitions which are "for purely educational, charitable, fraternal or religious purposes" exhibited by "any religious association, fraternal society, library, museum, public school, private school or institution of learning". This section does not exclude films which are to be shown in public places to patrons of restaurants, taverns, etc., as they are not within the exception stated above.

You are therefore advised that the films about which you inquire must be submitted to your Board for licensing in accordance with Article 66A. See 23 Opinions of the Attorney General 333.

C. FERDINAND SYBERT, *Attorney General*.

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General*.

MOTION PICTURES—SUBSTITUTE SEAL—BOARD OF CENSORS
MAY NOT ISSUE AFTER TWO YEAR PERIOD.

June 24, 1960.

*Mr. C. Morton Goldstein, Chairman,
Maryland State Board of Motion Picture Censors.*

We have received your letter in which you state that two motion picture films have been submitted to your Board as duplicates of the originals and that you have been requested to provide a substitute seal for both. The films are:

Lavender Hill Mob	No Print Number	No Seal
The Red Shoes	Print No. EA 535	No Seal

You state that the records of the Board indicate that the last print licensed of "Lavender Hill Mob" was Print A on May 9, 1956, and the last print licensed of "The Red Shoes" was Print FAF 535 on January 4, 1956, and both were submitted to the Board by Wheeler Film Company, Washington, D. C., as the applicant. You inform us there is no record that the prints, which have been submitted to you, have ever been licensed by your Board.

Article 66A, Section 7, Annotated Code of Maryland (1957 Edition) gives the Board authority, in its discretion, to issue a duplicate certificate of approval if the original has been lost, mutilated or destroyed. In furtherance of this section the Board adopted Rule 6 which states in part that substitute seals will not be issued on any such film if a period of two years has elapsed since the filing of the original application for censorship unless perforations are on the film at the time. The films which have been submitted to you do not contain perforations and, as indicated by you, the last print which was licensed on both films was in 1956. Therefore, it is our opinion that the Board may not issue substitute seals for the two films in question as the period of two years has elapsed since the filing of the original application with the Board.

If the films are being submitted as duplicate prints under Rule 3, the application must be made by the original applicant within one year, which is not the case here.

You also ask our opinion on another film which has been presented to you entitled "HURRY HURRY—SHE'S OIL MINE", which has no seal or perforation. The applicant who submitted this film desires re-perforation and seal at the minimum cost. You state that the applicant will submit an affidavit that the seal and perforation on the original has been lost, mutilated or destroyed through handling while being leased to one of the elementary schools in Baltimore County. You also state that the records of the Board indicate that the original print was licensed February 18, 1959, with Castle Film as the applicant.

This film is presented within the two year period specified in Rule 6 and therefore the Board may issue a substitute seal upon satisfactory proof being submitted to the Board that the original certificate of approval attached to the film, showing that it had been examined and approved by the Board, has been lost, mutilated or destroyed. It is also stated that the perforations are missing. Rule 6 provides that the Board may, in its discretion, require a written statement or affidavit to the effect that said print is the original censored print and that all eliminations ordered, if any, have been duly made.

It is therefore our opinion that if these affidavits are submitted to the Board and the Board is satisfied that the submitted print is the original censored print, then the Board has the discretion to issue a substitute seal and re-perforate.

C. FERDINAND SYBERT, *Attorney General*.

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General*.

MOTOR VEHICLES

MOTOR VEHICLES—LICENSES—"FARM TRUCK" AS DISTINGUISHED FROM THOSE "FOR HIRE".

January 4, 1960.

Colonel Carey Jarman,
Superintendent, Maryland State Police.

You have requested an opinion concerning certain operations which were disclosed by an investigation made by the Maryland State Police in the vicinity of Frederick, Maryland, involving the use of "farm trucks" for hauling corn to a cannery. Attached to your letter was a copy of an intradepartmental memorandum from the Lieutenant commanding Barrack "B" to your Executive Officer, wherein the operations and the findings in connection therewith were set forth. On the basis of such findings the question arises with respect to the legality of using trucks bearing "Farm Truck" license tags in performing the operations reported.

It appears that your Department's investigation disclosed that owners and operators of certain trucks bearing "Farm Truck" license plates were hauling corn and corn husks to and from the fields of others to a processing plant near Frederick, for which the owners or operators of some of said trucks allegedly received a monetary fee for such hauling upon a tonnage basis.

The investigation also disclosed that in other instances the owners or operators of said trucks were not being paid for their services but were reciprocating similar services which previously had been rendered by one farmer to the other.

Another situation which was disclosed by the investigation indicated that in some instances corn was hauled to the cannery in farm wagons which were either attached to the rear of a truck or were being towed by a tractor.

Your letter therefore raises a question with respect to whether the hauling of farm products under the situations

above set forth is permitted to be performed by trucks bearing "Farm Truck" plates or by tractors bearing "Farm Tractor" plates.

Section 81 (7) of Article 66 $\frac{1}{2}$ of the Code, (1957 Ed.) provides in part that "To be eligible for a farm truck license, the truck must be owned by a farmer and must be used solely in the business of the farm and farm home, in hauling farm products and the labor, the supplies, the equipment and other material necessary to the operation of the farm and the farm home."; and the section further provides that "A farm truck shall not be used for hire, nor shall it be used by the owner in any business other than his farm operations as defined herein."

Under Section 81 (5), (9) (2) of said Article 66 $\frac{1}{2}$, there has been set up by the Legislature a separate schedule of registration fees covering "Farm Trucks" and "Farm Tractors", which affords farmers a special low rate for trucks and tractors which can qualify as such under the Code, as against the higher registration fees required for commercial vehicles which cannot or do not so qualify.

In view of the investigation report that the operators and owners of the trucks involved are not engaged in hauling their own farm products to the cannery (corn and corn husks for silage are considered farm products within the meaning of Section 81 (7)), the question here presented is whether, by reason of the receipt of monetary payment for such hauling, the use of such trucks or tractors bearing "Farm Truck" or "Farm Tractor" license plates for money consideration constitutes such use as would require the trucks or tractors to display commercial "For Hire" plates costing the higher registration fee.

Section 81 (9) (2) covering Farm Tractors provides: "This charge (Registration fees for truck-tractors) shall not apply to farm tractors being operated by farmers in connection with their farming operations when traveling upon the public highways or streets of this State, on which shall be imposed in lieu thereof a flat fee of \$4.00"; the section further provides that:

“No charge shall be made for farm tractors where such tractor is being used in hauling farm wagons or implements in connection with farming operations, or for farm tractor hauled trailers of farmers using highways and not going a distance greater than five miles. The term ‘farmer’ as used in this sub-section means any person or corporation engaged in the raising, growing and producing of farm products on a farm of not less than three (3) acres in area, and who is not hauling farm products previously acquired by him for resale or hauling same for others for hire.”

The rationale of the sections above quoted indicates that it was the intention of the legislature to aid agriculture in recognition of its importance and impact on the economy of the State, by permitting those who qualified as “farmers” to receive certain “Farm Truck” and “Farm Tractor” license plates at reduced registration rates as a means of assisting them in the conduct of their farming operations. However, in affording those benefits the legislature has stated that such farming operations must be measured by the requirements and standards set out in the Code sections above quoted, and the legislature has particularly stated that “A farm truck shall not be used for hire, * * *.”

The legislature has also stated that a farm truck “must be used solely in the business of the farm and farm home, in hauling farm products and the labor, the supplies, the equipment and other material necessary to the operation of the farm and the farm home”. It would follow therefore that one farmer who assists another farmer in his farming operation by hauling his products on an exchange basis in connection with their farming operations, and where no moneys pass between them is, in effect, assisting that farmer in the conduct of his own farming operation.

“For hire” has been defined to be an agreement, either oral or in writing, whereby a person grants to another either the enjoyment of a thing or the use of the labor and industry, either of himself or of his servant, during a cer-

tain time, for a stipulated compensation. *Words and Phrases*, volume 19, page 485 et seq.

In 18 Opinions of the Attorney General 383, this office held that so long as no profits were intended to accrue from an operation but merely aimed at reimbursing one for actual moneys or expenses disbursed, such was not a "for hire" operation.

An operation whereby a farmer exchanges the use of his vehicle for that of another would constitute such exchange as being in connection with a "farming operation" encompassed within the Code definition.

You are therefore advised that the vehicles engaged in the operations above related, on a regular basis and for a monetary fee for such service, as distinguished from occasional or in connection with a farming operation on an exchange basis, are not entitled to use "Farm Truck" or "Farm Tractor" plates when the owners or operators of said trucks or tractors receive monetary consideration for their use, since the receipt of such consideration would, under the particular facts related, constitute a "For Hire" operation.

On the other hand, those farmers who are engaged in an "exchange" operation are entitled to use "Farm Truck" or "Farm Tractor" plates in connection therewith.

It follows therefore that when "farm wagons" are not being used in "farming operations," as defined and limited in the Code sections above referred to, such wagons become "trailers" when attached to the rear of any type of motor vehicle and are used for the transportation of persons or property, attention being invited to the following definition of "trailer" under Section 2 (63) of Article 66½: "Every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle." 40 Opinions of the Attorney General, 338. Farm wagons when used as trailers for monetary consideration become subject to the registration provisions of Sec. 81 (h)

of Article 66½. When farm wagons are used only incidentally in the farmer's own operation or on an exchange basis as indicated above, such farm wagon does not lose its identity as such and under the provisions of Section 81 (a) (2) is exempt from registration.

C. FERDINAND SYBERT, *Attorney General.*

ELI BAER, *Spec. Asst. Attorney General.*

REPORTING BY HOSPITALS TO DEPARTMENT MOTOR VEHICLES OF NAMES OF PATIENTS COMMITTED OR CONVICTED AS INSANE OR AS STATUTORY HABITUAL DRUNKARDS (INCLUDING DRUG ADDICTS) NOT REQUIRED—SUCH REPORTING MAY BE VOLUNTARY—REPORTING TO DEPARTMENT MOTOR VEHICLES BY CLERKS OF COURT AND MAGISTRATES OF SUCH CONVICTIONS OR COMMITMENTS ARE MANDATORY.

January 15, 1960.

Mr. Michael A. Noppinger,
Deputy Commissioner of Motor Vehicles.

You have requested advice with regard to whether there is a statutory requirement that hospitals or institutions of like character must advise the Department of Motor Vehicles of the names of patients admitted to such institutions by reason of a conviction or a commitment for insanity or as habitual drunkards, which includes addicts of alcohol, opium, cocaine, morphine, or any other intoxicant, as referred to in Article 16, Sections 43-48 of the Code.

In reply, you are informed that I have found no statutory directive requiring that hospitals or like institutions make any such report to the Department of Motor Vehicles, but no legal objection is found to such institutions making reports on a voluntary basis. However, under Section 102 of Article 66 $\frac{1}{2}$ it is provided, *inter alia*, that "Every clerk of the court, clerk of the court having jurisdiction in juvenile causes, magistrate for juvenile causes, trial magistrate and justice of the peace having jurisdiction over offenses committed under this article, or any other act of this State regulating the operation of motor vehicles on highways, . . ." must furnish to the Department of Motor Vehicles a record of any such conviction of any person in said Court.

Neither insanity nor habitual drunkenness are "offenses" under Article 66 $\frac{1}{2}$ unless accompanied by some act involving the operation of a motor vehicle; and, if the charge involves the operation of a motor vehicle by an operator who is

insane or who is a habitual drunkard or a habitual user of narcotics and such operator is found guilty thereof, it would seem clear that such record of conviction is required to be sent to the Department of Motor Vehicles by Section 102 aforesaid.

However, in the larger or more expansive sense your inquiry poses the question whether in the best interests of the public safety and welfare it may be said that conviction or commitment of a person as a habitual drunkard or as a user of narcotics would be within the contemplation of Section 102 so as to require "Every Clerk of the Court," etc., to send a record of such conviction or commitment to the Department of Motor Vehicles.

With respect to that question, attention is invited to the provisions of Sections 102 and 206 of Article 66½, which indicate the clear desire of the Legislature to keep off of the public highways—in the best interests of public safety and welfare—the occasional as well as the habitual user of narcotic drugs and intoxicating liquors; and, as an aid in the accomplishment of that purpose, the Commissioner of Motor Vehicles is given the authority under Section 105 of Article 66½ to refuse, cancel, suspend, or revoke an operator's or chauffeur's license when, in his opinion, the holder of the same is "an unfit or unsafe person." Clearly, convicted users of narcotics and intoxicating liquor are "unfit or unsafe" drivers within the contemplation and the purview of Section 105 aforementioned.

Further, it is significant that by Section 8 of Article 66½ the Legislature provided for the appointment of a Medical Advisory Board—consisting of not more than five (5) qualified doctors of medicine—by the Commissioner of Motor Vehicles to assist him in making determinations with respect to those operators who are mentally or physically unfit to hold the operating privilege and, specifically, to assist him in the administration of Sub-sections (4), (6), (8), (9), and (10) of Section 88 of said Article.

Also, it is of interest to note that by Section 38 of Article 66½ the Legislature evidenced an additional intention to

assist the Commissioner of Motor Vehicles in the processing of his records by providing that the Commissioner of Health of Baltimore City and the Health Officers of the several counties shall file with the Department of Motor Vehicles a copy of the list of the names and residence addresses of all persons over 21 years of age who are reported as being deceased, which list said officials are required by Section 33 of Article 33 to file with the Supervisor of Elections.

Accordingly, it follows, from the rationale of the sections of law above referred to, that the Court officials designated in Section 102 are required to furnish the Department of Motor Vehicles with a record of the conviction or legal commitment of every person found by the Court to be insane or a habitual user of narcotics or intoxicating liquor, in order that said official may administratively process the same in accordance with the duties imposed upon him by law. However, it should be pointed out that such requirement pertains only to judicial convictions as distinguished from the voluntary or civil commitments provided for under Article 16 of the Code.

C. FERDINAND SYBERT, *Attorney General*.

ELI BAER, *Spec. Asst. Attorney General*.

MOTOR VEHICLES—MANDATORY REVOCATION—DRIVING ON
REVOKED LICENSE—WHEN LICENSE IS CONSIDERED RE-
VOKED—REQUIREMENT OF NOTICE—ACTUAL AND PRE-
SUMPTIVE NOTICE.

April 28, 1960.

Mr. J. Owen Knotts,
State's Attorney for
Caroline County.

We have your recent letter requesting an opinion with regard to a matter now pending before you and reported to be as follows:

The defendant was convicted before a Trial Magistrate of Caroline County on February 25, 1960, for driving on a suspended license, the offense having occurred on February 4, 1960. The defendant did not appeal therefrom, thus constituting the conviction of February 25, 1960, a "final conviction".

Thereafter, a record of the conviction was received in this Department, and on March 22, 1960, the Department marked the defendant's driving record "revoked". On the same day the Department mailed a letter to the defendant, addressed to his last given address as shown by the Department's records, advising him that his license to operate had been revoked because of the Department's receipt of the record of "final conviction". The letter ordered the defendant to send to the Department his operator's license with the further advice that "upon receipt of the license it will be revoked for at least 90 days".

It is admitted that the defendant received the Department's letter of March 22 on March 23, 1960. However, on the next day, March 24, 1960, the defendant was issued a summons by a State Trooper for "driving on a revoked license" and it is stated that at the time of said arrest the defendant "was unable to produce his license when requested by the Trooper".

The Department of Motor Vehicles received the defendant's license "in the regular mail" on March 25, 1960.

In the light of these facts you have asked to be advised with regard to the following questions:

“1. Is a license ‘revoked’ within the meaning of Section 112 of Article 66½ (1) at the time the Department receives a copy of the final conviction of ‘driving on a suspended license’ from the Trial Magistrate and records it on the Department’s records along with the notation ‘revoked’; (2) at the time the defendant receives in the mail a letter (non-registered) advising him his license has been revoked and ordering him to send it in; (3) on the date the Department actually receives the license itself back, in conformance with the letter mentioned in (2); or (4) at the time the Department deposits in the mail in Baltimore the letter informing the defendant that his license has been revoked?”

2. If the defendant admitted to the Trooper who stopped him and requested to see his license that the license ‘has been taken away from me’ and ‘I have left it home,’ would the answer be any different?

3. Is the license of a person who fails to mail it back to the Department, as required by letter of revocation, valid until the Department can get control of it?”

In reply, our views are as follows:

Question 1. Section 104 (a) of Article 66½ of the Annotated Code (1957 Ed.) requires that the Department of Motor Vehicles “shall forthwith refuse or revoke the license of any operator or chauffeur upon receiving an official record of such operator’s or chauffeur’s conviction of, or refusal or revocation of license for, any of the following offenses in this State or any other State, when such conviction has become final” and, under sub-section (7) thereof, one of such offenses is “Operating after license or driving privilege has been refused, cancelled or suspended by the Department of Motor Vehicles of Maryland”.

It appears clear therefore that the Legislature, by using the words "shall forthwith," intended that the action to be taken by the Department of Motor Vehicles be mandatory and taken *eo instanti* as soon as it received "an official record" of conviction for any one of the seven offenses listed under Section 104. However, being mindful of a defendant's right to be informed with regard to the action required to be taken by the Department, the Legislature provided that every operator must be advised with respect thereto before such action might be enforced against such defendant; and, by Section 21 of Article 66½ it was provided that "such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Department" and, in the same section, it was provided that "The giving of notice by mail is complete upon the expiration of four (4) days after such deposit of said notice".

Accordingly, in the light of the facts set forth hereinabove, it appears that on March 23, 1960, the defendant admittedly received the Department's letter advising him that his operating privilege had been revoked and, under Section 21 aforementioned, it is immaterial that the Department's letter was "non-registered", since there is no requirement that the letter be "registered", the only requirement being either that it be received by the person involved or that it be mailed in a postage prepaid envelope "addressed to such person at his address as shown by the records of the Department" and that, in the absence of personal delivery, receipt is to be presumed "upon expiration of four (4) days" after such notice was deposited in the United States mail.

You have stated that the "regular form letter" which was mailed to the defendant advised that "upon receipt of the license it will be revoked for at least 90 days" and, your question has particular reference to whether such statement contained in the Department's official "Order of Revocation

and Suspension” takes precedence over the statement of the law as hereinabove set forth.

In reply, you are informed that although a review of the subject file discloses that the quoted language appears in the Department’s formal “Order of Revocation and Suspension”, such statement does not violate the expressed intent of the Legislature as disclosed in the statute. Certainly, the rationale of the statute was not intended to permit an interpretation which would allow a defendant to be contemptuous of the public safety and welfare by fixing for himself the date on which his period of revocation is to commence by merely refusing or failing to return his license to the Department until he was ready to do so, thus defeating the law’s mandate. *Stembler and Ford, Inc. v. Mayor and Common Council of Capitol Heights, Maryland*, 221 Md. 113, 156 A2d 430. *Rogan v. B. and O. Railroad Co.*, 188 Md. 44; *Baltimore Credit Union v. Thorne*, 214 Md. 200.

The Commissioner of Motor Vehicles advises that the language referred to has been used in the Department’s “Order of Revocation and Suspension” for many years and has never been successfully attacked upon the technical grounds here suggested. Further, it has been learned that the administrative language used is in compliance with the Department’s desire and intention (1) that a defendant be notified of the administrative action taken against him, and (2) that upon receipt of such notice the defendant will promptly return said license to the Department and that, in fairness to the defendant, such period of revocation or suspension would take effect, insofar as the Department’s application of the penal provisions of the law was concerned, from the date such license was received, the purpose being obvious that until a license is received by the Department it was found impossible administratively to determine the date on which the defendant’s period of revocation actually commenced.

Administrative construction of a statute, long continued and acquiesced in by the Legislature, has the force of law. *Kimball-Tyler Company v. Baltimore City*, 214 Md. 86, 99;

Comptroller v. Rockhill, Inc., 205 Md. 226, 233; *Popham v. Conservation Commission*, 186 Md. 62, 71.

Section 112 of Article 66½, in pertinent part states, "Any person whose operator's or chauffeur's license, or driving privilege as a non-resident has been refused, cancelled, suspended or revoked as provided in this Article, and who drives any motor vehicle upon the highways of this State while such license or privilege is refused, cancelled, suspended, or revoked, is guilty of a misdemeanor . . ."

In view of the facts set forth, it would appear clear that if it be a fact that a defendant has received either personal notice or the presumptive notice set forth in Section 21 aforementioned, he would be guilty of driving on a "refused, cancelled, suspended or revoked" license if he were found driving either (1) after he has received personal notice of the Department's order or (2) after the four (4) day period set forth in Section 21.

Question 2. In reply to this question, you are advised that although the defendant's quoted responses to the Trooper are seemingly inconsistent and unclear, the legal significance is clear, namely, that the defendant has admitted having knowledge of the action taken by the Department of Motor Vehicles and, therefore, the response given to your Question 1 remains the same.

Question 3. In reply to this question, you are advised that the response given to you under your Question 1 sufficiently answers this question in that the law does not contemplate permitting the defendant to name his own date on which a revocation or suspension is to commence. Therefore, the license held by a defendant under the circumstances recited becomes invalid and its use by such driver defendant, knowing of the Department's Order of Revocation and Suspension, would make him guilty of driving on an invalid or revoked license.

C. FERDINAND SYBERT, *Attorney General*.

ELI BAER, *Spec. Asst. Attorney General*.

MOTOR VEHICLES—POLICE COMMISSIONER—STATE POLICE—
TRIAL MAGISTRATES—PEDESTRIANS' RIGHT OF WAY AT
INTERSECTIONS.

August 16, 1960.

Mr. James M. Hepbron,
Police Commissioner
for Baltimore City.

You have requested our opinion as to pedestrians' right-of-way at street intersections and as to subsidiary problems.

The subject is largely controlled by the Motor Vehicles Law, Article 66½, Annotated Code of Maryland (1957 Edition). The following sections primarily govern questions concerning pedestrians' right of way at intersections:

Section 2 (a) *Definitions stated.*—

* * *

(9) **Crosswalk.** Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other marking on the surface or that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections.

* * *

(20) **Intersection.** The area embraced within the prolongation or connection of the lateral curb lines, or if none, the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

* * *

(45) **Right of Way.** The privilege of the immediate use of the highway.

* * *

(52) **Sidewalk.** That portion of a street between the curb lines, or the lateral lines, of a road-

way, and the adjacent property intended for the use of pedestrians.

* * *

(62) Traffic. Pedestrians, ridden or herded animals, vehicles, streetcars or trackless trolley and other conveyances either singly or together while using any street or highway for purposes of travel.

* * *

Section 185

(a) ENUMERATION.—The provisions of this article shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from—

* * *

(2) Regulating traffic by means of peace officers or traffic control devices;

* * *

(7) Regulating the movement of pedestrians by means of 'walk', 'don't walk', or 'wait' signals.

* * *

Section 193

* * *

(a) Green alone or 'go'.

(1) Vehicles facing the signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. All vehicles shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection at the time such signal is exhibited.

(2) Pedestrians facing the signal may proceed across the roadway within any marked or unmarked crosswalk.

* * *

(d) Red with green arrow.

(1) Vehicles facing such signal may cautiously enter the intersection only to make the movement indicated by such arrow but shall not interfere with other traffic or endanger pedestrians lawfully within the crosswalk.

(2) No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicles.

* * *

(g) Pedestrian control signals.—Any other provision of this section to the contrary notwithstanding, whenever pedestrian control signals exhibiting the words 'walk,' 'don't walk,' or 'wait' have been installed and are operating, the conduct of pedestrians shall be regulated thereby.

* * *

Section 236. Pedestrians' right of way at crosswalks.

(a) In general.—All pedestrians shall have the right of way at street crossings in the towns and cities of this State, except where traffic is controlled at such crossings by traffic officers, or traffic-control devices. Between street crossings in such towns and cities, vehicles shall have the right of way.

(b) Passing vehicle stopped for pedestrian.—Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at any intersection to permit a pedestrian to cross the roadway the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

Section 185 permits local authorities to regulate traffic by control devices. Under the Home Rule Amendment (Article XI A, Maryland Constitution) this authority has been given to the Mayor and City Council in the Baltimore City Charter. Subsections (24) and (29) (d), Section 6, *Charter and Public Local Laws of Baltimore City (1949*

Edition) and *State v. Stewart*, 152 Md. 419, 424. Regulation of city traffic has been further delegated in part to the Commissioner of Traffic and Transit by Sections 1-9, inclusive, Article 38, *Baltimore City Code* (1950 Edition) as amended by Ordinance Number 1006, Mayor and City Council of Baltimore, approved June 18, 1957, and Subsection (34 A), Section 6, *Charter, supra*, as enacted by Chapter 389, Acts of 1951. The Commissioner of Traffic and Transit may promulgate reasonable traffic rules so long as they do not conflict with the Public General Laws enacted by the Legislature. *Pressman v. Barnes*, 209 Md. 544, 554. We are advised by the Commissioner of Traffic and Transit that he has not issued any general rules bearing on the primary subject under inquiry. We shall therefore consider the State-wide provisions of the Motor Vehicles Law set out above.

It is apparent from the express language of Section 236 (a) that the pedestrian has the statutory right-of-way at all intersections not controlled by a traffic signal or a police officer. *Love v. State, use of Nelson*, 217 Md. 290, 293, 297; *Weitzel v. List*, 161 Md. 28, 33; *Schapiro v. Meyers*, 160 Md. 208, 211, and *Deford v. Lohmeyer*, 147 Md. 472, 476. This includes both vehicles proceeding forward and vehicles which are turning. Although there is no statutory definition of a street crossing, our Court of Appeals has used the statutory definition of a "crosswalk" (Section 2 (9)) as a definition. *Legum v. State*, 167 Md. 339, 347 and *Chasanow v. Smouse*, 168 Md. 629, 632. If the crossing is marked by paint or other means on the street surface, such portion of the roadway will be considered as the pedestrian crosswalk. No erect metal or wooden signs are required by the statute. In the absence of distinct surface markings, the prolongation of the sidewalk lateral lines will be considered as the crosswalk (within the statutory definition) for streets intersecting at about right angles. Our Court of Appeals has also considered the projection of the curb and building lines as the crosswalk. *State v. Belle Isle Cab Co.*, 194 Md. 550, 554 and *Chasanow v. Smouse*, 168 Md. 629, 632, *supra*. A paved alley without sidewalks was not considered to create

an unmarked crosswalk across a street it intersected. *Johnny's Cabs, Inc. v. Miller*, 199 Md. 16. A crosswalk is not created by custom. *Henderson v. Brown*, 214 Md. 463, 468.

The term "intersection" has been the subject of judicial consideration. A street which enters but does not cross another street has been deemed to create an intersection at the point where the two streets meet. *Buckey v. White*, 137 Md. 124, 129-130; *Ice Machinery Corp. v. Sachs*, 167 Md. 113, 121; *Sheriff Motor Co. v. State*, 169 Md. 79; and *Vizzini v. Dopkin*, 176 Md. 639, 642. A street divided by a grass plot has been construed to be a single and not a double intersection. *Packer v. Hampden Trans. Etc. Co.*, 206 Md. 407, 419.

In considering the statutory right of way, our Court of Appeals quoted the text Berry on *Automobiles* to the effect that the person who has the right of way ". . . is entitled to the first use of such crossing, and it is the duty of others to give him reasonable opportunity to do so." Under conditions of darkness or reduced visibility, the motorist must be more diligent ". . . instead of excusing the driver, it only adds to the degree of care required." *Sugar v. Hafele*, 179 Md. 75, 80, 82. The failure of a motorist to observe a pedestrian in the crosswalk is no defense. *Davis v. District of Columbia*, 91 A. 2d. 14, 16 and *Wintrobe v. Hart*, 178 Md. 289, 294. Although most of the Maryland cases involving pedestrians' right of way are civil suits for damages and the court was required to consider the factor of contributory negligence on the part of the pedestrian as barring his recovery against the motorist (11 Maryland Law Review 1), nevertheless, contributory negligence has no effect on your question which is concerned only with the enforcement of the criminal law. *Duren v. State*, 203 Md. 584, 593, and *Clay v. State*, 211 Md. 577. In the *Clay* case, which involved a conviction of manslaughter, the Court noted that the striking of a pedestrian in or near the crosswalk was evidence of violating the traffic laws. In *Merrifield v. Hoffberger*, 147 Md. 134, 140-141, the Court noted that the right of way statute required the motorist, in approaching a pedestrian

crosswalk, to slacken the speed of his car and to have the car under “. . . such control as to be able to avoid a collision with a pedestrian, either by stopping the automobile or diverting its course”. The Court went on to state that:

“. . . This rule of law may be at variance with the common belief of many operators of motor vehicles, as indicated by the apparent tendency of many users and drivers of automobiles to recklessly disregard the rights of other users of the thoroughfare, and particularly is this true in respect to the rights of pedestrians. A large number of drivers of automobiles, knowing that a collision with a pedestrian rarely results in injury to the machine or its driver, act as if it is incumbent upon one traveling on foot to use an extraordinary degree of care in keeping out of the way of an automobile, or else be maimed or killed. This is not the law, even though there be no statute which gives the pedestrian the right of way at a street crossing, for the simple reason that the consequences incident to a collision between an automobile and a pedestrian are much more serious to the pedestrian than to the automobile, and the rule properly is that the amount of care which the law requires one to exercise is commensurate with the consequences of his failure to do so.

Without statutory provision, there is and should be, a greater amount of care required of drivers of motor vehicles at street crossings, because of perils to pedestrians using them, under modern traffic conditions, and the duty of care which is cast upon the driver of such a vehicle is of a high degree. Vehicles may have the right of way on a portion of a street or highway set aside for them, but at crossings all drivers, particularly of motor vehicles, must be highly vigilant and maintain such control that on the shortest possible notice they can stop their cars so as to prevent injury to pedestrians. . . .”

In a subsequent case, *Parr v. Peters*, 159 Md. 106, 113, our Court of Appeals used equally vigorous language:

“The duty which drivers of motor vehicles owe to pedestrians at street crossings is one which should be deeply impressed upon all drivers of automobiles and other motor vehicles in this State, if need be, by a strict, vigorous, enforcement of the law. Many times, drivers in their desire to reach their point of destinations, or to gratify their inclination or fondness for fast driving, give little or no attention or consideration to pedestrians to whom the right of way is given at street crossings. They not only proceed with much haste and speed in approaching a crossing, but in addition thereto they utterly fail to observe other requirements imposed upon them.

The rapid movement of vehicles upon the streets is urged upon the ground of the alleged necessity therefor, in the more speedy transaction of business, but certainly these considerations should not prevail against the safety and protection of pedestrians, whose right to use the sidewalks and to cross the traveled portions of the streets, at crossings, is absolutely essential to the promotion and successful operation and conduct of business.”

See also *Sheer v. Rathje*, 174 Md. 79, 83.

In *Thursby v. O'Rourke*, 180 Md. 223, 230, the Court noted that:

“At street crossings a greater degree of care is required of motorists, and between crossings a greater degree of care is required by pedestrians . . .”

This was further clarified in *Henkelmann v. Insurance Co.*, 180 Md. 591, 595:

“. . . It is the duty of a driver at a street crossing to be exceedingly vigilant and to have his car under such control, and the speed of the car so reduced

that he may be able to stop and divert its course at the slightest sign of danger in order to avoid collision with pedestrians as far as reasonably possible . . .”

It will be noted in Section 193 (a) that, when a traffic signal shows green (including a green light with a green arrow for turning showing simultaneously), the pedestrian has the right to proceed over the crosswalk and the motorist ordinarily has the right to turn, but the motorist’s right is subordinate to the pedestrian’s right. *Jackson v. Yellow Cab Company*, 222 Md. 367, 368; *Sun Cab Co. v. Cialkowski*, 217 Md. 253, 257; *State v. Belle Isle Cab Co.*, 194 Md. 550, 554, *supra*; and *Wintrobe v. Hart*, 178 Md. 289, 298, *supra*. Our Court of Appeals emphatically upheld the superior right of the pedestrian in *Heffner v. Admiral Taxi Service*, 196 Md. 465, 471-472:

“ . . . The law is plain that a motor vehicle with the right to proceed or to turn right or left must yield the right of way to all other vehicles and pedestrians lawfully within the intersection at the time the signal is exhibited. . . . an automobile making a left turn must wait until those meeting it have passed, and must not cross in front of approaching traffic, either vehicular or pedestrian, in such a way as to interfere with its lawful progress But a green light does not give a driver the right to drive recklessly through an intersection regardless of traffic conditions and to abandon all care for the safety of pedestrians on the crosswalk”

It is clear that the motorist with a green light should not complete his turn but must yield to all the pedestrians who entered the crosswalk by virtue of the same green light under Section 193 (a) (1). 3 Maryland Law Encyclopedia “*Automobiles*” Section 104.

If the intersection has special pedestrian traffic signals, such as “walk”, “don’t walk” or “wait”, then the pedestrians’ right to proceed is controlled by such special traffic control device rather than by the ordinary red and green lights

which may be present for the control of vehicular traffic only. Section 193 (g).

If a police officer is present and exercising control of traffic, the pedestrians' right to proceed should be separately designated by the police officer controlling the traffic, and the pedestrian and motorist should not be required to speculate who has the right to proceed on an officer's vague manual "go" signal. Compare *Panitz v. Webb*, 149 Md. 75, 81, 83, 84 and 151 Md. 639, 642. The police officer should not give undue weight to a desire to keep vehicular traffic moving by ignoring pedestrians and thereby force pedestrians to assume the risk of crossing an intersection in unequal competition with motor vehicles or, in the alternative, to wait an unreasonable length of time for a favorable pedestrian signal from the police officer. The fact that a motorist is protected by a form of armor does not give him a greater right to be in a hurry.

You have raised a question as to one intersection in Baltimore, which has no special control for pedestrians and which in cycle indicates a general green light for eastbound traffic (to go forward or to make a turn in either direction) while the westbound traffic on the same street is stopped, and at the same time in the cycle the north and southbound traffic on the intersecting street is stopped, except for a green arrow signal permitting the southbound traffic on the intersecting street to make only a right or westbound turn. You inquire as to the rights of a pedestrian on the southeast corner who desires to proceed to the northeast corner at that phase of the signal cycle. Such pedestrian has the right to proceed from the southeast corner to the northeast corner (in the absence of a police officer's signal or special pedestrian control signal) only at such time as the regular traffic control signal permits the vehicular traffic (on the north and southbound street) to proceed across the entire intersection in a northerly direction. If a motorist fails to grant such pedestrian his right of way, then such motorist might properly be charged under Section 198.

A motorist's failure to grant the right of way to a pedestrian, pursuant to Section 236 (a), at an uncontrolled

street crossing is a misdemeanor under Section 251. The failure of a motorist, while making a turn on a green light, to grant a pedestrian his right of way, pursuant to Section 193 (a) (1), is a misdemeanor under Section 198. Failure to obey the traffic direction of a police officer is a misdemeanor under Section 181. A police officer has the right and ordinarily the duty to arrest anyone who commits a misdemeanor in his presence. *Dauids v. State*, 208 Md. 377, 382 and *Roddy v. Finnegan*, 43 Md. 490, 494. A police officer who observes a motorist failing to grant the right of way to a pedestrian, under Section 236 (a) or Section 193 (a), should forthwith issue a traffic summons to the motorist, under the conditions set forth in Section 321, irrespective of any injury or collision. In the ordinary case there is no necessity to issue a witness' summons to the pedestrian, since this would only produce testimony cumulative to the personal observation of the police officer and would work a hardship on the pedestrian whose rights had already been abused.

You have also questioned us as to cases where the police officer receives a complaint, but did not himself observe the right of way incident. Such cases would be governed by your ordinary procedures concerning arrests for misdemeanors committed out of the presence of a police officer, and in such cases the complainant ordinarily would be a necessary, if not the sole, witness for the State. The fact that the case before the court might involve a conflict of testimony (that is, the pedestrian contradicted by the motorist) is not controlling. Compare *Sheriff Motor Co. v. State*, 169 Md. 79, 83, *supra*. The credibility of the witnesses and the weight of the testimony is for the court. *Brown v. State*, 220 Md. 29, 38; *Shockley v. State*, 218 Md. 491, 497; and *Webb v. State*, 201 Md. 158, 162.

It is our opinion that the Legislature has evidenced a clear intention, in the Motor Vehicles Law, to give the pedestrian the right of way at intersections, unless a contrary order is given by a police officer, a pedestrian control signal or a red traffic signal. Considering the unequal situation of the

pedestrian and the motorist and the disproportionate danger to the pedestrian, the Police Department should strictly enforce the pedestrian's right of way in crosswalks at intersections.

C. FERDINAND SYBERT, *Attorney General*.

CLAYTON A. DIETRICH, *Asst. Attorney General*.

MOTOR VEHICLES—STATE POLICE—TRIAL MAGISTRATES—
LENGTH OF VEHICLES—PILING AND LOGS.

November 3, 1960.

Colonel Carey F. Jarman,
Superintendent,
Maryland State Police.

You requested our opinion concerning the applicability of Section 314, Article 661½, Annotated Code of Maryland (1957 Edition) to the hauling of logs on public highways. You have referred to us certain photographs and other pertinent information.

Provision to limit the length of vehicles has been included in the Motor Vehicles Law, but has been materially amended over the period of years. The limitation on length was added to the Code as Section 255 of Article 661½ by Chapter 1007, Acts of 1943. This enactment did not provide for any exceptions to the limitation on over-all length. Chapter 311, Acts of 1951, inserted an exception for piling. See Section 277 in the 1951 Code. The current 1957 Code has three exceptions: one for utility poles, one for piling, and one for rowing shells. The present Section 314 is as follows:

“No vehicle or combination of vehicles including the load thereon shall exceed 55 feet in length inclusive of front and rear bumpers; except that any utility poles being transported by or for any public utility company shall not be subject to the limitations provided in this section as to over-all length, and further provided that piling shall not be subject to the limitations provided in this section as to the over-all length, and provided further that vehicles or trailers transporting boats or vessels commonly known as crew or rowing shells for use in interscholastic or intercollegiate rowing contests shall not be subject to the limitations of this section as to over-all length.”

It is apparent from the recent statutory history that the Legislature has from time to time added exceptions to its

original limitation on over-all vehicle length. The exceptions are not an integral part of the original limitation and prohibition, and as a consequence the three exceptions or provisos are not matters for allegation and proof by the prosecution but are matters of defense only. *Bode v. The State*, 7 Gill. 326, 331; *Rawlings v. State*, 2 Md. 201, 211; *Barber v. State*, 50 Md. 161, 170; *Gibson v. State*, 54 Md. 447, 451; *State v. Knowles*, 90 Md. 646, 658; *Weber v. State*, 116 Md. 402, 410; *Ruggles v. State*, 120 Md. 553, 559; and *Foxwell v. State*, 146 Md. 90, 93. When a trooper observes a vehicle having a length exceeding 55 feet and it is not immediately apparent to him that the excess length is solely due to one or more of the three express statutory exceptions, it is his duty to arrest or summons the driver for a violation of Section 314.

We are advised that your troopers have observed vehicles loaded with mixed timbers; some of the timbers being suitable for piling and some timbers being suitable only for lumber. It is a violation of Section 314 to have on a vehicle any piece of timber which is not itself suitable for use as piling, if that piece of timber, without regard to piling timber, causes the vehicle to be over the maximum length of 55 feet. The fact that some of the timber is suitable for piling does not justify the addition and inclusion of other timber which is not so suitable and not intended to be thus used. Mixed loads, which exceed 55 feet over-all length, are not authorized by Section 314, unless all of the load falls in one or more of the three specific exceptions.

You advise us that some drivers have defended on the basis that the burden of proving that the timber was unsuitable for piling rested on the State. It is a matter of common knowledge that only straight timber is suitable for piling. Attention is invited to the definition which appears in *Webster's New International Dictionary of the English Language*, Second Edition, Unabridged, 1953, page 1862.

“*Pile* . . . A long slender member usually of timber, steel or reinforced concrete driven into the ground to carry a vertical load as in the case of a *bearing*

pile, to resist a lateral force as in the case of a *batter pile* (which is one driven at an angle with the vertical), or to resist water or earth pressure as in the case of a *sheet pile* . . .”

“*Piling* . . . Logs suitable for or ready to be made into piles.”

Compare *L. B. Menefee Lumber Co. v. Gamble*, 242 Pac. 628, 630.

Since the use of piling dates from antiquity and the suitability of particular timbers is within the common experience, a trooper is qualified to testify to his observations of the lumber on the vehicle in question. One of the simple and ordinary tests of the industry is susceptible to use by a layman, that is, placing a string from one end of the timber to the other end of the timber, and if at any point a substantial space separates the string from the timber, then the timber is generally considered unsuitable for use as piling. It is a matter of common knowledge and experience that only straight lumber is suitable for processing as piling, thus the Court may take judicial notice of the fact. This does not preclude a defendant from introducing such expert testimony as he may deem necessary in contradiction. *Macht v. Hecht Co.*, 191 Md. 98, 102.

You have received inquiries as to whether piling must be made of timber. It is apparent that the Legislature has not so limited the word “piling”. Any piling, whether derived from timber or manufactured by using concrete, metal or any other reasonable suitable material, would qualify. It is a question of fact in each case, but it would be advisable for transporters of steel, concrete or other type piling to carry appropriate evidence and proof of intention in the vehicle in order to facilitate identification in the event the vehicle is stopped for inspection. The form of identification can be determined administratively.

C. FERDINAND SYBERT, *Attorney General*.

CLAYTON A. DIETRICH, *Asst. Attorney General*.

MOTOR VEHICLES—TRIAL MAGISTRATES—WARRANTS—SUMMONS—AS LONG AS A SUMMONS SUFFICIENTLY DESCRIBES THE CHARGE A VIOLATOR OF TRAFFIC LAWS MAY BE TRIED WITHOUT A WARRANT BEING ISSUED.

December 28, 1960.

*Judge Edwin F. Fockler, III,
North East, Maryland.*

In your recent letter you ask whether or not it is necessary for you as a Trial Magistrate to issue a warrant in cases involving traffic violations.

Article 66½, Section 32, Annotated Code of Maryland (1957 Ed.), provides that a person shall be taken before the nearest available Trial Magistrate for an immediate hearing, and Article 66½, Section 321, provides for the issuance by the police officer of a summons to resident traffic violators to appear before a Justice of the Peace or Trial Magistrate, and in case a person shall fail to appear when summoned, a warrant or a second summons may issue to the violator, which shall show the trial date.

Article 52, Section 23, Code, reads as follows:

“Every justice of the peace, police justice or other similar official in those offenses which he has jurisdiction to hear and determine may, in his discretion, issue a summons directed to the proper officer requiring him to summons or give notice to the party whose attendance is required of the nature and circumstances of the supposed offense, and of the day and hour of the appearance of the accused before such justice of the peace, police justice or other similar officer; and a copy of every such notice or summons shall be served upon the accused which shall be returnable on a day to be stated in said summons or notice, not exceeding five days from the time of issuing the same; but the invalidity of any such notice or summons or of such service thereof shall not affect the jurisdiction of such justice of the peace, police justice or

other similar official if the accused party appears and the charge is one of which the official issuing the notice or summons has jurisdiction, and the said notice or summons may be amended.”

Section 24 reads as follows :

“Nothing in Section 23 shall prevent a justice of the peace, police justice or other similar official from issuing a warrant of arrest in the first instance, or at any time after the issuing of the notice or summons mentioned in Section 23, and when the warrant of arrest is issued it shall supersede and nullify any outstanding notice or summons issued under the provisions of Section 23.”

We think it is clear, after reading Article 66 $\frac{1}{2}$ and Article 52, that the Legislature did not intend that a criminal warrant should be issued in every case involving a violation of the motor vehicle laws. We believe it intended that a person be tried in such cases simply upon the charges as set out in the summons issued by the police officer. We have previously ruled that even under the provisions of Article 66 $\frac{1}{2}$, Section 324, a police officer may, in his discretion, issue a summons, but that the party arrested has no actual right to demand and receive a summons.

Article 21, Declaration of Rights, Maryland Constitution, reads as follows :

“That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.”

In *Tate v. Lamb* (Va.), 81 S.E. 2d 743, it was held that a traffic summons which fully embodies the charge consti-

tutes sufficient process and that no warrant need be issued or served in a case involving a violation of the traffic laws. In *Yunker v. Quillin* (Ore.), 275 P. 2d 240, a traffic ticket was held to be a sufficient complaint upon which to try a defendant.

The purpose of our constitutional provision is to ensure that everyone is fully informed of the crime with which he is charged so he can defend against it. We are, therefore, of the opinion that if a traffic summons fully and clearly sets forth the charge or charges against a defendant, it is sufficient, and that no warrant need be issued in the matter.

C. FERDINAND SYBERT, *Attorney General*.

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

RACING COMMISSION

RACING FUND—CAPITAL IMPROVEMENTS FROM FUTURE ACCUMULATION IN THE RACING FUND ARE AUTHORIZED.

February 26, 1960.

*Mr. R. Bruce Livie, Chairman,
Maryland Racing Commission.*

You have presented to us an application of the Maryland State Fair, Inc. (owners and operators of the Laurel Race Course) for approval of the construction of a training track on the grounds of the Laurel Race Course and for approval of the payment therefor out of the "future accumulation accruing to the credit of the Maryland State Fair, Inc., in the Racing Fund". It is stated that the estimated cost of the improvements will be approximately \$100,000. You have requested an opinion as to whether or not the application represents an expenditure for a project which is a proper subject for such reimbursement.

In 1938 the Racing Commission authorized the race tracks to take an additional 1% of the mutuel pool for the purposes set forth in a letter written by the then Chairman of the Commission, which stated as follows:

"This increase in funds is desirable provided it is used in improving the quality of racing the tracks offer the public, and improving facilities for the comfort and convenience of the general public, the working force employed on the tracks and the horsemen who contribute so much to the success of any meeting. . . .

"In the matter of improvements, much remains to be done in providing lighting and other conveniences for horsemen about the stables; and, generally in doing many of the things that the Commission has desired, and in some instances asked to have done in the past, but the doing of which has been postponed because of the lack of available funds. . . .

“With this understanding—improved racing, needed plant improvements, and aid to agriculture,—the Commission approves the petition as presented; that is, an increase of one per cent. . . .”
(35 Opinions of the Attorney General 257.)

By Chapter 961 of the Acts of 1945, now codified as Section 12 of Article 78B of the Annotated Code of Maryland (1957 Ed.), it was required that the Racing Commission exact from licensees certain percentages of the mutuel pool, and that the Commission hold and deposit the funds so deducted and from time to time authorize their use in building, substantial alterations, additions, changes, improvements or repairs to racing plants by the licensees. The Act (now codified as Section 12(c) of Article 78B) states, in part:

“* * * In determining whether to make such grant or grants as contributions to capital of any portion of the Racing Fund, the Commission shall give due consideration to whether its expenditure in each instance will promote the safety, convenience and comfort of the racing public and horse owners and generally whether it will tend toward the improvement of racing in this State. * * *”.

These provisions were first interpreted by Attorney General Hammond in an opinion dated May 17, 1950 (35 Opinions of the Attorney General 257). It was there held that the Commission could not permit reimbursement to a racing association for expenditures made several years before without prior Commission approval.

Subsequently, in an opinion dated January 27, 1953, Attorney General Rollins (38 Opinions of the Attorney General 249) held that the Racing Commission could not grant funds which would be accumulated in future years to a licensee to reimburse it for improvements approved by the Commission. Shortly thereafter, Chapter 422 of the Laws of 1953 was enacted. This specifically empowered and authorized the Commission to make capital grants from

future contributions to the Racing Fund and thereby nullified the opinion of Attorney General Rollins.

Based upon the aforementioned history of the Racing Fund statute, it is now clear that the Commission may authorize a grant from the Racing Fund out of future accumulation accruing to the credit of a licensee. However, as to the question of whether a training track will promote the "safety, convenience and comfort of the racing public and horse owners and generally whether it will tend toward the improvement of racing in this State" is a question which the Commission must in its expert opinion determine. If the Commission determines that it will "tend toward the improvement of racing in this State", then it may approve the requested grant. However, before a final approval is given, it should be pointed out that specific architectural plans and specifications should be submitted, together with contracts and other documents, showing the exact cost of this improvement. Caution would dictate that final approval be withheld until these details are supplied to the Commission.

C. FERDINAND SYBERT, *Attorney General.*

JOSEPH S. KAUFMAN, *Asst. Attorney General.*

RACING FUND—TRUCK CONTAINING WATER TANK NOT A
CAPITAL IMPROVEMENT TO BE PAID FROM RACING FUND.

May 5, 1960.

*Mr. James A. Callahan,
Acting Secretary,
Maryland Racing Commission.*

Reference is made to your recent letter forwarding to this office a copy of a letter from the Maryland Jockey Club (owners and operators of the Pimlico Race course). The Pimlico track has made the following request:

“We request your approval to purchase a new truck with a 2500-gallon water tank to be used for keeping the track moist and in condition. The old tanks that we have have outlived their usefulness, and this new tank is needed to keep the track in condition. The cost of this will be between \$10,000.00 and \$11,000.00. If we receive your prompt approval, we can probably get delivery before the Meet opens in May. This is to be charged against the Racing Fund and to be refunded as the money becomes available.”

I have reviewed the request and note that it is for the purchase of a truck containing a 2500-gallon water tank to be used for keeping the track in moist and proper racing condition. I have also carefully reviewed the purposes of the Racing Fund, all of which are more fully set forth in the opinion to the Commission in 45 Opinions of the Attorney General 170. Based upon the history of the Racing Fund statute, it appears that the purchase of a chattel such as is proposed is not within the type of capital improvement intended by the Legislature in establishing the Racing Fund. I am therefore of the opinion that the proposed purchase of the truck is not within the spirit and letter of the Racing Fund, and therefore approval should not be given for purchase of the same out of racing funds.

C. FERDINAND SYBERT, *Attorney General.*

"PICK SIX" BETTING—COMMISSION HAS AUTHORITY TO APPROVE.

September 26, 1960.

*Mr. James A. Callahan,
Acting Secretary,
Maryland Racing Commission.*

This will acknowledge receipt of your recent letter requesting our opinion as to the authority of the Racing Commission to permit a betting procedure, commonly known as the "Pick Six" type of betting, at the tracks within the jurisdiction of the Commission.

We are advised that the "Pick Six" betting arrangement allows the bettor to select one horse from each of six separate designated races. The money wagered under this plan is placed in a special pool and the person or persons selecting the most winners share 70% of the total pool. The person or persons selecting the second greatest number of winners share 30% of the total pool. Each day's pool must be distributed so that there will always be one or more winners.

The authorization to the Commission is contained in the following provisions of Article 78B, Annotated Code of Maryland (1957 Ed.) :

Section 11 (a)

"Said Racing Commission shall have full power to prescribe rules, regulations and conditions under which all horse races shall be conducted within the State of Maryland. Said Commission may *make rules governing, restricting or regulating betting on such races* and may fix, regulate and condition the rate of charge by the licensee for admission, or for the performance of any service, or for the sale of any article on the premises of such licensee, and may *regulate the size of the purse, stake or reward to be offered for the conduct of such races.*"
(Emphasis supplied.)

Section 15 (a)

“In addition to licensing racing, as hereinbefore provided, the Racing Commission is authorized to issue licenses to the following organizations: Agricultural and Mechanical Association of Washington County, Cumberland Fair Association, Inc., Pocomoke Agricultural Fair Association, Inc., Harford County Fair Association, Inc., Southern Maryland Agricultural Fair Association of Prince George’s County, and the Maryland State Fair and Agricultural Society, Incorporated. Such licenses shall permit the holders to conduct a race meeting or meetings *with betting privileges*, not to exceed twelve days for any one organization in any calendar year, provided such meetings are held in connection with or for the benefit of bona fide county fairs or agricultural exhibitions and are held in compliance with all the provisions of this article.” (Emphasis supplied.)

Section 17 (a)

“In addition to the licensing of racing as hereinbefore provided, the Commission is authorized in its discretion to issue licenses for the holding of trotting and pacing meetings at which there may be offered stakes, purses or awards, and at which *there may be exercised pari-mutuel betting privileges*, to Baltimore Trotting Races, Inc., the Rosecroft Trotting and Pacing Association, Inc., Laurel Harness Racing Association, Inc., and Ocean Downs Racing Association, Inc., and the Commission shall have supervisory powers over such meetings and those licensed in the same manner and to the same extent, where not inappropriate, as it has by virtue of the provisions of this article over those licensed under the provisions of §§ 7 and 15 of this article, provided, however, that under this section not more than one license with pari-mutuel betting privileges shall be issued in any county or in Baltimore City and that no such li-

cense shall be issued hereafter in Carroll, Dorchester, Frederick, Montgomery or Wicomico counties." (Emphasis supplied.)

You will note that in each of the aforementioned sections the Commission is given a broad discretion as to the manner in which pari-mutuel betting privileges may be exercised. In the recent case of *Southern Maryland Agricultural Association v. Magruder*, 198 Md. 274, the Court of Appeals, in reviewing these sections, stated as follows:

"A perusal of the relevant Maryland statutes will demonstrate that the General Assembly has established a broad policy of prohibiting the commercial exploitation of the public's gambling instinct. Article 27, Sections 288 to 301, inclusive. *Gaither v. Cate*, 156 Md. 254, 144 A. 239. The Legislature has deviated from this policy by the exception in favor of betting at race tracks provided in Section 292, and by the enactment of Article 78B. This statute permits the operation of race tracks at which horse racing, with attendant betting, is allowed under very close regulation and supervision. *The Maryland Racing Commission is given exceedingly wide and comprehensive regulatory powers. * * * It is apparent that the Legislature deliberately imposed grave responsibility upon the Racing Commission in order that this exception to the anti-gambling laws of the State be kept within proper limits.*" (Emphasis supplied.)

Based upon the foregoing authority, it is our conclusion that the Commission has the power and authority to allow a betting procedure such as the "Pick Six" type betting, as outlined. However, this office does not express any opinion as to the wisdom or advisability of authorizing the type of betting discussed. *A fortiori*, just as the Commission has the right to allow such a procedure, it may at any time eliminate or cancel this right when, in its discretion, it believes that to be the best policy.

C. FERDINAND SYBERT, *Attorney General*.

JOSEPH S. KAUFMAN, *Asst. Attorney General*.

SMALL LOAN LAWS

LENDER MAY NOT COLLECT PRINCIPAL BALANCE OF LOAN IF
THERE IS ANY OVERCHARGE OF INTEREST ON A SMALL
LOAN.

April 18, 1960.

Mr. Carl F. Vohden,
Administrator of Loan Laws.

In your recent letter you ask whether or not a loan made under the Small Loan Laws of the State of Maryland may be collected after there has been an overcharge of interest made on that loan by the lender.

Article 58A, Section 16(b), Annotated Code of Maryland (1957 Ed.), reads as follows:

“If interest, or charges in excess of those permitted by this article shall be charged, contracted for, or received, the contract of loan shall be void and the licensee shall have no right to collect, or receive any principal, interest or charges whatsoever.”

In construing a similar provision in the industrial finance laws, namely, Article 11, Section 196(c), Code, the Court of Appeals, in *Marion W. Fisher v. Bethesda Discount Corp.*, 221 Md. 271, held that the purpose of such a statute was not to compensate the borrower but was an aid to enforcement of the laws providing against usurious charges by lenders, and that, for that reason, such laws should be strictly construed against the lender. The court went on in that case to hold that the lender could not collect the amount of his loan because of an overcharge of interest. Applying the same principles to the small loan now being considered by your office, I am of the opinion that the lender in question may not collect any further payments on the loan since the loan has become void because of the overcharge of interest.

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

SPECIAL POLICEMEN

SECRETARY OF STATE—STATE POLICE—SPECIAL POLICEMEN
—PRIVATE DETECTIVE—EMPLOYEES PROVIDED BY PRIVATE
DETECTIVE LICENSEES MAY NOT BE COMMISSIONED
AS SPECIAL POLICEMEN.

February 2, 1960.

Hon. Thomas B. Finan,
Secretary of State of Maryland.

You have requested our opinion as to whether special police commissions may be issued to employees of a private detective agency upon the application of a corporation (George W. Krill, Inc.) engaged in the transportation business.

We have reviewed the letter of application to your office and are of the opinion that the subject corporate applicant does not qualify under the provisions of Section 342 or Section 348 of Article 23 of the Annotated Code of Maryland (1957 Edition).

The statute does not contemplate that the persons to be commissioned special policemen are to be the employees of an entity independent of the applicant. Compare the letter of this office to Governor McKeldin, dated December 16, 1957, copy of which was sent to your office. This is particularly true in the case of private detective licensees and their employees who, by the nature of their business, must operate as independent contractors and not as the full-time employees of a single applicant. Great confusion would result if private detectives and their agents were to be given special police power when only a part of their time is to be employed in the pursuit of guarding the property of a particular applicant. The extension of police power to private investigators was not contemplated by the Private Detectives Law (Sections 75-92, Article 56). Private detectives are authorized to investigate (without firearms or police power) and to provide uniformed, armed guards who have no police power whatsoever.

It is contrary to public policy to permit the general carrying of concealed, deadly weapons. Section 36 of Article 27. This sound public policy should not be circumvented by the issuance of special police commissions under the corporation law. Since a private detective agency may provide uniformed, armed guards to the applicant, the only conceivable purpose for seeking a special policeman's commission for named individuals would be to permit them to carry concealed, deadly weapons while wearing plain clothes and to operate in all of the counties of Maryland as well as the City of Baltimore. Curiously enough, this would be wider geographical jurisdiction than the State Police have in most instances. Cf. Section 23, Article 88B.

Under the facts set out in the letter of George W. Krill, Inc., it is our opinion that the applicant does not qualify and the intended purposes are beyond the scope of the special police statute cited.

C. FERDINAND SYBERT, *Attorney General.*

CLAYTON A. DIETRICH, *Asst. Attorney General.*

SPECIAL POLICEMEN MAY CARRY OUT THEIR DUTIES ON
PUBLIC OR PRIVATE PROPERTY—PICKET LINE OF
WORKERS ON STRIKE.

June 3, 1960.

*Judge William T. Evans,
Dundalk, Maryland.*

In your recent letter you ask whether or not "Special Policemen" appointed by the Governor at the request of the Bethlehem Steel Company have authority to control the picket line of workers on strike against the Bethlehem Steel Company while on company premises. You also ask whether or not such policemen have the same authority to act on a public highway as they do on company property.

Sections 342 through 348, Article 23, Annotated Code of Maryland (1957 Ed.), authorize the Governor to issue special commissions to employees to act as policemen for the protection of the property of any corporation, firm or individual maintaining or operating in this State a factory, warehouse, storehouse or other type of business, and for the preservation of peace and good order on the premises of such employer. Section 344 provides that every such policeman shall possess and exercise in the county or city where the premises of the corporation for which he may have been appointed are situated all the authority and powers held and exercised by Constables at common law and under the statutes of the State of Maryland, and also all the authority and powers conferred by law upon the policemen of the City of Baltimore.

Constables at common law were public officers with the duty to preserve the peace, prevent the commission of crime, and to arrest offenders within the county or town they were appointed. Article 20 of the Annotated Code of Maryland (1957 Ed.), grants to Constables the power to execute both criminal and civil process issued by any Justice of the Peace, to deliver prisoners to jail, to investigate gambling, to report all violations of law to the Circuit Court, to inspect licenses of all peddlers, and to inspect licenses of retailers

of spirituous liquors who do not reside in their respective counties or cities.

Section 530, Public Local Laws of Baltimore City, grants to policemen of Baltimore City the authority within the boundaries of the city, on water as well as on land, to preserve the public peace, prevent crime and arrest offenders, protect the rights of persons and property, guard the public health, preserve order at primary meetings and elections and at all public meetings and conventions, and on all public occasions and places prevent and remove nuisances on all streets and highways, water and water courses, and all other places, provide protection of firemen and property at every fire, and to see that all laws relating to disorderly persons and public health are enforced.

It is quite obvious that the Legislature intended such special policemen to act for the protection of the property of the corporation or the person employing them, and for the preservation of peace and good order on their respective premises.

In 20 Opinions of the Attorney General 367, it was held that special policemen had authority to act to enforce the traffic laws of the State of Maryland on a public highway which was adjacent to the property of the employer, and to make an arrest for any offense committed in their presence, even though the offense occurred on public property.

In 26 Opinions of the Attorney General 286, it was held that guards at the Glenn L. Martin Company could act to protect property of the company or of the federal government which the company was testing, even though that property was located on premises which did not belong to the Glenn L. Martin Company.

In 40 Opinions of the Attorney General 309, it was held that the jurisdiction of special policemen to act was limited to the county or the city for which their commission was issued.

You also ask whether or not Riverside Road is a public highway. This is a question of fact which must be determined by you from evidence which is more readily available to you than to this Department. However, it does not appear that this question need be answered since it is my opinion that the special policemen who were commissioned to act for the Bethlehem Steel Company had jurisdiction to maintain peace and good order regardless of whether the road where the action took place was owned by the corporation or was a public highway.

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

STATE EMPLOYEES' RETIREMENT SYSTEM

BENEFITS FOR ELECTED AND APPOINTED OFFICIALS AND PERSONS PROMOTED TO POSITIONS NOT COVERED BY THE MERIT SYSTEM.

June 23, 1960.

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

This is in reply to your inquiry regarding Mr. Norman M. Pritchett, presently the Chief Engineer of the State Roads Commission of Maryland. As indicated by the minutes of the meeting of the Commission dated December 23, 1953, Mr. Pritchett was appointed Chief Engineer as of January 1, 1954. However, at its meeting on June 1, 1960, the Commission did not reappoint Mr. Pritchett, but did, in fact, appoint a new Chief Engineer, effective July 1, 1960. Mr. Pritchett has filed an application for retirement and you request advice as to whether he is eligible for benefits under Section 11 (12) of Article 73B, Annotated Code of Maryland (1957 Edition), as an "appointed official".

The Court of Appeals of Maryland has on many occasions considered the requirements which are essential to a finding that a public office exists. The various characteristics which the Court has held should appear in the Constitution, statute or ordinance creating an office include (1) the taking of a prescribed oath of office, (2) the receiving of a commission, (3) the giving of an official bond, (4) a term of office which is fixed by the particular law, (5) a fixed salary, and (6) the specifying of duties, the performance of which call for the exercise of some portion of the sovereignty of the government. *School Commissioners v. Goldsborough*, 90 Md. 193; *Baltimore City v. Lyman*, 92 Md. 591; *Truitt v. Collins*, 122 Md. 526; *Buchholtz v. Hill*, 178 Md. 280; *Jackson v. Cosby*, 179 Md. 611. There also have been many opinions, too numerous to cite here, which have been rendered by the Attorney General of Maryland on this question, of which, we are certain, you are fully cognizant.

While the Maryland Court of Appeals has said that all of the above stated elements need not be present in the law involved, at least a sufficient number must exist to evidence the legislative intent to create an office. A careful perusal of the statute establishing the position of Chief Engineer shows that, in actuality, none of the requisites appears. Section 3 of Article 89B provides that the State Roads Commission may employ a chief engineer, if it deems it necessary. The Commission is directed to fix his salary and has the power to exact a bond for the faithful performance of duty. The chief engineer is subject to removal by the Commissioners. Hence, the statute does not require the taking of an oath of office, the chief engineer does not receive a commission, he does not have a fixed term of office, but, as pointed out, is subject to removal by the Commissioners. There is no delineation of duties which would require the exercise of the sovereignty of the State. Although there is a provision that the chief engineer may be required to give bond, the statute is not mandatory in this regard and no amount is designated. The matter is left entirely to the discretion of the Commission. Even his salary is not prescribed. It, too, is entrusted to the judgment of the Commission.

With these factors in mind, it is our conclusion that the Legislature, in promulgating Section 3 of Article 89B above-mentioned, has not manifested the intention to create a public office. Therefore the chief engineer is not an "appointed official" within the meaning of the State Employees' Retirement law as contained in Article 73B.

However, the benefits itemized in Section 11 (12) are not completely limited to "elected and appointed officials", as are some of the other provisions of the retirement law. The pertinent portion of Section 11 (12) reads as follows:

"Notwithstanding anything to the contrary in this Article, if any person, while being a member of the State Employees' Retirement System, has been or may hereafter be appointed or elected to any State office or *promoted to any position within*

the State government which is not a part of the classified service and which is not covered by the provisions of Article 64A (Merit System), for a fixed or indefinite term and not be continued in office, reappointed or re-elected, after the completion of twenty years of creditable service, regardless of age, such member may elect, in lieu of the withdrawal of his accumulated contributions, to have such contributions paid to him in an annuity of equivalent actuarial value, in which event he shall also be paid a pension equal to the ordinary disability pension that would have been payable at such time had he been retired on an ordinary disability retirement. . .” (Emphasis supplied.)

You have submitted information that Mr. Pritchett has been continuously employed by the State of Maryland in diverse positions since March 1, 1928. Obviously, he has more than the twenty years creditable service required. Furthermore, you advise that Mr. Pritchett was a member of the State Employees' Retirement System at the time of his appointment as Chief Engineer. Until he was appointed Chief Engineer of the State Roads Commission, Mr. Pritchett was within the classified service and was covered by the provisions of Article 64A (Merit System). However, Section 4 of Article 64A specifically declares that the Chief Engineer of the State Roads Commission shall not be included in the classified service.

It is quite apparent that with his appointment, Mr. Pritchett attained considerable additional prestige and his new position brought him a substantial increase in income. Of course, these were inducements for him to vacate a post protected by the Merit System. But more importantly, these circumstances clearly indicate that Mr. Pritchett was promoted and that the promotion was to a “position within the State government which is not a part of the classified service” within the meaning of Section 11 (12).

The facts in this case, we believe, present the exact type situation which the Legislature intended to give special consideration. Consequently, it is our opinion that Mr. Pritchett may elect to receive the benefits set forth in Section 11 (12).

C. FERDINAND SYBERT, *Attorney General.*

MARY ARABIAN, *Asst. Attorney General.*

SUBVERSIVE ACTIVITIES ACT

LOYALTY PLEDGE REQUIREMENT OF ACT IS APPLICABLE TO PERSONS RENDERING OCCASIONAL INSTRUCTIONAL SERVICES FOR COMPENSATION IN UNIVERSITY'S FORMAL INSTRUCTIONAL PROGRAM—"EMPLOYEE" DEFINED.

April 8, 1960.

*Dr. Wilson H. Elkins,
President and Executive Officer,
University of Maryland.*

You have asked whether the loyalty pledge provisions of the Subversive Activities Act of 1949 are applicable to persons who, while not appearing in the University Budget, and not listed as faculty members, render occasional instructional services for compensation in connection with certain formal credit bearing courses offered by the University. You state that the primary employment of such individuals is not with the University; and that the instructional service which they render in the University's program is much like a speaker's contribution, except that such service is rendered in association with, and as an integral part of a formal University course, and the individual may be asked to return semester by semester, or year by year. You further advise us that such persons are compensated for such instructional services by the University on a so-called "one-pay card" basis.

The Act in question, codified as Sections 1-19 of Article 85A, Annotated Code of Maryland (1957 Edition), provides in Section 10 that no subversive person as defined in the Act shall be eligible for "employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State . . .". Section 11 provides, *inter alia*, that every board, department or other agency of the State which appoints or employs any persons, including teachers and other employees of any public educational institution in this State, shall establish procedures to ascertain whether such person

is a subversive person; and that in securing facts necessary to such determination the applicant shall be required to sign a statement containing answers to such inquiries as may be material. Section 13 provides in substance that all persons in the employ of the State shall be required to execute a statement that he or she is not a subversive person.

By letter of June 16, 1949, we advised you that it was unnecessary to secure loyalty pledges under this Act from persons invited to the University Campus for the specific purpose of delivering one or two lectures for a stipulated sum of money. In that instance, the speaker's contribution was in no way related to the University's formal instructional program and it was our opinion that such person was not, in the legal sense contemplated by the statute, an appointee or employee of the State.

It is, however, our opinion that the individuals now in question are employees of the University during that period of time that their services are engaged by the University in connection with its formal instructional program. Recently, in *Keitz v. National Paving Company*, 214 Md. 479, our Court of Appeals held:

“. . . there are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these indicia, excepting (4), seems controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the

above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his right to do so that is important.”

We conclude, therefore, that such individuals must execute the loyalty oath prior to undertaking instructional service with the University. If you determine that such individuals have previously executed the loyalty oath as required in their primary employment with another State agency, or with an institution receiving State aid, no duplication will be necessary before they may be permitted to serve the University in the stated manner.

C. FERDINAND SYBERT, *Attorney General*.

ROBERT C. MURPHY, *Assistant Attorney General*.

TAXATION

INHERITANCE TAX—AN ALTERNATIVE CONTINGENT REMAINDER TO A CLASS IS SUBJECT TO IMPLIED CONDITION OF SURVIVORSHIP—REMAINDERS ESTABLISHED PRIOR TO 1935 NOT SUBJECT TO DIRECT INHERITANCE TAX EVEN THOUGH VESTING AFTER 1935.

March 9, 1960.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

Re: Trust u/W Annie Eliza Scott

You have asked for advice as to the tax consequences occasioned by the recent death of the last life beneficiary under the above captioned trust. The facts are these: The testatrix, who died in 1920, established a testamentary trust, naming succeeding life beneficiaries. Upon termination of the life estates, which occurred in 1959, the corpus is to be paid:

“among all of my children, . . . who may be then living, and the children of any deceased child, per stirpes.”

It seems clear that all the children took vested remainders subject to being divested upon their death prior to the last life tenant. *Safe Dep. & Tr. Co. v. Bouse*, 181 Md. 351, 356; Miller, *Construction of Wills*, Sec. 216, page 596. All of the children of the testatrix have died, with the exception of one who is excluded from participation for another reason, so we are concerned with the alternative or substitutional remainder. Only two of these predeceased children left issue. A had two children who are still living. B had a child who survived her parent, B, but who died in 1954.

The question to be decided is whether the condition of survivorship which is express as to the primary remainders is to be implied as to the alternative remainders. If survivorship is to be required, then the whole corpus falls to the children of A. On the other hand, if survivorship is not so implied, then one-half of the estate goes to the two children of A and the other half goes to the estate of the

child of B. In the first case there would be no inheritance tax due, since A's children would take directly as surviving remaindermen under a testamentary trust established prior to the Direct Inheritance Tax Act of 1935. 36 Opinions of the Attorney General 261, 41 Opinions of the Attorney General 376, 379. Cf. *Safe Dep. & Tr. Co. v. Bouse*, 181 Md. 351. If the second alternative stated above should occur then, while the one-half passing to A's children is tax exempt, the other one-half which would pass through B's child's estate, would be subject to a collateral tax of 7½%. This latter one-half interest likewise passes eventually to A's two children, so that this whole matter is of importance only for tax purposes.

The question precisely stated is: Is there an implied condition of survivorship imposed upon an alternative contingent remainder to a class which follows a vested but defeasible primary remainder, this latter expressly providing a condition of survivorship? There is a divergence of opinion on this question which is succinctly stated in Simes and Smith, *The Law of Future Interests*, 2nd Ed., Sec. 659, p. 137:

“When there is a condition precedent that the children of A survive A, but no express condition with reference to the issue of the children, two possible lines of argument are open. It may be urged that the requirement of survival applicable to the children is also applicable to the issue. It is also possible to urge that the testator knew how to write in words which would require survival (as he proved by making such requirement for the children) and his failure to do so insofar as the gift to the issue is concerned should be taken as a deliberate manifestation that no such requirement is imposed. Some American cases, following the English cases, have held that there is no implied condition precedent that the issue survive A. Others have come to the opposite conclusion, due in some instances, to the language of the particular will.”

An extensive review of the Maryland authorities indicates that this issue has not been directly decided here. Professor Russell R. Reno discusses the subject at length in XV Md. Law Rev. 193, 208-220 (1955), which is a follow-up on earlier treatment in II Md. Law Rev. 89. After consideration of all of the cases in point and the leading text material the conclusion is there drawn:

“Where there is a gift of a contingent future interest to a class, a condition precedent of survival until the occurrence of the contingency will be implied as to each class member, unless the Court can construe the class description as referring to specific individuals living at the testator’s death or at the effective date of the deed.” (XV Md. Law Rev. 193 at p. 220.)

We concur in this summary of the law. See also *Demill v. Reid*, 71 Md. 175 (1889); *Kemp v. Bradford*, 61 Md. 330 (1884); *Hammond v. Piper*, 185 Md. 314; *Ridgely v. Pfingstag*, 188 Md. 209; *Chism v. Reese*, 190 Md. 311; *Evans v. Safe Dep. & Tr. Co.*, 190 Md. 332; Jarman, *Wills*, 8th Ed. Vol. 2, pp. 595-604; Miller, *Construction of Wills*, Secs. 216, 217, pp. 595-604. Since we are of the opinion that a condition of survivorship is to be implied as to the contingent alternative remainders to the children of A and B, it follows that the gift to the child of B failed by reason of her death prior to the termination of the life estates.

For the reasons stated, it follows that the entire estate vested in interest and possession in the two children of A equally in 1959, upon the death of the last life beneficiary. This being so, there is no tax now due since the children of A take directly from the testatrix under a will effected prior to 1935. See Chapter 573, Acts of 1943.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O’C. GENTRY, *Asst. Attorney General*.

INHERITANCE TAX—BANK ACCOUNTS IN NAME OF MINOR
SUBJECT TO ORDER OF PARENT OR OTHERS—INTER
VIVOS GIFTS.

March 29, 1960.

Mr. Leroy C. Shaughnessy,
Register of Wills
for Baltimore City.

Re: Minors' Bank Accounts

You have requested advice as to the inclusion of certain bank accounts in a decedent's estate. Specifically you inquire whether a bank account in the name of "A, minor, subject to the order of B", should be included as an asset of the estate of B upon B's death.

Such accounts as these are fairly common and although frequently B will be a parent of A, or some other close relative, the relationship is not decisive of this question. The determinative factor is ownership of the account. If the account was created by B, but B has retained ownership intentionally or otherwise, then still being B's property it is one of the assets of his estate. On the other hand, if the funds in the account were in fact deposited by A and B's name is shown merely to conform to the Bank's by-laws, then it is A's property and not part of B's estate. Of course, between these two extremes there are many factual variations, which we will try to clarify.

In cases where the funds in such accounts were originally those of B and he was the depositor, the basis for exclusion of such accounts from B's estate would be that B had made a valid gift of the account to A and that the account was thereafter the property of A, not B. A determination that there had been such a gift would depend on the factors noted in *Berman v. Leckner*, 193 Md. 177 at 182:

"To make a valid gift *inter vivos*, there must be a clear intention on the part of the donor to transfer title to the property, and also a delivery by the donor and an acceptance by the donee. It is essen-

tial to the validity of such a gift that the transfer of both possession and title shall be absolute and shall go into immediate effect. In other words, the donor must intend not only to deliver possession, but also to relinquish the right of dominion. If a gift has reference to a future time when it is to operate as a transfer, it is only a promise without consideration, and cannot be enforced either at law or in equity. (Citing cases). The intention of the donor, however, need not be expressed in any particular form. It may be manifested by words or acts, or both, or may be inferred from the relation of the parties and the facts and surrounding circumstances of the case."

If the transfer measures up to a valid gift under the above conditions, the account would not be considered an asset of the estate of B, the donor. However, if the transfer is construed to be one in contemplation of death, there would be a tax consequence.

Two Maryland cases have dealt with bank accounts titled identically to that described here and opposite conclusions have been reached. In *Gardner v. Merritt*, 32 Md. 78 (1870), the question was whether a savings account, in the name of a minor, subject to the order of the grandmother, was a part of the grandmother's estate at death. The court found a completed gift to the minor, liberally interpreting a delivery to the infant despite the control retained by the donor. There the account's title was linked to the bank's by-law authorizing such deposits. The holding rationalized that the control retained by the donor was the minor's benefit and not such as would leave the donor a *locus poenitentiae* and thus invalidate the gift. At page 84, the Court found:

" . . . If she intended that all the moneys were her own, and deposited to her own credit, it is hard to conceive her purpose in requiring five accounts to be kept, one in the name of each of the infants, and a sixth in her own name. . . ."

and thereafter concluded:

“We think, in this case, that the donor had perfected her gifts and had no design to countermand them, and that the right of the donees is enforceable, as a trust, . . .”

The account was found not to be a part of the grandmother's estate.

An opposite result was reached in *Pomerantz v. Pomerantz*, 179 Md. 436 (1941). Here the account was in the name of a minor child, subject to the order of her father. In this case as in the former case all funds in the account were deposited by the adult (father and grandmother). Likewise the by-laws of the two banks in question in these two cases were the same. After blandly dismissing the applicability of the *Gardner v. Merritt* case, *supra*, the court reviewed the law at p. 439:

“ . . . It has been decided frequently by this court that to make a gift *inter vivos* perfect and complete there must be an actual transfer of all right and dominion over it by the donor and acceptance by the donee, or by some competent person for him, and that the transfer of the gift should go into effect at once and completely. If the transfer is to be at a future time, it is only a promise without consideration and cannot be enforced either at law or in equity. The law will not recognize a gift where there is reserved to the donor, either expressly or as a result of circumstances, a power of revocation or dominion over the subject of the gift. There can be no *locus poenitentiae*, and there is a *locus poenitentiae* when the supposed donor may at any moment undo what he has done. . . .”

The court further noted at p. 440:

“ . . . Particularly is delivery of the pass book necessary when the deposit is made in a savings bank by the rules of which the book must be produced at the bank before the deposit can be withdrawn. . . .”

It was held in that case that there had been no completed gift by the father to his daughter and therefore the daughter did not succeed to it when she became twenty-one. On the basis of this opinion it can be theorized that had the father died this account would have gone into his estate.

We are unable to reconcile the above two cases. See also 3 Md. L.R. 107, 114. Both cases have been cited with approval, See *Bieran v. Bohemian Bldg. Assn.*, 205 Md. 456, 460; and *Allender v. Allender*, 199 Md. 541, 548. Other cases on this subject showing a similar divergence of opinion are reported in 157 A.L.R. 925, 940.

In speaking of such bank accounts as these, Sykes, *Maryland Probate Law and Practice*, Vol. 1, Sec. 543, p. 514, states:

“Except where a trust has been declared, the donee must prove delivery of the bank book, the acceptance of it by him, and the intent of the donor to make the gift.”

Accounts such as are discussed here would not seem to be within the purview of those covered by Sections 100, 101 of Article 11 of the Code.

This office has uniformly held that the Registers of Wills are bound by the record title to property and must collect the tax thereon. 41 Opinions of the Attorney General 368. However, in the instance of minors' bank accounts, the titling of the account may not be conclusive or determinative of ownership. It therefore is imperative that you ascertain the facts so as to resolve the question. While we will assist you in any specific case, the following guides may be of general assistance to you where there is an account in the name of A, minor, subject to the order of B.

1. Where it is shown that the funds in the account were those of A and B's name is included on the account merely to conform to bank rules, the account is not an asset of B's estate at B's death.

2. Where the funds are deposited by B, who delivers the bank book to A, declaring in some manner his intention to make a gift to A, the account is not included in B's estate.

3. Where funds are deposited by B who retains the deposit book, but who shows by his acts and declarations his intention to make a gift and divest himself of all dominion over the money, the account is not part of B's estate. *Gardner v. Merritt*, *supra*; *Ide v. Pierce*, 134 Mass. 260; *Burton v. Bridgeport Savings Bank*, 52 Conn. 398; *Norway Savings Bank v. Merriam*, 88 Me. 146. In these cases, the courts have found a completed gift to A based upon constructive delivery to A of the funds by B, through delivery to the bank, acting as agent for A.

4. Where funds are deposited by B, who retains the account book, and the deposit is unaccompanied by acts or declarations indicating an intention to donate the fund, then it is not a completed gift to A, and the account falls into B's estate upon B's death. *Pomerantz v. Pomerantz*, *supra*; *Booth v. Bank*, 162 Mass. 457; *Bank v. Gleason*, 75 Ill. App. 251; *Beaver v. Beaver*, 117 N.Y. 421; *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257.

This office is of the opinion that the Registers of Wills should require that the executor or administrator of an estate report such accounts as assets of the estate of the deceased depositor, unless the executor can satisfy the Registers that the depositor had made a completed gift of the funds to the minor prior to death.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O'C. GENTRY, *Asst. Attorney General*.

CIGARETTE TAX—DIVISION OF COSTS BETWEEN STATE AND
SUBDIVISIONS IMPOSING LOCAL TAX—METHOD OF AP-
PORTIONMENT WITHIN DISCRETION OF COMPTROLLER.

April 4, 1960.

Mr. B. F. Nossel,
Chief Deputy Comptroller.

You have requested our opinion as to the proper method to be used in allocating the expense incurred in the collection of State and local cigarette taxes as required by Section 460(c), Article 81, Annotated Code of Maryland (1957 Ed.), which reads as follows:

“The Comptroller shall pay to each county and the City of Baltimore, the local tax on cigarettes, if any imposed in that political subdivision and collected by the Comptroller under the provisions of this subtitle, less its proportionate amounts of the salaries for and expenses of administering the provisions of this subtitle, and less a reserve for refunds. The balance shall be paid into the general funds of this State.”

The State tax is 3c per pack and the following subdivisions assess a local cigarette tax in the following amounts:

Baltimore City	3c per pack
Baltimore County	3c ”
Carroll County	2c ”
Harford County	2c ”
Montgomery County	2c ”
Garrett County	1c ”

These local taxes, which are collected by the Comptroller along with the State tax, are not represented by separate stamps; a single stamp represents both the county and the State tax.

You state that during the first year of operation, July 1, 1958—June 30, 1959, it was impossible to determine in advance what the cost of administration would be, and that

therefore an arbitrary percentage of the gross collections was set aside out of which the expenses were paid, with the understanding that an adjustment would be made for the actual expenses at the end of the year. The actual expenses to be distributed for that year have been found to be \$264,283.96. At least three methods of apportioning these expenses have been advanced by various parties, each method being said to be *the* proper one under Section 460 (c).

1. The first method to be discussed, and the one recommended by the State Auditor, is the so-called "gross sales method". Under this approach, the total expenses would be apportioned on the basis of the gross revenues received pursuant to the following process:

(a) The gross revenue from sales in each of the above-mentioned subdivisions is first ascertained and is then compared to the total revenue received throughout the State. Using Baltimore City as an example, and taking the statistics for the first fiscal year of operation, the sales within that subdivision amounted to \$7,649,520 or 42.543% of the total State-wide revenue of \$17,980,500.

(b) The total expenses (\$264,283.96) are then multiplied by 42.543% and the product, \$112,435.44, is considered to be the portion of the total expense incurred in collecting the revenue in Baltimore City.

(c) However, since part of the revenue so collected within Baltimore City represents State taxes and part City taxes, the \$112,435.44 must be further apportioned. As Baltimore City imposes a 3c per pack tax and the State a like amount, this cost is apportioned on an even basis, each bearing \$56,217.72 or 50% of the total. In those counties where the local tax per pack is less than the State tax, the cost charged to operations in each such county, after being ascertained as in steps (a) and (b) above, is then apportioned between the State and county according to the ratio of their per pack taxes.

Under the gross sales method, the subdivisions imposing local taxes would bear \$90,542.20 of the total expense of

\$264,283.96 and the State would bear the remaining \$173,741.76. Of the amount which would be borne by the State under this method, some \$77,281.51 would represent the costs attributable to the 18 counties in which no local tax is imposed but in which \$5,257,830 of State taxes were collected on cigarette sales during the fiscal year in question.

2. The second method advanced is the so-called "stamps-sold method". Under this method, the total expenses of \$264,283.96 would be apportioned on the basis of the number of stamps sold within each subdivision. Using this approach, the percentage of the total expenses to be attributed to operations in Baltimore City would be only 32.357%, since 127,492,000 stamps were sold within that subdivision out of the total 394,020,000 stamps sold throughout the State. This would result in Baltimore City operations being charged with \$85,513.66 of the total expenses. At this point in the formula, the share attributable to Baltimore operations would be apportioned between the City and the State on the basis of revenue received, i.e., on a 50-50 basis, resulting in a charge against each in the amount of \$42,756.83 and an increase in net payments to Baltimore City of \$13,460.89 over that payable under the first method. The expenses chargeable against the other counties would be determined in the same manner and apportioned in the same way. Under this method the subdivisions would bear a total of \$70,591.78 and the State a total of \$193,692.18, of which \$117,556.80 would be attributable to the operation in the 18 counties which impose no local tax. This method would decrease the net revenue to the State by \$19,950.42 under that produced by the first method.

3. The third method to be discussed, and the one advocated by Baltimore City, is likewise a stamps-sold method, but is somewhat different from the second method discussed. Under this method, the amount chargeable against the operations in each subdivision is the same as under the second method, but the manner in which it is shared between each subdivision and the State is different. Unlike the second method which proceeds at step (c) on a revenue basis, the so-called "Baltimore City method" would apportion the ex-

penses on a 50-50 basis in all subdivisions imposing local taxes on the theory that it costs the same to issue one stamp regardless of whether it is for a total State and County tax of 6c, as in the case of Baltimore City, or 4c, as in the case of Garrett County. Insofar as Baltimore City and Baltimore County are concerned, this method would result in precisely the same division of expense for the fiscal year in question as under method No. 2, since in those subdivisions the revenue method also results in a 50-50 split under present tax rates. The net result under this method would be to increase the charge against the remaining counties and to lower the total expenses borne by the State by approximately \$2,500.

Baltimore City maintains that the method which it suggests is the only proper one. The State Auditor, on the other hand, argues that a stamp-sold approach is not an accurate method of apportioning costs in a case of this nature since it overlooks the fact that the cost of purchasing the stamps accounts for less than 40% of the total expenses, the remainder going to items which do not necessarily bear a direct relation to the number of stamps sold. He points out that of the some thirty-odd State employees engaged in collecting cigarette taxes, only one actually handles the stamps themselves; twenty-six are engaged in auditing the records of cigarette vendors and in investigating alleged violations; four perform stenographic and record keeping services. In view of this, the State Auditor maintains that the only fair way to apportion the expenses is on the basis of the revenue received under the first method discussed above.

Section 460(c) does not define what is meant by the term "proportionate amounts of salary for and expenses of administering the provisions of this subtitle". Dictionary definitions of the term "proportionate" do not aid us in the solution of the present problem since they refer to ratios based upon determined frames of reference. Nor do we find any aid in the judicial decisions in this State defining the phrase as used in contracts or under general principles of law. See, for example, *Hammaker v. Schleigh*, 157 Md. 652,

665. Judicial decisions from other States likewise offer little help since they all proceed upon factual situations in which the basic frame of reference is beyond dispute. (See cases collected, *Words and Phrases*, Vol. 34A, pp. 427-432.) In view of the lack of any definite meaning of the term as used under general law and the lack of any definition in the Act itself, we are of the opinion that Section 459 authorizes the Comptroller to adopt a rule or regulation defining the meaning of that term since that section specifically authorizes and empowers him "to make, adopt and amend such rules and regulations as he shall deem necessary to carry out the provisions of this subtitle, and to define any words or terms used herein."

Since any of the three methods suggested could reasonably be adopted by the Comptroller as a definition of the term "proportionate amounts, etc.," we are of the opinion that any one may be selected by him. We do not believe that it can be said that the gross revenue method, or the stamps-sold method, or the Baltimore City method is the *only* way in which the proportionate amounts chargeable to the subdivisions can be determined. Each method proceeds upon a reasonable basis; none can be said to be "exact". But the very nature of the problem renders exact computation impossible; and the wording of the statute does not require it. The statute requires the costs to be apportioned on a fair and reasonable basis and we think that each of the three methods meets that requirement.

Having reached this decision as to the legal authority of the Comptroller, we feel that any recommendation by this office as to the method to be ultimately selected would constitute an invasion into the field of policy making.

C. FERDINAND SYBERT, *Attorney General*.

JOHN MARTIN JONES, JR., *Asst. Attorney General*.

REAL PROPERTY—NO EXEMPTION FOR PROPERTY OWNED BY
FOREIGN DIPLOMATS—LIABLE FOR SCHOOL TAXES EVEN
IF NO CHILDREN ATTENDING SCHOOL.

April 12, 1960.

Mr. Bernard F. Nossel,
Chief Deputy State Comptroller.

You have forwarded to us an inquiry from the Chief of the Courtesies and Privileges Section, Office of the Chief of Protocol of the Department of State of the United States, with enclosures. It appears that the Labor Counselor of the Swiss Embassy owns and resides on property located in Montgomery County, Maryland. Our opinion is requested as to whether the Counselor is liable for real property taxes on this land and improvements, and particularly whether the Counselor is liable for the Montgomery County School tax which is based on the real property assessment.

The Department of State does not direct our attention to any treaty between the United States and Switzerland which might be thought to deal with the problem. It further appears that the property involved is used by the Counselor as his residence and no point is raised that the property is used by the Counselor in connection with his official diplomatic duties.

In 39 Opinions of the Attorney General 319, our opinion was requested as to whether the Burmese Government would be exempted from the payment of ordinary taxes on property located in Montgomery County, Maryland, which that Government was then considering purchasing. It was held that the property would not be exempt from taxation. This conclusion was based on Article 81, Section 7(1) of the Annotated Code of Maryland (1951 Edition, now Section 8(1) of the 1957 Edition), which provides that all real properties in this State, by whomsoever owned, shall be subject to assessment for ordinary taxes, unless exempted under Section 9 or governed by the provisions of Section 10, which are inapplicable. There was and is no exemption for property owned by a foreign government under

Section 9. There is no special exemption for property owned by foreign diplomats under Section 9. We are therefore of the opinion that property owned by a foreign diplomat, in his private capacity, is not exempt.

This conclusion would appear to be in accordance with the principles set forth in Hyde, *International Law*, 2d Rev. Ed. (1945), Vol. II, Section 440A, page 1278, in which it is stated:

“The mere circumstance that property is owned by a diplomatic officer does not necessarily indicate that, at least when it is not employed for a public purpose associated with his mission, it is exempt from taxation, or that the owner is free from an obligation as such to pay taxes thereon.”

We are further of the opinion that the Counselor is liable for the school tax even though he has no children attending school in Maryland. A tax does not cease to be operative as to an individual because the taxpayer does not benefit directly in the objects for which the tax funds are expended when, under the scheme of taxation, he benefits as a member of the group for the welfare of which the tax is imposed. One who pays ordinary taxes is not supposed to receive any equivalent for his taxes except the common benefits of government. *Pumphrey v. County Commissioners*, 212 Md. 536, 542 (1957). This concept was expressed by the Supreme Court in 1905 in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, where the Court stated at 199 U. S., page 203:

“But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal

property to be guarded; or of a road tax, though
he never use the road.”

Since no special treatment is afforded foreign diplomats under Maryland law, the foregoing principles would apply with respect to the Swiss Labor Counselor's liability for school taxes in the matter you present.

C. FERDINAND SYBERT, *Attorney General.*

LAWRENCE F. RODOWSKY, *Asst. Attorney General.*

PERSONAL PROPERTY—ALTHOUGH APPEALS FOR PRIOR YEARS DETERMINE ASSESSMENTS ERRONEOUS, NO REFUND ALLOWABLE FOR SUBSEQUENT YEARS, NOT APPEALED, INVOLVING SAME ERROR IN ASSESSMENTS MADE PRIOR TO DECISION.

April 18, 1960.

*Mr. Albert W. Ward, Director,
State Department of Assessments and Taxation.*

Re: Alban Tractor Co., Inc.

You have requested our opinion as to whether a taxpayer is entitled to a refund of personal property tax for the years 1957 and 1958. We understand the facts to be as follows:

The taxpayer appealed its final assessment of tangible personal property for the years 1955 and 1956 to the State Tax Commission, to the Circuit Court for Baltimore County and to the Court of Appeals of Maryland. The issue involved was whether certain property, in form owned by the taxpayer and leased to its customers, was assessable to the taxpayer or whether the lease was in legal effect a sale, under which the retention of title was only a security interest or devise, so that the personal property involved was not assessable to the taxpayer. In *Alban Tractor Co., Inc. v. State Tax Commission*, 219 Md. 593, decided April 17, 1959, the issue was resolved in favor of the taxpayer.

While this litigation was pending, the taxpayer was contacted, probably by telephone, by one of the assessors in your office and requested to furnish a schedule of leased equipment for purposes of the assessment for the year 1957. This information was furnished by the taxpayer by letter dated April 12, 1957. A notice of tentative assessment, which included the leased equipment, was mailed to the taxpayer on July 10, 1957. The notice of tentative assessment contained the usual language, "You are hereby warned that this tentative assessment will become final and conclusive unless written application for a change therein shall be presented to the Commission within twenty (20) days

from the date of this notice". No written application for a change in the tentative assessment was made by the taxpayer and no appeal was taken from the assessment which became final twenty (20) days after the aforesaid notice.

Again, while the litigation with respect to the years 1955 and 1956 was pending, the taxpayer was requested to furnish a schedule of leased equipment in connection with the assessment for the year 1958. This was furnished under cover of a letter dated April 15, 1958, which stated in part, "We are supplying this information under protest and are awaiting final decision in litigation pending in this matter". The usual form of notice of tentative assessment containing the above quoted warning to the taxpayer was mailed on May 6, 1958. The assessment included the leased equipment. No written protest or request for a hearing was made by the taxpayer subsequent to the notice. No appeal was taken from the assessment for the year 1958.

The taxes for the years 1957 and 1958 have been paid.

It would seem clear that the taxpayer is not entitled to a refund with respect to the taxes paid for the year 1957. Article 81, Section 213, relating to refunds of ordinary State taxes, provides:

"No refund shall be made, approved or certified in any case where it appears that the assessment upon which such taxes were levied and collected has become final and has not been modified on appeal as provided in this article, and the only basis for the refund is a claim that such assessment was erroneous or excessive."

A similar provision is set forth in Section 214 concerning refunds of ordinary County or City taxes. Under the decision in the *Alban Tractor* case, it is now known that the assessment levied for the year 1957 was probably an erroneous one. However, the word "erroneous" as used in the refund statute "is broad enough to cover all types of error, even those that may invalidate an assessment or render it

void. This is not only the plain meaning of the word, but such construction would appear to carry out the legislative policy to make the remedy by way of appeal exclusive in this type of case". *Wasena Housing Corp. v. Levay*, 188 Md. 383, 394 (1947).

Taxpayer's assessment for the year 1957 constituted a new assessment. See Article 81, Section 251. It was incumbent upon the taxpayer to appeal from the final assessment for that year in order to preserve and keep open its legal contention as to the leased equipment. The taxpayer did not do this and has paid the taxes for that year. The assessment for the year 1957 has been allowed to become final and remains on the books for that year. See *Wasena Housing Corp. v. Levay, supra*; *La Belle v. State Tax Comm.*, 217 Md. 443 (1958), *cert. den'd.* 358 U.S. 889, 3 L. ed. 2d 117, 79 S. Ct. 135; 40 Opinions of the Attorney General 443. The decision of the Court of Appeals in the *Alban Tractor* case does not affect this conclusion, since that case related only to the years 1955 and 1956. The principle set forth in the Court of Appeals decision involving the taxpayer cannot be applied to the 1957 assessment since it is now final, even though probably erroneous. A refund would, therefore, not be properly allowable.

We do not intend to intimate by the reference to Article 81, Section 251, that the result would be otherwise if a real property, as opposed to a personal property, assessment were involved, but we express no opinion on this question which is not presented.

It is also our opinion that the same conclusion applies with respect to the assessment for the year 1958. This is not altered by reason of the statement in the taxpayer's letter of April 15, 1958, that the additional information concerning leased equipment was furnished under protest. As of that date, the appeals by the taxpayer from the assessments for the years 1955 and 1956 had not been finally adjudicated. As we interpret the statement in the taxpayer's letter, it was intended only to indicate that, by the act of furnishing the additional information which was not

initially reported, the taxpayer did not intend to waive its position that the leased equipment was not assessable to it. We do not believe that the letter is to be considered as a protest of a tentative assessment for the year 1958, which had not at the time been made. Moreover, under Regulation 3(b) of the then State Tax Commission, it was provided: "No protests shall be entertained by the Commission unless made in writing within (twenty) days from the mailing of the notice of tentative assessment."

This conclusion would seem required by the policy of the ordinary tax statutes which place the obligation on the taxpayer to challenge alleged erroneous assessments by way of appeal. To conclude otherwise would be to hold, essentially, that it is the obligation of the assessor to make a timely protest for the taxpayer when the assessor has acquired some knowledge prior to the actual making of the assessment that the assessment is not in accordance with the opinion or belief of the taxpayer. In the matter at hand, the tentative notice of assessment clearly advised the taxpayer that the assessment would become final if written application for a change was not made within twenty days. Since none was made, no appeal was taken, and the taxes have been paid, we are of the opinion that the assessment is final and that no refund is properly allowable for the year 1958.

It is also our opinion that the decision in *State Tax Comm. v. Bullis School*, 218 Md. 558 (1959), does not alter this result. The principle of collateral estoppel was therein applied with respect to the assessment for a year in which the right to question the validity of the assessment had been preserved by appeal. Thus, as to the matter at hand, had "protective appeals" been taken for the years 1957 and 1958, the decision in the *Alban Tractor* case would seemingly govern the cases for the two subsequent years. Likewise, taxpayer's favorable decision would seem to operate as a collateral estoppel on the point therein involved as to future assessments of the taxpayer where there has been no sufficient change of facts and circumstances. However, we are

of the opinion that there is no existing statutory authority under which taxpayer's final assessments for the years 1957 and 1958 can now be corrected or revised, or a refund made of the taxes which have been paid.

C. FERDINAND SYBERT, *Attorney General.*

LAWRENCE F. RODOWSKY, *Asst. Attorney General.*

INHERITANCE TAX—DETERMINATION OF GIFTS MADE IN
CONTEMPLATION OF DEATH—ELEMENTS TO BE FOUND
IN ESTABLISHING NATURE OF INTER VIVOS GIFTS.

May 13, 1960.

Mr. Harry Newcomer,
Register of Wills for Washington County.

Re: Estate of George H. Lemen

You have asked our advice in determining whether certain gifts made during the lifetime of the above decedent were in contemplation of death and therefore taxable. The decedent died in May, 1958, testate, at the age of 89, leaving an estate of approximately \$4,000. Between November, 1956 and December, 1957, he had made gifts of over \$140,000 to his daughter and of over \$6,000 to his son-in-law. Mr. Lemen's physician submitted an affidavit to the effect that he was in "good health *for a man of his years*".

Under Article 81, Section 151, of the Annotated Code of Maryland (1957 Ed.), any transfer of a material part of a decedent's property in the nature of a final disposition thereof made by decedent within two years prior to his death, except a bona fide sale for an adequate and full consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this Section. It is undisputed in the present case that this transfer was made within two years prior to death. It is likewise clear that the transfer of \$150,000 by this decedent, who subsequently left an estate of \$4,000, constitutes a material part (if not virtually all) of the decedent's property. 39 Opinions of the Attorney General 269. The question to be determined in the present case, therefore, is whether the facts produced on behalf of the Executor overcome the statutory presumption and justify a finding that the transfer in question was not made in contemplation of death.

The factors to be considered in a case of this nature were set forth in 27 Opinions of the Attorney General 437, 438, as follows:

“Whether a transfer is made in contemplation of death is a question of fact in each case, dependent upon circumstances and conditions such as age, health, nearness of the time of transfer to death, similarity of disposition under the transfer to that normally to be expected at death, the presence or absence of motives for the transfer associated with life rather than death, and other pertinent and relevant tests too numerous to mention.”

In *Supreme Court of the United States v. Wells*, 283 U.S. 102, 119, the Court stated:

“There can be no precise delimitation of the transactions embraced within the conception of transfers ‘in contemplation of death’, as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute.”

Other opinions of this office which have considered this question are: 24 Opinions of the Attorney General 925; 27 Opinions of the Attorney General 408; 31 Opinions of the Attorney General 229; 32 Opinions of the Attorney General 288; 40 Opinions of the Attorney General 458; and 41 Opinions of the Attorney General 206.

In considering the various factors which determine whether a transfer has been made in contemplation of death, the following circumstances of the present case are pertinent:

1. Because of this man's very advanced age, 89 years, the gifts were certainly given in lieu of a testamentary bequest, and were therefore in contemplation of death. Since Mr. Lemen retained virtually no other property after these

gifts, the gifts were in the nature of a final disposition of his estate.

2. The gifts bear an unmistakable similarity to the type of disposition which might normally be expected at death. He in effect gave his estate to his only child.

3. Health—While the physician certifies to good health, he qualifies that testimonial by adding “for a man of his years”. Certainly most of the infirmities of age must have been present. It would seem that his age more than offsets his health.

4. It would appear that Mr. Lemen was motivated by thoughts of death rather than life. There is no indication that the daughter had any urgent needs at the time of these gifts. He was merely giving his estate to her in his lifetime rather than as a legacy.

The gift, having been made within two years of death, is to be presumed to have been made in contemplation of death unless clearly shown to the contrary by the executor. While the determination is to be made by you, it would seem that there are ample grounds ruling that the gifts were in contemplation of death and are taxable.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O’C. GENTRY, *Asst. Attorney General*.

INHERITANCE TAX—FORMULA FOR DETERMINING TAX OF
PRIMARY LIFE ESTATE FOR SUCCESSIVE LIFE INTERESTS.

May 27, 1960.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

Re: Estate of Adolf L. Hamburger

You have asked advice in the procedure to be followed in evaluating certain life interests in the above estate. The will provides for a residuary trust. This grants a life interest in the widow with broad powers of invasion. The widow was 51 years of age at the time of the testator's death. Upon death of the widow, the income of the trust estate is payable jointly to two sisters, aged 70 and 67. The husband of one sister, aged 69, succeeds to that sister's share upon her death. The entire income is payable to the survivor of these three for life. Following the death of these three, the income is payable jointly to a nephew and niece, ages 41 and 45, for life. The spouses of these two, ages 43 and 55, succeed to the respective shares of the nephew and niece upon death of each. The entire income is payable to the survivor of these four persons for life. Upon death of all the corpus is payable to charity.

The widow's life interest is taxable at 1% and upon payment of any of the principal to her by the trustee, this likewise is taxable at 1%. The factor to be used in calculating her life interest is .50785.

The widow's life estate is to be followed by bare life interests in seven other persons, all collaterals, and all subject to a 7½% tax. Inasmuch as the tax rate applicable to each of these is the same, it is permissible to calculate the value of all of these succeeding life interests collectively, using the youngest life among all seven as the basis. The youngest of these collaterals is the nephew who was 41 years of age at the time of the testator's death.

The method to be followed is described in CCH Estate and Gift Tax Reporter, Vol. 2, par. 8003.10, Example 3.

This procedure indicates a factor to be used to find the present value of an income from \$1.00 until the death of the last to die of two persons aged X and Y. The formula is expressed as

$$\frac{A}{XY}$$

Following this formula and using Table III, par. 8003.55 with 51 and 41 as the ages (widow and nephew), we find that the combined value of the life interests of the widow and nephew in \$1.00 would be \$0.67122. Since we already know the factor determining the widow's life interest to be .50785 (Table I, par. 8003.45), that factor subtracted from the factor for the combination will give us .16337. This factor can be used to determine the present value of the nephew's interest. Since the nephew is the youngest life, all preceding life interests are merged in his. The factor of .16337 can be applied therefore to determine the current value of all life interests which follow that of the widow.

Of course, the collaterals, who have contingent life interests, have the option of waiting until their respective interests vest in possession and at that time paying the tax on the value of that interest.

C. FERDINAND SYBERT, *Attorney General*.

JAMES O'C. GENTRY, *Asst. Attorney General*.

INHERITANCE TAX—TAXABILITY OF VESTED REMAINDER
UPON DEATH OF ONE OF LIFE TENANTS.

June 9, 1960.

Mrs. Kathryn J. Corddry,
Register of Wills for Worcester County.

Re: Estate of William J. Benson

You have asked advice as to the inheritance tax due in the above estate. The facts disclose that in 1952, the decedent and his wife were granted, by deed, a life estate, as tenants by the entireties, in certain real property, with full powers of sale. Upon death of the survivor, without having exercised the power of sale, the remainder interest shall pass equally to two sons as tenants in common. Mr. Benson died in April 1960.

By reason of the above deed, the life interest of Mrs. Benson, who is now the survivor, continues. She still retains full power of sale. The vested remainders of the two sons remain unchanged. Their right to possession and enjoyment is postponed until the death of surviving life tenant, if there has been no sale in the interim.

In the light of the above facts, we are of the opinion that the recent death of Mr. Benson has occasioned no taxable event as to this property. Mrs. Benson is exempt from tax by reason of being a surviving tenant by the entirety. Article 81, Section 151 of the Code. The two sons have taken nothing more than they acquired in 1952. The deed was too remote in time to be considered a gift in contemplation of death.

Upon death of Mrs. Benson, the full value of the property in fee will be subject to a 1% tax from the two sons, if it has not been previously sold. This is so because the present life interest of Mrs. Benson, coupled with a power of sale, is deemed to be "dominion" under Section 151, and the tax applies to the passage of any property in which the decedent held any "dominion."

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

REAL PROPERTY—BLIND PERSON EXEMPTION—APPLICATION
TO ENTIRETIES, JOINT AND IN COMMON TENANCIES.

August 16, 1960.

*Mr. Albert W. Ward, Director,
State Department of Assessments
and Taxation.*

You have asked our opinion concerning the construction of Article 81, Section 9(35) of the Annotated Code of Maryland (1957 Ed.), which, *inter alia*, provides for an exemption from real property taxes in favor of certain blind persons as therein defined. The statute provides: "The dwelling house and the lot or curtilage whereon the same is erected of any blind person shall also be exempt from taxation up to an assessed value of \$6,000, in any instance; . . .". Dwelling house is defined by Section 9(35) (d) as ". . . any one-family or two-family building or structure owned and occupied by a claimant as his legal residence in this State, and includes any out houses or appurtenances belonging thereto or usually enjoyed therewith."

You ask, first, whether a blind person owning property with his spouse as tenants by the entirety is entitled to the exemption. Under the common law theory of tenancy by the entirety property so held is not owned either by the husband or by the wife to the extent of any undivided interest. It is considered to be held by the husband and wife as constituting a single entity. Under the rule that tax exemptions must be strictly construed, and under the common law concept that property owned by tenants by the entirety is owned by this unique entity comprised of both husband and wife, the result could be reached that no exemption whatsoever would be allowable in the situation which you pose, since the blind person would not own the dwelling.

However, while exemptions from taxation are to be strictly construed, they are not to be construed so strictly as to defeat the intention of the Legislature. *Armco Steel Co. v. State Tax Commission*, 221 Md. 30 (1959). Section

9(35)(d) clearly contemplates that the dwelling house afforded exemption may be a family dwelling. In addition, the Legislature undoubtedly was aware of the general practice in this State for married persons to hold title to their dwellings as tenants by the entirety. Since the intention to grant some exemption is clear and since the very strict construction above noted would defeat that intention in many cases, we are of the opinion that such a construction is to be rejected and conclude that property of a blind person, held with the spouse as tenants by the entirety, is entitled to exemption.

You next inquire how the exemption is to be calculated. Assuming the example of a property assessed for Seven Thousand (\$7,000.00) Dollars, you ask whether the exemption should be Six Thousand (\$6,000.00) Dollars, that is, applied to the whole, or whether it is Three Thousand Five Hundred (\$3,500.00) Dollars, by applying the maximum Six Thousand (\$6,000.00) Dollar exemption only to one-half of the total assessed valuation. Under the theory of tenancy by the entirety, under which title is held by the unique entity, neither the husband nor the wife has the power, acting individually, to alienate the property or any interest therein. Since no individual interest of the blind person is divisible during the tenure of the tenancy, we are of the opinion that the maximum Six Thousand (\$6,000.00) Dollar exemption should be applied against the total assessed valuation of the property and not against a one-half interest therein.

You finally inquire whether property owned by a blind person as a joint tenant, or as a tenant in common with a third person, not the spouse of the blind person, should be granted the exemption applied to the total assessed valuation, or to the particular interest of the blind person therein. Tenancy in common and joint tenancy are distinguishable from tenancy by the entirety in that the interest of a tenant in the two former tenancies is alienable, *inter vivos*, by the action of one of the tenants without the concurrence of the other tenant. We are of the opinion that the exemption, in situations of this type, should be applied only to the

undivided interest of the joint tenant or tenant in common, and not against the total assessed valuation. Such a construction of the statute will not have the effect of depriving the blind person of any exemption, and will give effect to the cardinal principle that exemptions are to be strictly construed.

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

LAWRENCE F. RODOWSKY, *Asst. Attorney General.*

INHERITANCE TAX—RETIREMENT SYSTEM FUNDS IN NATURE
OF INSURANCE PROCEEDS ARE NOT TAXABLE UNLESS
PAYABLE TO DECEDENT'S ESTATE.

September 28, 1960.

Mrs. Virginia M. Black,
Register of Wills for
Montgomery County.

Re: Estate of Elizabeth B. Jones

You recently requested advice as to whether proceeds payable from the State Employment Retirement System by reason of the death of the above decedent are taxable.

With regard to retirement system funds, we find that these are in the nature of insurance proceeds and are to be accorded the same treatment. That is to say, if the death benefits payable under the retirement system are designated to be paid to the decedent's estate, then such proceeds would be taxable. However, if a specific beneficiary is named to receive such death benefits as are payable, then such proceeds would not be subject to the tax.

Since you have indicated that in the case of the above decedent, her sister was named beneficiary, it is our opinion that those funds would not be subject to inheritance tax.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

SALES AND USE TAXES—COMMENCEMENT OF LEGAL ACTION
AGAINST CORPORATION FOR UNPAID SALES AND/OR USE
TAXES DOES NOT SUSPEND STATUTE OF LIMITATIONS AS
TO ACTION AGAINST CORPORATION'S OFFICERS.

October 5, 1960.

Mr. Edward F. Engelbert,
Chief, Retail Sales Tax Division,
State Comptroller's Office.

We have your inquiry as to whether or not the six year statute of limitations for the commencement of actions for the collection of unpaid retail sales tax bars an action for the collection of this tax against the officers of a corporation which has failed to remit such tax, when an action against the corporation to collect such tax is commenced within the six year statutory period, but an action against the officers in their individual capacities is not.

It is the opinion of this office that the failure to institute such action against the corporate officers within the statutory period, even though such an action was timely commenced against the corporation itself, bars any further action by your office against the corporate officers.

Section 328, Article 81, Annotated Code of Maryland (1957 Ed.), imposes personal liability on corporate officers for sales tax required to be collected by a corporation in the following terms:

“The vendor and any officer of any corporate vendor shall be personally liable for the tax collected or required to be collected under this sub-title. . . . Any vendor who fails to collect the tax, and any officer of a corporate vendor which fails to collect the tax, pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected.”

Section 342 (a) then further provides :

“The tax imposed by this sub-title and all increases, interests and penalties thereon shall be-

come, from the time due and payable, a personal debt of the person liable to pay the same to the State of Maryland. An action may be brought at any time within six (6) years from the time the tax shall be due and payable by the Comptroller in the name of the State to recover the amount of any taxes, penalties and interest due under the provisions of this sub-title, but such actions shall be utterly barred after the expiration of the aforesaid six (6) years."

In effect, the statutory scheme in the case of corporate vendors gives the State two sources against which to assert its claim for unpaid sales tax, the corporation itself or its officers. Section 342(a) provides, however, that the State must take legal action to collect the tax within six years from the time the tax becomes due, and the commencement of any action to collect such tax after the expiration of the six year period is utterly barred.

The fact that appropriate action was taken against the corporation within the requisite period does not suspend the running of limitations against the corporate officers. It is generally recognized that where a legal proceeding is timely brought against a corporation, partnership or association, and after the period of limitations has elapsed, officers of the corporation or others are brought into the proceeding by amendment, the statute of limitations constitutes a bar to suit against the added defendants. *Bruun v. Katz Drug Co.*, 359 Mo. 334, 221 S.W. 2d 717; *Grant v. Carpenters' Dist. Council*, 322 Pa. 62, 185 A. 273; *Craig v. San Fernando Furniture Co.*, 89 Cal. App. 167, 264 Pac. 784.

The courts adopt the view that the corporation or other business group is a separate and distinct entity from its officers or members for the purposes of the running of the statute of limitations, and suit against the former does not suspend the statute as to the latter. The logic of these cases would seem equally applicable whether the new defendant is joined in a suit already instituted or is proceeded against by an independent action. *Bassett v. St. Albans Hotel Co.*,

47 Vt. 313. It is true that in special circumstances, some jurisdictions permit a new defendant to be made party to a suit after limitations have seemingly expired, but these cases deal with situations such as a misnomer of the original party defendant who is actually one and the same as the "new" defendant. *Western Union v. State, use of Nelson*, 82 Md. 293. Such special circumstances are not present here. Maryland recognizes the principle that when suit has been timely filed as to a party defendant in one capacity, the statute will not be tolled as to suit against him in another capacity. *Alexander v. Rose*, 181 Md. 447. We read this case as an indication that Maryland would follow the authorities referred to above in holding that a suit against a corporation does not suspend limitations as to a suit on the same matter against the corporate officers.

The courts have also recognized that suits timely brought by tax collectors against one defendant cannot be maintained against another defendant after the period of limitations has expired. *Town of Wendell v. Scarboro*, 213 N.C. 540, 196, S.E. 818; *Jaicks v. Sullivan*, 128 Mo. 177, 30 S.W. 890.

We therefore conclude that the State is now barred by limitations from bringing any action against the corporate officers in this matter.

C. FERDINAND SYBERT, *Attorney General*.

WILLIAM J. MCCARTHY, *Asst. Attorney General*.

INHERITANCE TAX—TAXABILITY OF BEQUEST TO “THE OLD KENT CHAPTER D.A.R.”.

November 16, 1960.

Mr. E. Randolph Burgess,
Register of Wills for Kent County.

Re: Estate of Ann B. Smith

On July 29, 1960, we wrote you advising of the inheritance tax consequences of certain bequests in the above estate. You request a ruling on the \$1,000.00 bequest to “The Old Kent Chapter D.A.R.”.

We find that the Daughters of the American Revolution have been granted a Federal income, estate and gift tax exemption by the United States Treasury Department (rulings 7/5/49 and 7/29/60), which exemption extends to all of its “subordinate units”. We have also received a financial statement of the Kent Chapter for 1958-1959 and 1959-1960. The expenditures indicate that a substantial amount, in relation to income, is spent for educational and charitable purposes in Maryland, notably the Washington College scholarship program. The furtherance of educational objectives is one of the principal aims and purposes set out in the charter.

For the reasons stated we rule that the bequest to “Old Kent Chapter of the Daughters of the American Revolution” is exempt under the provisions of Art. 81, Sec. 150 of the Code.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O’C. GENTRY, *Asst. Attorney General.*

INHERITANCE TAX—NATIONAL HEADQUARTERS OF VETERANS
OF FOREIGN WARS QUALIFIES FOR TAX EXEMPTION.

December 13, 1960.

Mr. Thomas M. Eichelberger,
Register of Wills of Frederick County.

Re: Estate of George D. Stull

You ask our advice with regard to a bequest by the above decedent to the "National Headquarters of the Veterans of Foreign Wars of the United States in Kansas City, Missouri, to be used primarily for the benefit of disabled veterans and their dependents within the State of Maryland."

The Veterans of Foreign Wars is chartered by Congress, U.S.C.A., Title 36, Chapter 7A, Sections 111-120, and its purposes are stated to be "fraternal, patriotic, historic and educational". One of its functions is charitable in nature, "to assist widows and orphans" of veterans. The exemption provided in Article 81, Section 150 of the Code applies to organizations which are (among other things) "educational" in character, and which carry on a substantial part of their business in Maryland or the District of Columbia.

Because of the activities of the Veterans of Foreign Wars in the District, and because the local department is an affiliate of the national parent organization, it appears that the National Headquarters of the Veterans of Foreign Wars does qualify for exemption. It is also significant that the bequest specifies that the funds be expended here.

For the reasons stated here and in our prior opinion to you dated June 24, 1958, we find this bequest to be exempt from inheritance tax. We cannot give any advice as to how the funds should be spent once in the hands of the legatee, nor is this a matter with which you should be concerned.

C. FERDINAND SYBERT, *Attorney General.*

JAMES O'C. GENTRY, *Asst. Attorney General.*

TIDEWATER FISHERIES COMMISSION

CHAIRMAN MAY NOT ALSO HOLD POSITION OF DIRECTOR, BUT COMMISSION MAY AUTHORIZE HIM TO PERFORM DUTIES OF DIRECTOR WHEN THAT POSITION IS VACANT.

November 30, 1960.

*Hon. Walter B. Dorsey,
Leonardtown, Maryland.*

You have asked whether a person may legally hold the position of Chairman of the Tidewater Fisheries Commission and, at the same time, act as Director of the Department of Tidewater Fisheries. These positions are provided for in Article 66, Sections 6 and 9, of the Annotated Code of Maryland (1960 Supp.). These sections were passed in 1959 in order to reorganize the Department of Tidewater Fisheries.

Section 6 creates the Department of Tidewater Fisheries to administer the laws relating to the conservation and rehabilitation of tidewater fisheries, and provides that it shall be supervised by a Commission of five members appointed by the Governor. The Commissioners, with the approval of the Governor, select one of their number as Chairman. Flat annual salaries are provided for members, with a higher salary fixed for the Chairman.

Section 9 provides, in part, that "The Commission shall appoint, with the approval of the Governor, a competent person as Director of the Department of Tidewater Fisheries, who shall be the administrative head of the Department and who shall personally direct its operations and activities. The Director shall devote his full time to the work of the Department and shall receive such salary as may be provided in the budget. The Director shall not hold office under or be subject to the provisions of Article 64A of this Code, title 'Merit System', but he shall hold office at the pleasure of the Commission."

Prior to the reorganization Act of 1959, the Chairman of the Commission on Tidewater Fisheries was the ad-

ministrative head of the department. In furtherance of the transfer of administrative duties from the Chairman to the Director, Section 9 also contains the following provision :

“Wherever reference is made in this article or elsewhere in the laws of this State to the Chairman of the Commission on Tidewater Fisheries, it shall hereafter mean the Director of the Department of Tidewater Fisheries.”

It is obvious that the legislative plan was to establish the Director as administrative head of the Department, to direct its operations and activities, under, however, the control and guidance of the Commission. It is equally obvious that it was not the legislative intent that the Director (an employee of the Commission) should be a member of the Commission (the directing head). A reading of the two sections referred to shows the clear legislative intention that the Commission should appoint someone other than a member of the Commission as Director. See 41 Opinions of the Attorney General 313.

My conclusion is fortified by the fact that when the Legislature has intended that a position such as the Director here involved may be held by a member of the Board or Commission of the same agency, it has expressly so provided. See Section 108, Article 41, Code, providing that the Chairman of the Board of Parole and Probation shall be the Director of Parole and Probation, and Section 1, Article 43, Code, which provides that the Director of Health may be a member of the State Board of Health.

In view of my interpretation of the legislative intent, I do not find it necessary to engage in any discussion of Article 35 of the Declaration of Rights, which precludes any person from holding more than one office of profit at the same time. Parenthetically, it is my view that the Chairman or a member of the Tidewater Fisheries Commission is a public officer, but that the Director is an employee and not an officer of the State.

I understand that your question is prompted by reason of the fact that the present Chairman of the Tidewater

Fisheries Commission has for some time been acting as "Acting Director" of the Department. I have been advised that the Chairman does not receive any salary as "Acting Director", but receives only his salary as Chairman. I also understand that the Chairman was authorized by the Commission to perform the duties of the Director until such time as the Commission could find a competent, permanent Director. What I have said above should not be taken to mean that the Commission may not authorize the Chairman, or one of its members, or someone else to carry on the duties of the Director until a permanent Director is found. An anomalous situation would be created if it were held that no one could perform the duties of the Director during any period of time when the Department was without such an officer. While there is no express provision for a position of "Acting Director" during the period of any such vacancy, the statute does commit supervision of the Department to the Commission, and the Commission certainly has the implied power to see to it that the administrative business of the Department is carried on during the time of any vacancy.

There would appear to be a duty on the part of the Commission to make continuing efforts to employ a competent person as Director, in view of the clear legislative intent that there should be a Director who is not a member of the Commission.

C. FERDINAND SYBERT, *Attorney General.*

TRIAL MAGISTRATES

POLICE COMMISSIONER—SUNDAY OBSERVANCE—DISTURBING
PUBLIC PEACE—POWER LAWNMOWERS.

June 7, 1960.

Mr. Milton H. Saul,
Magistrate of the Northern District.

You have requested our opinion as to whether the operation of a power lawnmower on Sunday is a violation of designated provisions of the criminal law. Your inquiry inherently involves two aspects: One, the violation of laws governing Sunday observance and two, violation of laws concerning disturbing the public peace.

Your attention is invited to Sections 492 and 121 of Article 27, Annotated Code of Maryland (1957 Edition). It is apparent from reading either of the two sections that the answer to your inquiry is primarily a question of fact and thus must be determined in each particular case by the trier of fact.

The first question involved is the Sunday observance laws. On this point we assume that the power lawnmower in question is not otherwise in violation of any law. Section 492 is pertinent insofar as it applies to the doing of work or bodily labor on Sunday. This section reads in part 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 on the Lord’s day (*works of necessity and charity always excepted*), . . .” (Emphasis supplied.)

You will note that there is a general exception as to works of necessity and charity. It is a question of fact as to whether or not the operation of the particular power mower is a work of necessity or of charity. Necessity does not have

to be strictly construed but might be given a reasonable interpretation in light of the factors which bear on a particular operator.

It would occur to us that the second question may be controlled in most cases by the amount of noise which emanates from the particular mower considering the time of day or night during which it is being operated. Section 121 concerning the disturbance of the public peace and making noise may be pertinent to your inquiry. A portion of that section reads as follows:

“Any person . . ., or who shall wilfully disturb any neighborhood in such city, town or county by loud and unseemly noises . . . shall, upon conviction thereof, be sentenced to a fine . . .”

It may very well be a disturbance of the peace to operate, during the early morning hours or late evening hours of any day, a gasoline engine mower which makes a substantial amount of noise. The amount of noise involved in the operation of a particular engine may be decisive of your question not only on a Sunday but on any day. The two primary inquiries under Section 121 would be the amount of noise emanating from a particular lawnmower and the time of day or night the lawnmower was being operated in light of the zoning of the particular neighborhood.

We have taken the liberty of discussing the matters which are essentially within your sound discretion, but this has been done in the interest of giving you guidelines for your judgment. It is our opinion that whether a particular power mower is in violation of either the observance of Sunday laws or the laws governing disturbing the peace must of necessity turn on the particular facts of each case as presented to you.

C. FERDINAND SYBERT, *Attorney General*.

CLAYTON A. DIETRICH, *Asst. Attorney General*.

DOCKET MUST BE OPEN FOR PUBLIC INSPECTION AT ALL
REASONABLE TIMES.

September 8, 1960.

Mr. Lloyd L. Simpkins,
Executive Assistant, Governor's Office.

You have asked to be advised whether a Trial Magistrate's docket must be left open to public inspection at reasonable times.

Article 52, Section 26, Annotated Code of Maryland (1957 Edition), requires each Justice of the Peace to keep a docket and to record and make regular entries of proceedings in which he shall act by virtue of his office. The following sections set forth other duties of the Trial Magistrate in respect to his docket.

It is clear that the Trial Magistrate's docket is his official record of the performance of his duties, and therefore, being a court which is required to enter judgments, this docket must of necessity, such as all court dockets, be a public record. As a public record, I have no hesitancy in stating that this docket is open to public inspection at all reasonable times. See *Pressman v. Elgin*, 187 Md. 446.

C. FERDINAND SYBERT, *Attorney General.*

UNIVERSITY OF MARYLAND

BOARD OF REGENTS MAY MAKE DISPOSITION OF PERSONAL PROPERTY AND WRITE OFF UNCOLLECTIBLE ACCOUNTS RECEIVABLE WITHOUT APPROVAL OF BOARD OF PUBLIC WORKS.

June 1, 1960.

*Dr. Wilson H. Elkins, President,
University of Maryland.*

We have your letter of May 18, 1960, in which you ask:

- (1) Does the University of Maryland have the authority to write-off as uncollectible monies owing to it without the approval of the Board of Public Works?
- (2) Does the University of Maryland have the authority to dispose of personal property without approval of the Board of Public Works?

By Chapter 318, Acts of 1943, as amended by Chapter 718, Acts of 1945, any real or personal property of the State, as well as any legal or equitable rights or interests in, to, or over the same, may be sold, leased, transferred, or otherwise disposed of for a consideration adequate in the opinion of the Board of Public Works. These Acts, now codified as Section 15 of Article 78A, Annotated Code of Maryland (1957 Edition), further provide that where any such property or interests to be disposed of are under the control of any State board or agency the conveyance evidencing such disposition shall be executed by such board or agency and by the Board of Public Works.

By Chapter 14 of the Acts of 1952, now codified as Section 249 (e) of Article 77 of the Code, the Board of Regents of the University of Maryland was invested with the following broad and sweeping grant of authority:—

“Notwithstanding any other provision of law to the contrary, the Board of Regents shall exercise with reference to the University of Maryland, and

with reference to every department of same, all the powers, rights and privileges that go with the responsibility of management . . . and said Board shall not be superseded in authority by any other State board, bureau, department or commission, in the management of the University's affairs, with the following exceptions:" (Emphasis supplied.)

The exceptions contained in this section relate to University employees in the Classified Service, control of income, audit of expenditures, the right of certain State officers to attend board meetings, the requirement that annual reports be made, and that requests for appropriations be submitted to the Department of Budget and Procurement.

In 37 Opinions of the Attorney General 473, we recognized that the plain and obvious purpose of the Act of 1952 was to give the Board of Regents more freedom in operating the University of Maryland by freeing it from control of other State boards and agencies. In this connection we said:

" . . . We feel compelled to recognize Chapter 14 as having accomplished that purpose, and we do not believe that we have the right to seek subtle refinements or obscure meanings of words to thwart the will of the General Assembly. We do not mean to suggest that the law is ambiguous, for, in our view, its words are meaningful and its purpose is clear . . ."

In 37 Opinions of the Attorney General 479, the question presented was whether the Board of Regents could execute leases without obtaining approval of the Board of Public Works. In that instance we noted that what are now Sections 8 and 15 of Article 78A of the 1957 Code required approval of the Board of Public Works before any lease could be executed by any board or agency of the State government. We further noted, however, that these Sections were enacted prior to the passage of Chapter 14 of the Acts of 1952 and were inconsistent with the powers granted to the Board of Regents by that later enactment. Applying the well established rule of statutory construction that where two Acts

of the General Assembly are in irreconcilable conflict the last in point of time must prevail, we held that the Board of Regents could execute leases without obtaining approval of the Board of Public Works.

We think the questions which you now present compel the same conclusion. Section 249 (e) of Article 77 (Acts of 1952) remains as a later expression of the legislative intention than that found in Section 15 of Article 78A (Acts of 1943 and 1945). In our opinion the Board of Regents would be denied the exercise of all the rights, powers, and privileges "that go with the responsibility of management", and would lack the power to operate the University without being superseded in its authority by another State board, if it had to gain approval of such other board as a condition precedent to effecting disposition of the properties in question. In reaching this conclusion we are not unmindful of the fact that Section 15 of Article 78A was repealed and reenacted, with amendments, at the 1955 session of the General Assembly. The amendment to this Section, however, merely added an additional clause at the end of the Section requiring that cash received for disposition of capital assets be applied to the State Annuity Bond Fund account. The amendment did not expressly include the University within its terms and, in our view, was not intended by the Legislature to divest the Board of Regents of any authority granted to it by the Act of 1952.

We, therefore, conclude that the Board of Regents is not required to obtain approval of the Board of Public Works before it may act to write-off debts owing to the University in the form of accounts receivable, or to dispose of personal property held in the University's name.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

SOIL CONSERVATION DISTRICTS—NO AUTHORITY TO BORROW MONEY.

June 1, 1960.

*Dr. Wilson H. Elkins, President,
University of Maryland.*

We have your recent letter in which you ask whether Soil Conservation Districts of the State of Maryland have authority to borrow money. We understand this question has arisen as a result of an instance whereby a District borrowed money from a Bank with which to purchase needed equipment, executing a note in the Bank's favor, and paying the Equipment Vendor with the funds so borrowed.

Authority for the creation of Soil Conservation Districts is contained in the Maryland Soil Conservation Districts Law, codified as Sections 88-103 of Article 66C, Annotated Code of Maryland (1957 Edition). Section 92 provides that such Districts may be formed upon petition of twenty-five land occupiers directed to and approved by the State Soil Conservation Committee; and when formed the Districts are constituted as governmental sub-divisions of the State and public bodies corporate and politic, exercising public powers. Section 94 provides that the governing bodies of such Districts shall consist of five Supervisors. Section 95 sets forth in considerable detail the powers of the Districts and of the Supervisors in matters of soil conservation, erosion prevention and control, and the like.

Soil Conservation Districts, being solely creatures of statute, possess only such powers as are expressly conferred upon them by the Legislature, or necessarily implied from those expressly granted. There is no express authority contained in Section 95 or elsewhere in the Act which would authorize the Districts to borrow money and none properly may be implied. In so concluding, we are not unmindful of the provisions of Section 95 (10) which expressly authorize the Districts "to make and execute contracts and instruments necessary or convenient to the exercise of its pow-

ers". This Section merely gives the Districts power to contract for purposes within the scope of their powers. It does not contemplate that the Districts shall achieve their governmental objectives, or further their governmental purposes on borrowed funds.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Asst. Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND

SERVICE ON MANAGER—NOTICE TO DEFENDANT—NEW LAW
PROSPECTIVE NOT RETROSPECTIVE.

May 27, 1960.

*Mr. Dan M. Vann, Manager,
Maryland Unsatisfied Claim and
Judgment Fund Board.*

Re: Goodson v. Jones, Claim No. S161 379

We have received your letter in which you request an opinion regarding the application of Chapter 85, Acts of 1960, Article 66½, Section 115A, Annotated Code of Maryland (1957 Edition), which provides that in any suit commenced against persons owning or operating an uninsured motor vehicle when a summons has twice been returned *non est*, it shall be deemed equivalent to an appointment by such person of the chief administrative employee of the Unsatisfied Claim and Judgment Fund Board as his true and lawful attorney upon whom may be served all lawful processes in the action or proceeding instituted, filed or pending against him as to which the summons was twice returned *non est*. This Chapter does not, however, become effective until June 1, 1960.

The new law further provides that service upon such person shall be made by leaving a copy of the process with a fee of \$5.00 in the hands of the Manager or in his office and that this shall be sufficient service, *provided* notice of such service and a copy of the declaration are sent by registered mail to the defendant; and the defendant's return receipt and the plaintiff's or his attorney's affidavit of compliance filed with the clerk of the court or trial magistrate in which the proceedings are pending.

In the instant case, notice of a claim has been tendered to your Board, as required by the Unsatisfied Claim and Judgment Fund Law, and suit has been filed in the Superior Court of Baltimore City. Two *non ests* have been returned

by the Sheriff of Prince George's County and the question now arises whether the effect of the new law stated above will be retroactive so as to permit such service upon your Board in respect to collisions which took place and which suits were filed prior to June 1, 1960.

A general rule of statutory construction is that in the absence of a clear manifestation of a contrary intent, a statute which adversely affects substantive rights will be assumed to operate prospectively rather than retrospectively. *Kelch v. Keehn*, 183 Md. 140. However, where the effect of the new statute or rule is to alter the procedural machinery involved in the enforcement of a substantive right but does not impair those substantive rights, such legislation or rule is generally construed as applying to all actions, whether accrued, pending or future, unless a contrary intention is expressed. *Richardson v. Richardson*, 217 Md. 323, and *Beechwood Coal Co. v. Lucas*, 215 Md. 248.

In this case, we believe that there is a substantive right affected, that is, a person's right to personal service. Chapter 85 states that ownership or operation of an uninsured motor vehicle on the public highways of Maryland, as evidenced by permitting the operation of an uninsured motor vehicle on any of the public highways of the State, shall be a signification of the person's agreement that such process be of the same legal force and validity as if served on him personally. The agreement referred to in Chapter 85 could not take effect until June 1 and therefore Chapter 85 would apply only to those suits which are filed as the result of an accident involving an uninsured motorist, which accident occurred on or after June 1, 1960.

It therefore follows that the claimant in the case which you have referred to us cannot obtain service as prescribed in Chapter 85 of the Acts of 1960, as the accident occurred before June 1, 1960.

C. FERDINAND SYBERT, *Attorney General*.

JAMES H. NORRIS, JR., *Spec. Asst. Attorney General*.

WORKMEN'S COMPENSATION COMMISSION

AWARD OF COMMISSION NOT A PROPERTY RIGHT SUBJECT
TO FEDERAL TAX LIEN.

November 16, 1960.

*Mr. Daniel T. Doherty, Commissioner,
Workmen's Compensation Commission.*

We have your inquiry as to whether an award of your Commission may be made subject to attachment by the United States Internal Revenue Service for the collection of delinquent taxes due from the recipient of such award by the Service's filing attachment papers with the insuring company or with a self-insured employer.

We have previously indicated to you in our opinion appearing at 42 Opinions of the Attorney General 490, that Section 50 of Article 101, Annotated Code of Maryland (1957 Ed.), provides that no money payable as a Workmen's Compensation award shall be capable of attachment, and we there construed this section to be applicable to attachments by the Federal Government. We feel that there are additional reasons, which are set forth hereafter, that also indicate that such an award cannot be made subject to a federal tax levy.

Section 6321, Title 26, U.S.C.A., affords the Federal Government a lien upon all property or rights to property of a delinquent taxpayer. It is an established principle, however, that Section 6321 does not create property rights, but only establishes federally defined consequences to those property rights and interests that are created under State law. *United States v. Bess*, 357 U.S. 51, 2 L. Ed. 2d 1135; *United States v. Durham Lumber Co.*, 363, U.S. 522, 4 L. Ed. 2d 1371. It is necessary then to examine the law of Maryland in order to determine the nature of the interest, if any, that a claimant may have in an award by the Workmen's Compensation Commission.

The Court of Appeals of Maryland, in the case of *Cambridge Manufacturing Co. v. Johnson*, 160 Md. 248, clearly

indicated the differences between an award of compensation on the one hand, and a property right on the other. The Court pointed out that the purpose of the Legislature in enacting the Workmen's Compensation Law was not to grant an injured workman a vested right to a particular fund which would take on the aspects of a property right and thus become an asset of his estate as such. The Court demonstrated that the philosophy underlying the Act was to pay compensation to injured workmen and their dependents, rather than to create vested property rights. It should be noted that Section 50, Article 101, Code, does not merely prevent attachment or execution on an award, but provides that the money payable shall not be "*capable*" of being assigned or charged by the employee himself. Thus, the Legislature has further negated the theory that an injured person has a proprietary interest in such an award.

We also call your attention to the fact that even though an award may be rendered in favor of an injured employee, the Commission, within certain time limitations, retains continuing jurisdiction over such award and may change it in any respect if later circumstances indicate a change in the employee's condition. Section 40, Article 101, Annotated Code of Maryland (1957 Ed.). This provision also indicates that such award cannot be considered a vested property right.

When the above factors are considered, and bearing in mind the basic policy of the Workmen's Compensation Act, we are of the opinion that awards by your Commission are not "property" or "rights to property" under Maryland law, and therefore are not subject to the Federal tax lien here asserted.

C. FERDINAND SYBERT, *Attorney General*.

WILLIAM J. MCCARTHY, *Asst. Attorney General*.

ZONING

MASTER ZONING PLAN FOR ANNE ARUNDEL COUNTY—COMMISSIONERS MAY ENACT ORDINANCE LEVYING TAX TO PAY FOR CONTRACTUAL SERVICES IN CONNECTION THEREWITH—ORDINANCE NOT TO BE LEGALLY BINDING ON PRESENT COMMISSIONERS OR ANY SUCCESSOR BOARD—COUNTY PLANNING AND ZONING COMMISSION EXPRESSLY AUTHORIZED BY STATUTE TO ENGAGE CONTRACTUAL SERVICES IN FORMULATING SUCH PLAN HAS IMPLIED POWER TO CREATE DEBT BY CONTRACT ON FAITH AND CREDIT OF COUNTY WHERE DEBT IS TO BE FUNDED BY REVENUES FROM TAX LEVY—COUNTY LIABILITY ON CONTRACT NOT TO BE AFFECTED BY REPEAL OF TAX ORDINANCE.

January 15, 1960.

*Mr. James P. Morton, Jr.,
Planning and Zoning Commission
of Anne Arundel County.*

You have inquired as to the authority of the Board of County Commissioners of Anne Arundel County to enact an ordinance providing for an annual two-cent tax levy over a period of six years as part of a plan to finance the costs of formulating a Master Zoning Plan for the county. You have also asked whether such an ordinance, if lawful, would be legally binding on the Board, including all subsequent members thereof, during the six-year period.

The Board of County Commissioners of Anne Arundel County is authorized by the provisions of Article 66B, Annotated Code of Maryland (1957 Edition), to formulate and adopt a Master Zoning Plan. In pursuance of this purpose, the Board had express statutory authority to create a Planning and Zoning Commission, and by a Resolution dated January 2, 1952 did create such a Commission. Section 15 of Article 66B provides that it is the duty of this Commission "to make and adopt a master plan for the physical development of the municipality (county), including any areas outside of its boundaries which, in the Commission's judg-

ment, bear relation to the plan of such municipality (county)". Section 14 of Article 66B authorizes this Commission to contract with city planners, engineers, architects and other consultants for such services as it may require in connection with its work, the Commission's expenditures to be within the amount appropriated by the Board for this purpose. By the provisions of Section 20 of Article 25 of the Annotated Code, (1957 Edition), the Board of County Commissioners is authorized to levy all needful taxes and pay and discharge all claims on or against it which have been expressly or impliedly authorized by law.

In light of these statutory provisions, we think it comes squarely within the general taxing power of the Board to enact the tax ordinance for the purpose in question. See *Kimble v. Bender*, 173 Md. 608; *Smith v. Munroe*, 97 Md. 370; *Commissioners of Public Schools v. Allegany County Commissioners*, 20 Md. 449. We are of the further opinion, however, that the ordinance would not be legally binding during the six year period on the present Board or on any successor Board. In 6 Opinions of the Attorney General 118, we held that one of the basic ideas of representative government is that the people have, by electing a new set of officials, the right to change the policy of their government; and that one Board may undo what the previous Board has done, subject to the constitutional provision that the obligation of contracts be not thereby impaired. See also *Montgomery County v. Bigelow*, 196 Md. 413; *Liberto v. City of Baltimore*, 180 Md. 105; *Jones v. Board of Prison Control*, 134 Md. 103.

You advise us that the money to be raised by the contemplated taxing ordinance would be earmarked exclusively for the purpose of paying for certain contractual services which the County, acting through the Planning and Zoning Commission, will require in connection with its formulation of such Master Zoning Plan. You further advise us that these services will be rendered over a period of approximately three years by a private organization specializing in zoning survey work; and that under the proposed contract between the Planning and Zoning Commission and the

private organization payment for these services will be spread over the six-year taxing period, with the county paying roughly one-sixth of the total contract price in each of the six years. To this end, it is contemplated that there will be appropriated in the annual county budget, each year for a period of six years, a sum equal to the estimated return that a two-cent tax levy would produce, and this sum, as annually appropriated, applied in liquidation of the contract indebtedness.

The question arises as to whether the Planning and Zoning Commission has authority to execute a contract such as that above contemplated. Section 9-39 of the Anne Arundel County Code (1957 Edition) provides:

“After June 1, 1939, the county commissioners shall create no floating debt, obligation or liability on the credit of the county and shall borrow no money to pay any deficiency arising from reduction of anticipated revenues, but the county commissioners may in any year temporarily borrow, in anticipation of the receipt of taxes levied for such year, an aggregate amount up to, but in no event exceeding, two hundred thousand dollars, which shall be used only in accordance with the budget in the same manner as tax revenues.”

Section 9-44 of the Anne Arundel County Code (1957 Edition) clarifies the above Section by providing that the limitations contained in Section 9-39 are intended as a limitation on the power of the County—

“. . . only insofar as creating such floating debt, obligation or liability or borrowing such money is necessary to pay any deficiency arising from the reduction of anticipated revenues in any year, and in no way shall affect the power of the county to create floating debt, obligation or liability to borrow money or to pledge its faith and credit for any other purpose, *under any authority heretofore or hereafter granted the county by the General Assembly of Maryland.*” (Emphasis supplied.)

It is manifestly the primary purpose of these statutes to prohibit the County from borrowing money by incurring unfunded obligations or debts to meet deficiencies arising from the reduction of anticipated revenues. Section 9-44 recognizes, however, that the County may, with prior legislative approval, incur indebtedness by contract or otherwise on its faith and credit for any legislatively sanctioned purpose not proscribed by the Constitution. We think that the express power given to the Planning and Zoning Commission by Section 14 of Article 66B authorizes it, as aforesaid, to contract for services required in connection with its lawful function; and that this express authority is such as carries with it, as a necessary incident thereof, the implied power to create a debt by contract binding on the County where the means for payment is adequately to be funded by the annual two-cent tax levy which the Board will enact for this purpose. The County's liability on the contract thus lawfully made cannot be affected by repeal of the taxing ordinance by the present Board or by a subsequent Board, since the County Commissioners could be compelled by a mandamus action to make a levy to cover all lawful claims for services rendered to the County under such contract. See *Worcester County v. Melvin*, 89 Md. 37 and *Kimble v. Bender*, *supra*.

C. FERDINAND SYBERT, *Attorney General*.

ROBERT C. MURPHY, *Asst. Attorney General*.

ZONING ORDINANCE—COUNTY STATUTES NOT EFFECTIVE
WHERE IT CONFLICTS WITH PUBLIC GENERAL LAWS
UNLESS SPECIFIC AUTHORITY GRANTED TO COUNTY TO
PASS ORDINANCE.

November 21, 1960.

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

In your recent letter you ask whether or not a provision of the Anne Arundel County Zoning Ordinance, which provides that a zoning certificate of occupancy must be exhibited to you before you issue any State licenses for premises in Anne Arundel County, is binding upon you.

Local ordinances must not conflict with the Public General Laws of the State except where, by virtue of express provision or necessary implication, the enabling act permitting the passage of the zoning ordinance grants such authority to the governing body of the county which enacted the zoning ordinance. McQuillin, *Municipal Corporations*, 3rd Ed., Sec. 25.58. The enabling act must specifically grant authority to the governing body of the county to pass an ordinance to regulate the State officer in the performance of his duties, as outlined in the Public General Law. Any county ordinance which is in conflict with applicable State statutes must yield to such State statutes.

I have made a thorough study of Article 66B, Annotated Code of Maryland (1957 Ed.), and find no grant of authority to the counties to pass an ordinance such as you have set out in your letter. If the county had such inherent power, it could possibly prevent the issuance of a State license at all. I am, therefore, of the opinion that you should continue to issue State licenses as authorized under Article 56 of the Code, without meeting the requirements of the Anne Arundel County Zoning Ordinance, insofar as it relates to the zoning certificate of occupancy. If the Anne Arundel County authorities wish to restrict the issuance of State licenses until such time as a zoning certificate of occupancy has been issued, it will be necessary for the General Assembly to so provide.

STEDMAN PRESCOTT, *Deputy Attorney General.*

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