COMPLIMENTS OF

THOMAS B. FINAN

ATTORNEY GENERAL

ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1961

THOMAS B. FINAN
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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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
[7]C. Ferdinand Sybert	1954
[8]Thomas B. Finan	1961

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

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

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

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

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

[7]Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

[8]Appointed January 13, 1961, to serve unexpired term.

STATE LAW DEPARTMENT

[1]C. Ferdinand Sybert	Attorney General
[2]Thomas B. Finan	Attorney General
[3]Stedman Prescott, Jr.	Deputy Attorney General
[4]Joseph S. Kaufman	Deputy Attorney General
Clayton A. Dietrich	Assistant Attorney General
[5]Thomas W. Jamison, III	Assistant Attorney General
[6]Robert S. Bourbon	Assistant Attorney General
[7]James O'C. Gentry	Assistant Attorney General
[8]Robert F. Sweeney	Assistant Attorney General
[9]Mary Arabian	Assistant Attorney General
[10]James P. Garland	Assistant Attorney General
[11]James H. Norris, Jr.	Special Assistant Attorney General
William J. McCarthy	Special Assistant Attorney General for the Comptroller of the Treasury
Lawrence F. Rodowsky	Special Assistant Attorney General for the Department of Assessments and Taxation
Robert C. Murphy	Special Assistant Attorney General for the University of Maryland
Joseph D. Buscher	Special Assistant Attorney General for the State Roads Commission
Bernard S. Melnicove	Special Assistant Attorney General for the Department of Employment Security
Edward S. Digges	Special Assistant Attorney General for the Department of Tidewater Fisheries
[12]Gerard S. Wittstadt	Special Assistant Attorney General for the Unsatisfied Claim and Judgment Fund
Eli Baer	Special Assistant Attorney General for the Department of Motor Vehicles

Louis E. Schmidt	Special Assistant Attorney General for the Department of Health
J. Howard Holzer	Special Attorney for the State Accident Fund
[13]Ernest N. Cory, Jr.	Special Assistant Attorney General in Charge of Crime Investigation
Mrs. Anne Davis Greer	Administrative Assistant, State Law Department
Miss Agnes T. Conroy	Stenographer, Law and Legislative
Mrs. Katherine D. Hudlin	Stenographer, Law and Legislative
Miss Inez M. Bull	Stenographer, Law and Legislative
Mrs. Margaret B. Braccia	Stenographer, Law and Legislative

[1]Resigned January 12, 1961.
[2]Appointed January 13, 1961.
[3]Resigned January 24, 1961.
[4]Appointed Deputy February 1, 1961.
[5]Appointed February 13, 1961.
[6]Appointed April 5, 1961.
[7]Resigned April 25, 1961.
[8]Appointed April 26, 1961.
[9]Resigned April 30, 1961.
[10]Appointed May 1, 1961.
[11]Resigned January 31, 1961.
[12]Appointed October 2, 1961.
[13]Appointed November 22, 1961.

Offices: 1201 Maryland National Bank Building,
Baltimore, Maryland 21202

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OFFICIAL OPINIONS

Annual Report For 1961

January 1, 1962.

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

DEAR GOVERNOR TAWES:

Upon the completion of my first year as Attorney General, I have the honor and pleasure of submitting herewith a report of the proceedings and activities of the State Law Department. This is in compliance with Section 10 of Article 32A of the Annotated Code of Maryland (1957 Ed.), and is for the period ending December 31, 1961.

On January 12, 1961, the Honorable C. Ferdinand Sybert resigned as Attorney General to accept an appointment as a Judge of the Court of Appeals of Maryland. On January 13, 1961, I assumed the duties of the office of Attorney General, having been appointed by you to serve the unexpired term which ends December 20, 1962.

In the interest of economy and practicality I have pursued the policy established by my predecessor and have omitted a resume of the court cases. However, the various courts are listed and show the number of cases in each. Some have been completed, some partially tried and some are still pending. It is to be noted that during the year there has been a great increase in the volume of business transacted by the Department.

SUPREME COURT OF THE UNITED STATES	4 cases
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	5 cases
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND	3 cases

COURT OF APPEALS OF MARYLAND

Civil	17 cases
Criminal	105 cases
MEMORANDA IN POST CONVICTION CASES	58 cases
CASES IN LOWER COURTS	190 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 January 4, 1961, and adjourned on April 1, 1961.

The Annapolis office during the session was in charge of Mr. Robert S. Bourbon, 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, the departments and officials of the State government having an interest in proposed legislation.

The State Law Department, acting with the full cooperation of the Permanent Commission on Municipal Courts and of the Bar Association of Baltimore City, prepared the legislation to implement the 1960 constitutional amendment creating the Municipal Court of Baltimore City. This Department also prepared five bills relating to the Municipal Court for the 1961 Special Session which convened on June 9, 1961 and adjourned the same day. A number of bills relating to assessment notices and appeals procedure and a bill for the exemption of radiation fallout shelters

were also prepared by the Department. After the adjournment of the two sessions of the Legislature, 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 at Point Clear, Alabama. Mr. Joseph D. Buscher, Special Assistant Attorney General for the State Roads Commission, accompanied me to the meeting as I had accepted the chairmanship of a Special Study Committee to study and attempt to solve the problems and conflicts that arise between the several states and the Bureau of Public Roads in connection with the Interstate Highway Act.

In June, I attended the Annual Meeting of the Association which was held in New York. Deputy Attorney General Kaufman, Assistant Attorney General Bourbon and Assistant Attorney General Murphy also attended the Meeting.

The following changes in the personnel of the Department occurred during the year: On January 24, 1961, Deputy Attorney General Prescott resigned to resume the private practice of law and on February 1, 1961, I appointed Assistant Attorney General Kaufman in his place; on January 31, 1961, Mr. James H. Norris, Jr., resigned to engage in the private practice of law and on February 13, 1961, I appointed Mr. Thomas W. Jamison, III; on April 5, 1961, I appointed Mr. Robert S. Bourbon as an Assistant Attorney General; on April 25, 1961, Mr. James O'C. Gentry resigned to become Assistant Vice-President and Assistant Counsel of the Monumental Life Insurance Company, and on April 26, 1961, I appointed Mr. Robert F. Sweeney; on April 30, 1961, Miss Mary Arabian resigned to accept an appointment as one of the Judges of the Municipal Court of Baltimore City, and on May 1, 1961, I appointed Mr. James P. Garland to fill the vacancy. On October 2, 1961, I appointed Mr. Gerard W. Wittstadt as Special Assistant Attorney General for the Unsatisfied Claim and Judgment Fund; on November 22, 1961, I appointed Mr. Ernest N. Cory, Jr., Assistant Attorney General, in Charge of Crime Investigation.

I desire to express to you my sincere appreciation of your

courtesy and consideration at all times. The state officials whom we were called upon to advise and represent were most cordial and the cooperation which we received from them greatly facilitated our task of handling the many and ever increasing complex problems which were presented to us.

With kindest personal regards, I am,

Very sincerely yours,

THOMAS B. FINAN,
Attorney General.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1, 1960 and Ending June 30, 1961

Appropriations and Budget Credits:

Program .01	$165,812.91
Program .02	13,583.00
	$179,395.91

Program .01

Legal Counsel and Advice:

Appropriation	$165,120.00
Appearance Fees	245.30
Budget Credits	692.91
	$166,058.21
Appearance Fees turned into State Treasury	245.30
Net Appropriation	$165,812.91

Salaries:

Attorney General	$15,000.00	
Deputy Attorney General	11,781.66	
Assistant Attorney General (5)	41,888.31	
Special Assistant Attorney General	4,608.99	
Administrative Assistant, State Law Department	7,463.99	
Stenographer, Law and Legislative (4)	19,753.29	
Additional Clerical Assistants	231.90	
Salaries		$100,728.14

Expenses (Exclusive of Salaries):		
Communication	$ 6,701.12	
Travel	3,663.85	
Motor Vehicle Operation and Maintenance	1,910.09	
Contractual Services	23,142.19	
Supplies and Materials	1,950.24	
Equipment—Additional	4,742.24	
Fixed Charges	21,645.50	
Expenses (Exclusive of Salaries)	$63,755.23	
Salaries and Expenses		$164,483.37
Reverted to State Treasury		1,329.54
Net Appropriation		$165,812.91

Program .02

Subversive Activities Control:		
Net Appropriation		$13,583.00
Salaries:		
Special Investigator	$3,045.91	
Stenographer, Law and Legislative	1,480.86	
Salaries	$4,526.77	
Expenses (Exclusive of Salaries):		
Communication	$ 118.50	
Travel	433.00	
Contractual Services	894.37	
Supplies and Materials	96.18	
Fixed Charges	15.00	
Expenses (Exclusive of Salaries)	$1,557.05	
Salaries and Expenses		$ 6,083.82
Reverted to State Treasury		7,499.18
Net Appropriation		$13,583.00

Summary

Total Net Appropriations:		
Program .01	$165,812.91	
Program .02	13,583.00	
		$179,395.91
Total Expenditures:		
Program .01	$ 63,755.23	
Program .02	1,557.05	
		$ 65,312.28
Total Reversion to State Treasury		$ 8,828.72

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

AGRICULTURE

EGGS—TRADE MARKS—MARYLAND EGG LAW PROHIBITING USE OF DESCRIPTIVE TERMS IN CONNECTION WITH SALE OF EGGS DOES NOT PROSCRIBE USE OF VALID TRADE-MARKS—ALLEGED TRADE MARKS MERELY OR PRIMARILY DESCRIPTIVE OF QUALITY OF EGGS ARE FORBIDDEN BY THE ACT.

June 27, 1961

Dr. Gordon M. Cairns
State Board of Agriculture,
University of Maryland.

We have your recent letter requesting interpretation of the newly enacted "Maryland Egg Law" (Chapter 466, Acts of 1961) and particularly Section 161 of Article 48 thereof which reads as follows:

> "The Maryland standard for quality of individual shell eggs shall be the same as the United States Department of Agriculture Standard of AA quality, A quality, B quality and C quality. The Maryland consumer grades for shell eggs shall be Grade AA, Grade A, Grade B and Grade C, ... No descriptive term or terms other than the applicable grade and size designations, shall be used when eggs are offered for sale, exposed for sale, sold, or advertised, except the descriptive term 'fresh', and for eggs produced in Maryland, the term 'Maryland Fresh' may be used in addition to the applicable grade and size designation; provided further that terms 'fresh' and 'Maryland fresh' may not be used for eggs below A quality. . . . "

You ask whether trade marks descriptive of the grade or quality of eggs are prohibited from use by the provisions of Section 161. You state that this question has been raised by certain egg dealers who maintain that for many years they have affixed to their egg cartons the alleged trade-

marks "Mighty Fresh", "Farm Fresh" and "Certified Eggs". These dealers contend that notwithstanding the provisions of Section 161 they have a right to continue to use such alleged trade-marks in connection with their egg sales. Determination of the issue thus presented necessitates a brief review of the purposes of the Act.

The Maryland Egg Law expressly prohibits the sale of shell eggs to retailers or consumers in Maryland unless, as stated in Section 160, ". . . such shell eggs shall meet a standard of quality, a grade and size (weight) classification, as provided for in this sub-title." Section 161, hereinabove quoted, prescribes the grade standards, and Section 162 prescribes the size (weight) standards, viz., Jumbo, Extra Large, Large, Medium, Small, and Unclassified. Section 163 proscribes the sale of eggs not properly designated with respect to the applicable grade and size standards. This section further provides that such standards be plainly and conspicuously shown on the containers of sale, or by a sign placed on or near the eggs if sold loose. Section 165 provides that no person may sell eggs to a retailer unless, at the time of delivery, the retailer is furnished with an invoice delivery ticket showing, *inter alia*, the date of delivery, seller's name, and the grade and size of the eggs sold. Section 166A authorizes the State Board of Agriculture, as enforcing authority, to issue "stop sale" orders when it finds that any of the provisions of the Act are being violated.

It is manifest from the above that the primary purpose of this Act is to protect the public against fraud, deception or misrepresentation in the sale of eggs. By establishing a set of egg standards, based on the universally recognized quality criteria of grade and size (weight), and by providing that eggs can only be sold, and must be labeled, in conformity with such approved standards (excluding all other descriptive designations), the Legislature has in effect provided the public with requisite assurances that eggs offered for sale in Maryland will, in fact, be as represented by the seller. To most effectively accomplish this result, and to safeguard against public confusion, the Legislature absolutely prohibited the use on the container of sale of

any term descriptive of the quality of the eggs, other than the applicable grade and size designations, and except the descriptive term "Fresh" or "Maryland Fresh" for eggs of A quality or higher. In basic application, therefore, the Maryland Egg Law is essentially a correct labeling law, one well within the province of the Legislature to enact under the police power of the State.

It was not the intention of the Legislature under Section 161 to prohibit the use of valid trade marks in connection with egg sales. It is the function or office of a trade-mark to indicate, either in itself, or by association, the *origin* or *ownership* of the goods to which affixed, so as to distinguish such goods from similar goods of others. In other words, the object of a trade-mark is to identify, by its own meaning, or by association, the origin or ownership of the article to which it is applied. Such a symbol permits the public to recognize goods as the product of a particular manufacturer or dealer and to rely on that mark as an emblem of quality. A trade-mark must, therefore, be distinctive, not of common use generally, and such as is subject to exclusive appropriation. A word or phrase, however, which is merely or primarily descriptive of the quality, grade, ingredients, composition or characteristics of the article to which it is attached, or to which it has reference, cannot be the subject of exclusive appropriation, and cannot constitute a valid trade-mark. Neither can trade-mark rights be acquired in laudatory or commendatory expressions, or in words merely indicating superior excellence, popularity or universality in use. In effect, such words are inherently incapable of performing the office of a trade-mark. See *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation,* 305 U. S. 315; *Pennzoil Co. v. Crown Central Petroleum,* 50 Fed. Supp. 891, *Affirmed* 140 Fed. 2d. 387, *cert. den.* 322 U. S. 750; *Pepsi Cola Co. v. Krause Bottling Co.,* 92 Fed. 2d. 272; *Reardon Laboratory v. B & B Exterminators,* 71 Fed. 2d. 515; *Auto Line Oil Co. v. Indian Refining Co.,* 3 Fed. 2d. 457; *Callman, Unfair Competition and Trade-Marks,* Section 65, et seq; 40 Opinions of the Attorney General 632. The test in determining whether a particular name or phrase is descriptive is

whether, as it is commonly used, it is reasonably indicative and descriptive of the thing to which it is applied, and it is held that such name is descriptive if information is afforded to the general nature or character of the article. See *Drive-It-Yourself Co. v. North,* 148 Md. 609; 87 C.J.S. *Trade Marks,* Section 34.

It is obvious that the terms "Certified" or "Certified Eggs" are not valid trade-marks. It is equally apparent that the terms "Mighty Fresh" and "Farm Fresh", as applied to eggs, are descriptive or deceptively misdescriptive and, in our opinion, being incapable of acquiring secondary significance, could in no event constitute valid trade-marks. Our conclusion in this respect would not be different even if it were shown that these terms have been registered as trade-marks, either under federal or state law. Statutory registration of a trade-mark confers no rights, and limits none, but is a procedural advantage, dependent on common law ownership. *Dixi-Cola Laboratories v. Coca-Cola Company,* 117 Fed. 2d. 352, *Anheuser-Busch, Inc. v. Cohen,* 37 Fed. 2d. 393; *National Icy-O-Beverages v. Davis,* 3 Fed. Supp. 351. See also *A & H Transportation, Inc. v. Save Way Stations,* 214 Md. 325 and *Sherwood Co. v. Sherwood Distillery Co.,* 177 Md. 455.

We conclude, in light of the above, that Section 161 does not prohibit use of valid trade-marks, since these function solely to indicate the origin or ownership of the eggs to which such mark is applied. The alleged marks hereinabove cited do not perform the trade-mark function, but are merely descriptive or, possibly, deceptively misdescriptive, of the quality of the eggs sold. Being beyond the descriptive designations permitted by the Legislature, their use is proscribed by Section 161.

THOMAS B. FINAN, *Attorney General*

ROBERT C. MURPHY, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES

LICENSES—AUTOMAT TO BE TREATED AS RESTAURANT FOR LICENSING PURPOSES.

February 14, 1961.

Dr. L. S. Green, Chairman,
The Liquor Control Board
of Harford County.

We have your recent inquiry in regard to whether or not an automat falls within the definition of "restaurant" as provided in Article 2B, Section 2(p) of the Annotated Code of Maryland (1957 Ed.). The proprietor of such automat has applied to your Board for the issuance of a Class B beer and light wine license to be used in conjunction with the operation of such premises and you inquire whether or not an automat may be treated as a restaurant for the purposes of these sections. You advise that the automat meets every requirement of Article 2B, Section 2(p) relating to sanitary facilities, dining facilities, and the like, and that a customer will be able to obtain hot meals (which will be consumed on the premises) from the automatic dispensing device.

It is our opinion that an automat should be treated as a restaurant for these purposes. A "restaurant" is defined in *Webster's International Dictionary* as "an establishment where refreshments or meals may be procured by the public; a public eating house". Although an automat is a modern method of food preparation and the dispensing thereof, the service rendered is the same afforded by any restaurant as such term is commonly employed. We do not think that this applicant should be denied a license simply because he is employing a modern form of carrying on the restaurant trade.

An interesting parallel situation recently came before the Baltimore City Court in the case of *Director of the Department of Assessments of Baltimore City v. Javodick,* Harlan, J., Daily Record, December 24, 1960. This case

involved the question of whether or not a laundromat would be considered as a laundry within certain taxation statutes. In holding that the laundromat was simply a modernized form of laundry, the Court said:

> "If a laundromat is not a laundry, what is it? Is not an automat a restaurant? Both questions reflect the same tendency to attach a new name to a new mode of offering the same service. No reasonable argument could be made that a cafeteria or automat is not a restaurant in the common meaning of the term simply because the customer serves himself."

See also *Food Corporation v. Zoning Board of Adjustment of the City of Philadelphia,* 121 A. 2d. 94 (Pa.).

We therefore advise you that an automat may be considered a restaurant for licensing purposes within the meaning of Article 2B, Section 2(p). We call your attention to the requirements set forth in such section as to the amount of gross monthly receipts from the sale of foods that must be earned on such premises if the license is granted. This provision will serve as a continuing check to insure that the granting of the license in this situation would not be abused.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES—LICENSES—LICENSE MAY NOT BE ISSUED TO WHOLESALER WHEN OFFICER OF WHOLESALER IS PRINCIPAL STOCKHOLDER OF ANOTHER CORPORATION LEASING PROPERTY TO RETAIL LICENSEE.

May 18, 1961.

Mr. Roger V. Laynor, Chief,
Alcoholic Beverages Division,
Comptroller of the Treasury.

You have inquired of this office whether or not a wholesaler's license, Class 5, may be issued under the following circumstances. The license application on behalf of a certain beer wholesaler has been made in the names of three of the officers of the corporation, as is appropriate under Article 2B, Section 40(b) of the Annotated Code of Maryland (1957 Edition). One of these officers, who owns one-third of the stock in the corporate beer distributor, is also the principal stockholder of a corporation which owns and is renting a certain premises to a retail licensee, from which premises various types of beer are sold, including the type beer distributed by the present applicant. You ask whether or not, under this set of facts, a license may be issued to the beer wholesaler.

We refer you to Article 2B, Section 110, of the Annotated Code of Maryland (1957 Edition) which provides:

> "It shall be unlawful for any holder of a . . . wholesaler's license, or anyone connected with the business of such holder . . . to have any financial interest in the premises upon or in which any alcoholic beverage is sold at retail by any licensee . . .".

In our opinion, the officer of the beer wholesaler who is the principal stockholder of the rental corporation clearly has a financial interest in a premises upon which alcoholic beverages are sold. It is true that the lease of the premises to the retail licensee is between such licensee and a controlled corporation, rather than between the licensee and

the individual himself, but we do not feel that this is sufficient reason to permit the application to be accepted. The basic purpose of Article 2B, Section 110, is to prevent what is known as "tied houses", whereby a manufacturer or wholesaler may be able to artificially stimulate the sale of his product by certain controls over a retail licensee, to the detriment of the general public and the industry at large. It is possible to see, on the facts presented here, that such a possibility of abuse exists, perhaps in the form of an agreement of a rental reduction with the retail licensee, if such licensee would agree to devote more than a normal sales effort to the products of this wholesaler.

We feel that this conclusion is supported by our previous opinion in 33 Opinions of the Attorney General 92 in which Attorney General Hammond indicated the possibilities of a violation of the pertinent provisions of the alcoholic beverages laws here considered, when the elements of renting property to retail licensees by persons interested in the manufacturing or wholesale aspects of the industry are combined.

We therefore advise you that the instant application for a wholesaler's license, Class 5, should be denied.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES—"HOLDER OF CLASS D" SIX DAY LICENSE MAY NOT CONDUCT BUSINESS ON NEW YEAR'S EVE FALLING ON A SUNDAY.

December 12, 1961.

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

We have your inquiry as to whether or not the holder of a Class "D" Beer, Wine and Liquor (Tavern) License (without amusement permit) in Baltimore City may conduct business on New Year's Eve of this year, which falls on a Sunday.

In answering your question, two pertinent sections of Article 2B of the Annotated Code of Maryland (1957 Edition) must be considered.

Section 89(a). *Baltimore City and Baltimore County.*

"Nothing in this article shall be construed to require any holder of an on-sale license in Baltimore City and Baltimore County to close his establishment at any time on January 1st of any year, and any holder of said license shall be permitted to make any sale of alcoholic beverages authorized by his license at any time on January 1st of any year."

Section 93(b). *Class D, beer, wine and liquor license (without amusement permit).*

"No sales shall be permitted by the holder of a Class D, beer, wine and liquor license (without amusement permit) between the hours of 1 A.M. on Sunday and 6 A.M. the following day."

From the foregoing it will be seen that a holder of this "Class D" license would normally be forbidden by Section 93(b) to make sales from 1 A.M. on Sunday, December 31, to 6 A.M. on Monday, January 1. Since January 1 is New Year's Day, Section 89(a) does away with the requirement

of Section 93(b) that the tavern not open until 6:00 A.M. on Monday, January 1, and permits the tavern owner to open at 12:01 A.M. on that date. But, as was said in 26 Opinions of the Attorney General 55, Section 89(a) merely advances the opening of the New Year's Day license day, rather than extends (or even relates to) the New Year's Eve license day.

We therefore advise you that since New Year's Eve falls on Sunday, December 31, this year, the "Class D" tavern licensee must not conduct business from 1:00 A.M. Sunday, December 31, until at least 12:01 A.M. Monday, January 1.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

BANK COMMISSIONER

CREDIT UNIONS—BORROWING POWER—APPROVAL OF BANK COMMISSIONER.

July 7, 1961

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You have requested our opinion as to the effect of Article 11, Section 161. Article 11, Section 161, being part of the Credit Union Law, provides as follows:

> "A credit union may borrow from any source, such sum or sums of money which will not exceed twenty-five (25) per cent of its assets, for a period not exceeding ninety days. This period may be extended for an additional period of 90 days with the approval of the Bank Commissioner. A credit union may loan to or borrow from any other credit union."

You specifically wish to know whether a credit union may borrow any sum which does not exceed an amount of twenty-five (25) per cent of the assets of said credit union for a period of ninety days without any authority from the Bank Commissioner. You also wish to know whether the Bank Commissioner may extend the authority to borrow for more than the additional ninety days set forth in Section 161.

The provisions of Article 11, relating to credit unions insofar as their ability to borrow, etc., is a limitation on said organizations which does not exist in general corporations. General corporations of the State are empowered by the provisions of Article 23, Section 9, to borrow money. Since there is a limitation placed on credit unions, we believe that this provision must be strictly construed in favor of the policy of allowing credit unions to be formed by persons having a common employer or a common trade or by a church congregation, a fraternal or co-operative organiza-

tion, or a well defined rural community with a population under two thousand to meet their financial needs. Since we feel that this provision must be strictly construed, it is our opinion that a credit union may borrow a sum up to twenty-five (25) per cent of its assets for a period not exceeding ninety days without the prior approval of the Bank Commissioner. If the Legislature had desired such approval by the Bank Commissioner, it could have easily set forth this condition in Section 161. Since the Legislature did not express its intention to require prior approval by the Bank Commissioner, we believe that the Bank Commissioner has no authority to approve loans for a period not exceeding ninety days.

It is also clear to us that the Legislature intended that extensions of loans to credit unions may be made only for a period of ninety days and then only after approval of the Bank Commissioner. It is also clear to us that the Bank Commissioner has no further authority to approve further extensions after the expiration of the ninety day extension.

You are therefore advised that it is beyond your authority and beyond the authority of a credit union to borrow money for more than the original ninety days and a ninety day extension.

THOMAS B. FINAN, *Attorney General*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

BUDGET

BUDGET AMENDMENTS—AUTHORITY OF GOVERNOR TO APPROVE AMENDED SCHEDULE FOR DISBURSEMENT AND APPORTIONMENT OF DEPARTMENTAL APPROPRIATION—EFFECT OF LIMITATION OR CONDITION PLACED ON EXPENDITURE OF DEPARTMENTAL APPROPRIATIONS BY LEGISLATURE IN BUDGET ACT.

April 20, 1961.

Mr. Thomas J. S. Waxter, Director,
State Department of Public Welfare.

We have your recent letter in which you inquire as to the legality of a proposed budget amendment to transfer part of the Public Medical Institution Patient Fund appropriated to your Department in the current State budget (Chapter 42, Acts of 1960) to various other public assistance programs administered by your Department, principally to the program item designated "General Public Assistance to Employables." You state in your letter that the current high level of unemployment throughout Maryland has resulted in heavy expenditures of State funds for the various public assistance categories and that, unless the contemplated transfer is authorized, the grant of public assistance funds for May and June, particularly to employables, may be seriously curtailed.

The language of the Budget Act with respect to expenditure of the Public Medical Institution Patient Fund reads as follows:

"11.01.01.13 *Public Medical Institution Patient Fund*

> To supplement the Public Assistance Appropriation to the State Department of Public Welfare for the purpose of enabling payment of assistance grants to eligible clients who are patients in public medical institutions, subject to the rules and regulations of the State Board of Public Welfare. These funds are only to be

expended under a plan agreed on jointly by the State Director of Public Welfare, the State Director of Health and the State Budget Director.

General Fund Appropriation.....$250,000"

Budget amendments are authorized by the provisions of Article 15A, Section 8 of the Code (1957 Ed.), the pertinent part of which is as follows:

"(a) The items and amounts making up the appropriation in any budget bill, supplementary appropriation bill or bond issue bill shall represent the initial plan of disbursement and apportionment of the appropriations of which they are part. Each appropriation shall be paid out only in accordance with the schedule therefor, unless such schedule be amended, within the limits of such appropriation, in the following manner:

.....

"(e) Any department, board, commission, officer or institution may, at any time submit in writing to the Governor an amended schedule for the disbursement and apportionment of the appropriations made to it by him. If the Governor shall approve such amended schedule he shall transmit the same, with the certificate of approval, to the Comptroller and thereafter, such appropriation shall be paid out in accordance with said amended schedule. . . ."

The basic question to be determined by your inquiry is whether the language of the 1960 Budget Act relative to expenditure of the Public Medical Institution Patient Fund is such as manifests a legislative intention to place this appropriation beyond the reach of the Governor's authority to effect transfer of a part thereof by budget amendment in accordance with the provisions of Section 8 of Article 15A. In this connection, it is to be noted that a budget bill is a law on a par legally with any other law which the

Legislature enacts, and while its purpose is simply to appropriate money, and not to legislate generally, it is entirely proper for the Legislature to attach any lawful condition or limitation to the expenditure of any appropriation as it may choose, provided such limitation or condition be directly related to the expenditure of the sum appropriated. See 22 Opinions of the Attorney General 201, 34 Opinions of the Attorney General 105, 37 Opinions of the Attorney General 139. On the other hand, the law does not favor repeals by implication unless there is a manifest inconsistency between a statute and a later statute or unless their provisions are so repugnant and irreconcilable that they cannot under any reasonable construction stand together. See *Buchholtz v. Hill,* 178 Md. 288. We find no such manifest inconsistency between Section 8 and the language in the appropriation in question and, accordingly, it is our view that by budget amendment the Governor may, if he so desires, approve a transfer of a portion of the unused Public Medical Institution Patient Fund to the various other public assistance programs administered by your Department.

It is our opinion that the appropriation language stating that the fund is for the purpose of enabling payment of assistance grants to eligible clients who are patients in public medical institutions was intended to be merely explanatory of the nature of the program, rather than as a positive condition or limitation restricting expenditure of the fund without regard to the Governor's authority under Section 8 to approve budget amendments. In this connection it is to be noted that this program originated with the 1960 Budget Act and undoubtedly required some explanation as to its scope and purpose, particularly in light of the close relationship between the State Department of Health and the State Department of Public Welfare in the established and existing programs governing medical and hospital care of the indigent. Similarly, it is our opinion that the language of the appropriation expressly providing that the funds be expended only under a Plan agreed upon jointly by the State Directors of Health and Welfare, and the State Budget Director, imposed only a limitation with

respect to establishing a procedural format to govern and control the manner of making and details of payment to the various public medical institutions to which eligible clients would be confined. The evolvement of such a plan, prior to the expenditure of monies in this new program, would, of course, be a matter of fundamental necessity, and we understand that such a plan was placed in effect upon the effective date of the current budget enactment. This construction, we feel, is well supported by the fact that the explanatory nature of the program, as well as reference to the plan of expenditure, was not repeated in the Budget Bill enacted by the Legislature at its 1961 session (H.B. 155). (Chapter 598.)

In concluding that the proposed budget amendment would, if made, be both legal and effective, we have considered the following restrictive language contained in the current budget with reference to expenditure of public assistance funds:

> "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."

It is the obvious purpose of the above to enforce a balanced or pro rata monthly expenditure of public assistance funds. While the Public Medical Institution Patient Fund was not included within this restriction, we understand that the Board of Public Works approved an earlier request made by your Department to permit the inclusion thereof in calculating the total figure to be used in computing the pro rata amounts authorized to be expended for the public assistance programs each month during the 1961 fiscal year. We see nothing in the over-all prohibition, however, which was intended to prevent the actual transfer by budget amendment of monies appropriated to the Public Medical Institution Patient Fund to the various public assistance programs falling within the restriction. The proposed budget amendment would not, of course, increase the total appropriation previously granted but would merely effect a redistribution thereof among the various programs.

By opinion to the Director of the State Department of Public Welfare, 45 Opinions of the Attorney General 25, we ruled under the facts of the situation there presented that the Governor could, on authority of the above quoted Section 8, approve a transfer of unused funds in the Department's Administration Account for Local Departments to the various public assistance programs administered by the Department. This ruling was consistent with an earlier unpublished opinion of this office to the Budget Director dated October 18, 1955, which approved the converse of this situation, *viz.*, a budget amendment transferring funds from public assistance programs to Administration of Local Departments. The present situation is not materially different, and we therefore conclude that it would be both legal and effective to transfer by budget amendment, with the Governor's approval, a portion of the unused Public Medical Institution Patient Fund to the various public assistance categories, specifically including the program designated "General Public Assistance to Employables."

THOMAS B. FINAN, *Attorney General.*

ROBERT C. MURPHY, *Assistant Attorney General.*

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

CORPORATIONS — CHARTER — NECESSITY OF COMPLIANCE WITH PROCEDURE SET OUT IN SECTIONS 160A TO 160KK OF ARTICLE 23 FOR FILING CHARTER.

July 27, 1961

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

This is in reply to your letter concerning the Articles of Incorporation of Transcontinental Building and Loan Association, Inc., which articles were submitted to your Department for recording together with a check in the amount of $30.00 to cover the bonus tax and recording fee.

You have informed us that upon examination you found that there was a defect in the Articles of Incorporation which required you to return them to the submitting attorney for correction. Your inquiry is whether your Department should accept for recordation a charter paper filed with you prior to June 12, 1961 relating to the formation of a savings and loan association, which charter paper is in conformity with the law of Maryland as it existed prior to June 1, 1961.

The most important consideration in this respect is the date upon which the charter paper was accepted by you for recordation after having had corrected the defect which your initial examination disclosed. Section 131 of Article 23 of the Code provides as follows:

> "(a) Except as otherwise expressly provided in this article, all charter papers shall become effective upon the acceptance thereof for record or filing by the Commission, (now Department) and not before."

Section 128 of Article 23 provides as follows:

> "(a) The Commission shall not accept for record

> any charter paper of a corporation of this State, which is not in conformity with law . . ."

Section 160C of Article 23, which became effective on June 12, 1961, provides in pertinent part as follows:

> "(a) *Who may transact business.* No person or group of persons except (1) an association duly incorporated under Sections 160A through 160KK of this Article, or (2) an association duly incorporated prior to the enactment of the aforesaid sections and conducted in conformity with the aforesaid sections, . . . shall transact business within the scope of this sub-title or do business under any name or title, or circulate or use any advertising or make any representation or give any information to any person which indicates or reasonably implies the operation of a building, savings and loan or homestead business."

Unless the charter papers of Transcontinental Building and Loan Association, Inc., were accepted for recordation by your Department prior to June 12, 1961, in accordance with Sections 131 (a) and 128 (a) of Article 23, that association was not duly incorporated prior to the enactment of Sections 160A through 160KK of Article 23 and must be, therefore, incorporated in accordance with the provisions of Section 160M of Article 23. Any charter papers not previously accepted by your Department for record which were received after June 12, 1961, by reason of the necessity for making corrections therein, or for any other reason, which charter papers may be in conformity to the general corporation law as it existed prior to June 12, 1961, but which relate to the incorporation of building, savings and loan or homestead corporations and which are not in conformity with Section 160M of Article 23 must be rejected by your Department.

Your inquiry specifically referred to the law as it existed prior to June 1, 1961, the contemplated effective date of Chapter 205 of the Laws of the General Assembly of 1961, which is substantially similar to Sections 160A through

160KK of Article 23. As you know, certain referendum petitions were filed in connection with the aforesaid Chapter 205, which petitions, if valid and sufficient, would have had the effect of suspending the effective date of Chapter 205. Legal questions have been raised as to the validity and sufficiency of the referendum petitions, however, and it has not yet been judicially determined whether or not the effective date of Chapter 205 has been suspended by reason of the filing of such referendum petitions. It is not necessary for us to give an opinion on this point, however, unless charter papers may have been accepted by your Department for recordation between the period June 1 to June 12, 1961, relating to the incorporation of building, savings and loan and homestead associations. Suffice it to say, however, that any charter papers actually accepted for recordation by your Department prior to June 1, 1961 are not governed by the new legislation relating to building, savings and loan and homestead associations, and any papers not accepted for recordation by your Department until after June 12, 1961, relating to the incorporation of building, savings and loan and homestead associations, are subject to and must be in compliance with the provisions of Sections 160A through 160KK of Article 23.

THOMAS B. FINAN, *Attorney General*

JAMES P. GARLAND, *Assistant Attorney General.*

BUILDING, SAVINGS AND LOAN ASSOCIATIONS—ARTICLES OF SALE, LEASE OR TRANSFER OF ASSETS—NOT GOVERNED BY SECTION 160U OF ARTICLE 23.

August 18, 1961.

Mr. Harry B. Wolf, Jr., Chief Supervisor,
Building, Savings and Loan Division,
Department of Assessments and Taxation.

You have forwarded to us a photostatic copy of certain Articles of Transfer by and between two savings and loan associations subject to the provisions of Sections 160A to 160K of Article 23 of the Annotated Code of Maryland. You have requested our opinion as to whether these Articles of Transfer are governed by any requirement of the last cited sections, or whether they are governed solely by the general corporation law contained in Article 23 as it existed prior to the adoption of the above sections thereof.

You will note that Section 160U of Article 23 (one of the newly adopted sections) provides that any association shall have power to *consolidate* or *merge* with any other incorporated association in this State, as provided by Article 23, for corporations having capital stock, upon first filing its plan of consolidation or merger with the Director and securing his approval thereof. Section 160U also sets out certain standards which the Director shall adhere to in determining whether or not a plan of consolidation or merger shall be approved. Sections 65 through 73 of Article 23 (which sections existed prior to the adoption of the new sections relating exclusively to building, savings and loan associations) set up as three separate rights of corporations of this State to: (1) consolidate; (2) merge, and (3) sell, lease, exchange or transfer all or substantially all its property and assets. In furtherance of these powers, the aforementioned sections differentiate among articles of consolidation, articles of merger, and articles of sale, lease, exchange or transfer, and set up different procedures for each type of articles. From this, it must be concluded that the law considers merger, consolidation and sale, lease, ex-

change or transfer of assets, as distinct transactions rather than as transactions so substantially similar that they should be treated in the same manner. Since Section 160U (one of the new sections) speaks only of consolidation or merger and does not mention sale, lease, exchange or transfer of assets, and since it must be assumed that the Legislature was fully cognizant of the distinction made among these transactions under prior law, it must be concluded that the Legislature did not intend to include the sale, lease, exchange or transfer of assets in the provisions of Section 160U. It is therefore our opinion that the Articles of Transfer which have been submitted to the Department of Assessments and Taxation are not subject to Section 160U, but rather are subject only to the provisions of Article 23, Sections 70, 72, and 73 of the Annotated Code of Maryland.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

BUILDING, SAVINGS AND LOAN ASSOCIATIONS — GUARANTEE STOCK OWNERSHIP—DISCLOSURE OF NAMES OF OWNERS OF BENEFICIAL INTEREST.

October 17, 1961

Mr. Harry B. Wolf, Jr., Chief Supervisor,
Savings and Loan Division,
Department of Assessments and Taxation.

We have your letter of October 10, in which you inquired whether or not, under the provisions of Section 160P(f) of Article 23 of the Annotated Code, your Department is entitled to know the names of the beneficial owners of shares of guaranty stock in a building, savings and loan association, which stock is nominally held by trustees, nominees or other supposed fiduciaries.

We have no doubt whatsoever that the General Assembly, in requiring that a guaranty stock building, savings and loan association should provide the Director with a list showing the name, address, and number of shares owned by each owner of guaranty stock, meant that the names of the beneficial owners of such stock be provided and not merely that the names of some person or corporation acting in a fiduciary character be provided. An immediate indication of this is that the very provision requiring that such list be furnished requires that it be kept confidential by the Director. Such requirement of confidence would, of course, not be necessary, if the section merely contemplated that the names of nominees, agents or other fiduciaries be given as owners of the stock.

Furthermore, the assessment provisions of Article 23, Section 160P(g), indicate that the General Assembly contemplated a personal liability upon the holders of guaranty stock, in the first instance, to make up any deficiency in the capital of an association having guaranty stock. Under Section 31(c) of Article 23, it is clear that one who holds in a fiduciary capacity is not personally liable as a stockholder. Since the same section provides that notice of sale of his stock shall be served personally or by mailing to a stock-

holder refusing or neglecting to pay the assessment provided therein, it would seem quite unusual to suppose that the General Assembly meant that such notice be mailed to a mere nominee.

Moreover, this office has consistently held, in regard to the State Racing Commission, that the requirement that all racing associations file with that Commission a list of stockholders, means that those who have a beneficial interest in the stock, rather than those who have bare legal title, such as brokers with whom the stock may be registered, must be named. Such disclosure has always been deemed necessary because the business of horse racing is affected with a vital public interest. Section 160A of Article 23 declares, as the policy of this State, that the building, savings and loan or homestead business is affected with a public interest and shall be supervised as a business affecting the economic welfare of the people of the State of Maryland. Certainly, the importance of the public interest surrounding this business is clear. It is therefore our opinion that the requirement of disclosure of names of the stockholders of such associations as have guaranty stock was meant by the General Assembly to mean the disclosure of the names of the beneficial owners of such stock and that the disclosure of such names is required by a public interest, subject to the proviso that such names be maintained confidentially by the Department.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

BUILDING, SAVINGS AND LOAN ASSOCIATIONS—BRANCH OFFICES—ESTABLISHMENT OF BY FEDERALLY CHARTERED ASSOCIATIONS NOT SUBJECT TO APPROVAL OF STATE DEPARTMENT OF ASSESSMENTS AND TAXATION—RIGHT OF FEDERAL ASSOCIATION TO PROTECT.

October 17, 1961.

Mr. Harry B. Wolf, Jr., Chief Supervisor,
Building, Savings and Loan Division,
Department of Assessments and Taxation.

This is in reply to your letter of October 9 with which you enclosed a copy of a letter received by you from an attorney for a federally chartered savings and loan association located within the State of Maryland, which association proposes to establish, or has established, since the effective date of the law regulating building, savings and loan or homestead associations, a branch office. The attorney's letter was the result of his having received a notice that a hearing would be held by your Department with respect to the establishment of such branch office pursuant to the provisions of Section 160V of Article 23 of the Code. In that letter, which is dated October 4, 1961, the attorney refuses, on behalf of the association which he represents, to be present at the proposed hearing and denies the authority of the Director of the State Department of Assessments and Taxation under Article 23 to determine the propriety of the establishment of a branch office by a federally chartered savings and loan association.

There is no possible doubt that it was the intention of the General Assembly that Section 160V of Article 23 should govern the establishment of branches of both federally chartered and state chartered associations located within the State of Maryland. Sub-section (a) of that section states:

> "No domestic federally or state chartered association shall establish, maintain or relocate any

> branch office without filing application therefor with the Director and securing his prior approval thereof."

The question, however, is whether the General Assembly is empowered to subject federally chartered savings and loan associations to State regulations in regard to the opening of branch offices, in light of the laws of the United States governing the establishment of federal savings and loan associations.

Several United States District Courts have held that Congress, by enacting legislation governing federal savings and loan associations and by granting to the Federal Home Loan Bank Board the duty and power to supervise such associations, has precluded the field of such regulations, allowing no room for State regulation thereof. See, e.g., *Elwert v. Pacific First Federal Savings and Loan Association of Tacoma, Washington,* 138 F. Supp. 395 (D. C. Ore. 1956); *People of State of California, et al. v. Coast Federal Savings and Loan Association,* 98 F. Supp. 311 (D. C. Cal. 1951). We need not, however, go to the extent of endorsing such a broad premise at the present time. Suffice it to say, however, that on the narrow issue of the control and supervision of the establishment of branch offices, although the Supreme Court of the United States has not yet ruled upon it, we are of the opinion that there is ample authority to preclude the State's regulating federally chartered associations in this regard.

Three United States Court of Appeals decisions, in two of which certiorari to the Supreme Court of the United States was sought and denied, have established that the Federal Home Loan Bank Board has been clothed with congressional sanction to allow the establishment of branches. *North Arlington Bank v. Kearney Federal Savings and Loan Association,* 187 F. 2d 564 (3d Cir. 1951), cert. den. 352 U. S. 816, 72 S. Ct. 20; *First National Bank of McKeesport v. First Federal Savings and Loan Association of Homestead,* 225 F. 2d 33 (Ct. App. D. C. 1955); *U. S. ex rel. Wisconsin v. First Federal Savings and Loan*

Association, 248 F. 2d 804 (7th Cir. 1957), cert. den. 78 S. Ct. 543, 355 U. S. 957, 2 L. Ed. 2d 533.

In addition, in *Springfield Institution for Savings v. Worcester Federal Savings and Loan Association,* 329 Mass. 184, 107 N. E. 2d 315 (1952), cert. den. 344 U. S. 884, 73 S. Ct. 184, 97 L. Ed. 684, the Supreme Judicial Court of Massachusetts held that the law of Massachusetts, limiting the establishment of branch offices, could not be applied as against the establishment of branch offices of federally chartered savings and loan associations which had had the written approval of the Federal Home Loan Bank Board. The court, after having reached the conclusion that the Federal Home Loan Bank Board has been given the power to allow the establishment of branches, went on to state:

> "Once the conclusion is reached that the Home Loan Bank Board has been clothed with Congressional sanction to allow the establishment of branches, the rest of the reasoning follows almost automatically. It then would become inconsistent to assert that there is no conflict between §37A and the power of the board to approve the establishment of a branch and at the same time to insist that that power is so circumscribed by §37A as to render nugatory the approval of a branch in a municipality which is not within fifteen miles of the city or town where the principal banking office is located. In our opinion, the conflict already exists, and it is a conflict which is 'direct and positive'."

We believe that the reasoning in the above cases is persuasive and we must conclude that the State has no power to regulate the establishment of branches by federally chartered savings and loan associations when that regulatory power has been granted to the Federal Home Loan Bank Board. It is true that neither the highest court of the United States nor the highest court of the State of Maryland has spoken on this question. However, until clear authority to the contrary can be cited, we must assume that the

decisions above quoted and the reasoning therein will be followed.

In your letter of October 9, you also ask our opinion on a problem which is almost precisely the converse of that posed by the above mentioned federally chartered savings and loan association. You enclosed with your letter a memorandum from an attorney, representing a state-chartered savings and loan association which has been notified that a hearing will be held by your Department concerning the establishment of a branch of that office, giving notice that said association objects to the asserted right of a federally chartered savings and loan association to protest the establishment of the state-chartered association's branch, in accordance with Section 160V of Article 23. The attorney has assigned two reasons for such objection: (1) that the federal association is not located within the area in which the branch office is proposed to be located, as provided by the act, and (2) that the federally chartered association, being protected and immune from State regulation of the establishment of its own branch offices, is not, therefore, a financial institution within the purview of Section 160V of Article 23.

We find no merit in either of these contentions. In regard to the first, it should be noted that the act gives no definition or limitation as to the "area in which a branch office is proposed to be located." It is obvious that one of the matters to be decided by the Director, on a hearing to determine whether or not a branch should be established, is whether or not the protesting association is one "within the area". This matter is essentially one of discretion, which must be decided by the Director, and it would seem to us that this would be best accomplished by rulings in individual cases, rather than by the establishment of a regulation attempting to govern all cases.

As to the second assertion, we can find no indication in the act that the use of the words "financial institution" in Section 160V was meant to connote any narrower restriction of the protest privilege therein than would have been the case had the word "association" been used. In fact,

"financial institution" is a much broader designation and would seem to encompass other institutions in addition to savings and loan associations. In addition, it is clear that the contention of the attorney in this regard is answered by subsection (c) of Section 160B, which provides for federally chartered associations all of the rights, powers, immunities and exemptions granted by this article to associations operating hereunder, and to the members thereof, unless federal laws or regulations provide otherwise. Although federal regulations provide otherwise as to limitations upon the State's power to regulate branch offices of the federally chartered savings and loan associations, it cannot be said that any federal law or regulation prohibits federally chartered savings and loan associations from availing themselves of the privilege of protest provided in Section 160V. Conversely, it is our understanding that there is nothing in the federal law or regulations relating to the establishment of branches of federal savings and loan associations which prevents state chartered associations from protesting to the Federal Home Loan Bank Board against the establishment of such branches and, indeed, it is our understanding that such protests by state associations have been filed in the past.

You have also asked our opinion as to the legal effect of the language, "establishment, maintenance or relocation of any branch", as contained in Section 160V, and you have asked for an interpretation of Section 160W as it relates to "members of the family". Since, in each of these cases, you have requested what must, in effect, be a very broad interpretation of the provisions of the law, without the opportunity to narrow that interpretation to specific cases, you must appreciate that a great deal of research and the consideration of numerous possible situations must be undertaken in attempting to comply with your request. In view of this, we ask your indulgence on each of these questions, as you have also requested that our answer be as prompt as possible.

THOMAS B. FINAN, *Attorney General.*
JAMES P. GARLAND, *Assistant Attorney General.*

BUILDING, SAVINGS AND LOAN ASSOCIATIONS—AUTHORIZED INVESTMENTS—PAYMENTS TO "TRUST FUND" OF PRIVATE INSURER.

December 7, 1961

Mr. Harry B. Wolf, Jr., Chief Supervisor,
Division of Building, Savings and Loan Associations,
Department of Assessments and Taxation.

In your letter of October 10 and in the copy of your letter to the Chairman of the Board of Building, Savings and Loan Association Advisors enclosed with your letter of October 2, you have raised the question of the propriety of certain payments by savings and loan associations into a "Trust Fund" established by Security Financial Insurance Corporation, which payments we understand to be required by that corporation as a condition of its insuring the accounts of such savings and loan associations.

It is our understanding that the "Trust Agreement" setting up such fund calls for an initial payment by each such association of an amount equal to 3% of the then outstanding shareholders' savings accounts on deposit with said association, into a "Trust Fund" to be held by Security Financial Insurance Corporation as "Trustee," under the name "Security Financial Insurance Corporation, Trustee." It is our further understanding that the Agreement calls for the payment of an amount equal to an additional 1% of said savings accounts six months after the date of signing such agreement, and a further payment equal to another 1% of such savings accounts one year from the date of the Agreement, bringing the total required cash payments into the fund to an amount equal to 5% of the outstanding shareholders' savings accounts on deposit with each such association.

It is stated that the purpose of the establishment of the "Trust" is to allow each such association "to better indemnify its savings account shareholders and to also increase the liquidity of said association and to set up a reserve fund for contingencies." Nevertheless, the Security Financial In-

surance Corporation, as "Trustee," is given the power and authority under the Agreement to "reinvest" the moneys in the fund, in its sole discretion, restricted only to the type of investments which the association itself could make under the law. Even this restriction is somewhat nebulous in that a subsequent provision of the Agreement (Article Sixth thereof) expressly authorizes and empowers the "Trustee," in its sole and absolute discretion:

> "A. To invest, reinvest and change the investments of any trust and to keep the same invested in such stocks, common or preferred, bonds, mortgages, ground rents or other property, real or personal, as it may consider advisable or proper, without being restricted as to the character of any investment by any statute or rule of law or court governing the investment of trust funds.
>
> "B. To hold investments in the name of a nominee or nominees or in the corporate name of the Corporate Trustee without disclosing its fiduciary capacity, or to retain the same in unregistered form, payable to bearer."

These provisions are certainly in conflict with the provisions of the law restricting the investments which building, savings and loan or homestead associations may make.

It is our further understanding that the "Trust Agreement" provides that the association so depositing its shareholders' money with Security Financial Insurance Corporation shall be paid an amount of interest on the fund equal to 3% per annum, with the sole discretion abiding in the "Trustee" to raise or lower the interest rate.

It is our understanding also that under this "Trust Agreement", the contributing building, savings and loan association may not withdraw its contributions or any part thereof, except in the event that its available cash, or withdrawable funds in bank or available from banks, is reduced to an amount equal to less than 1% of the then outstanding shareholders' accounts, and in such event, the association

may withdraw only such amount as is necessary to raise such available cash to an amount equal to 1% of its then outstanding shareholders' accounts; even in such event, this withdrawal right may be exercised only once in any given six-month period. Moreover, in the event of such withdrawal, the association is required to pledge and post with "Security Financial Insurance Corporation, Trustee", mortgages and other securities equal in value to the amount of the cash withdrawal.

Although Article Fifth of the Agreement provides for termination thereof upon termination of the insurance policy to which the Agreement refers, Security Financial is given absolute discretion to retain, after such termination, any amount of cash or securities deposited thereunder to protect Security Financial (as insurer or as "Trustee") against continuing liability either under the insurance policy or under the "Trust Agreement."

No specific provision is made for the segregation of the funds of any association, and the broad powers otherwise given to the "Trustee" would seem to indicate that it has assumed no duty to segregate.

DISCUSSION

The "Trust Agreement" which has been described above is indeed a curious document. Some of its provisions cast doubts as to whether it constitutes, in fact, a trust relationship. However, it is not necessary to consider that question at this time since it is plain that the Agreement, whatever its true nature, calls for the investment of funds deposited by the free share members of the association affected. The sole question is whether such investment can be made under the laws limiting the investments of associations.

Article 23, Section 150, Annotated Code of Maryland (1957 Ed.) limits such investments to cash, fixtures, or loans on hypothecated stock of such associations, judgments or decrees for payment of money received by courts in this State, mortgages on real or leasehold estate situate in this

State, ground rents issuing from real estate located in this State, bonds of this State and bonds or other obligations of, or guaranteed as to principal and/or interest by, the United States.

Section 160Z of Article 23 broadens the investment powers of associations to some degree by providing:

"*Investments of Associations.*

"(a) *Power to invest.* In addition to the investments permitted to be made by associations organized under the laws of this State, pursuant to Section 150 of this Article, every association shall have power to invest:

(1) In such real estate as may be or reasonably anticipated to be necessary or convenient for the transaction of its business, and this shall include the power to derive revenue, by rental or otherwise, from any portion of such real estate;

(2) In real estate purchased at auction sale, public or private, judicial or otherwise, upon which the association has lien or claim, legal or equitable;

(3) In real estate accepted by the association in satisfaction of any obligation;

(4) In real estate acquired by the association in exchange for real estate owned by the association;

(5) In real estate acquired by the association in connection with salvaging the value of property owned by the association;

(6) In chattels and equipment necessary to conduct its business;

(7) By making loans to members of cooperative housing projects secured by the assignment of their interest or equity in a unit of such project, notwithstanding the fact that such project as a whole may be subject to a prior lien, and notwithstanding any other provisions of this Act;

(8) With banks insured by the Federal Deposit Insurance Corporation.

(b) *Title to and location of property.* Title to all real estate, shall be taken and held in the name of the association. The real or leasehold property securing any mortgage authorized by Section 150 of this Article shall be situate in this State, or without this State if such property is within a fifty (50) mile radius of the principal Maryland office of the association.

(c) *Second mortgages.* Any mortgage held by an association shall be a first lien upon such real or leasehold property except that such mortgage may be a second lien if the first lien on said property is held by the association."

Section 160EE of Article 23 requires that each association maintain a reserve in a total minimum required amount equal to six percent (6%) of the aggregate withdrawal value of the association's free share accounts, "to be used solely for the purpose of absorbing losses."

The above provisions make it clear that deposits by associations to the Security Financial "Trust Fund" are not authorized, either as investments or as a portion of the required reserves. As investments, they could be supported, if at all, only as "cash"; but the restrictions in the "Trust Agreement" upon the withdrawal of the deposited funds, both during the life of the "Trust" and after its termination, prevent those deposits from being considered cash, under any valid definition of that term.

The deposits cannot qualify as a portion of the required reserve since they are not, under the Agreement, set aside solely for the purposes of absorbing losses of the association.

In the final analysis, the transaction constitutes no more than an unsecured loan, at an interest rate to be fixed at the whim of the borrower, for such term as the borrower

deems appropriate, for the sole benefit of the borrower. As such, it violates both the letter and the spirit of the law relating to building, savings and loan and homestead associations.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

CHIROPRACTORS

USE OF TERM "CHIROPRACTIC PHYSICIAN" BY PERSON NOT AUTHORIZED TO PRACTICE MEDICINE AND SURGERY IN STATE IS VIOLATION OF MEDICAL PRACTICE ACT—CHIROPRACTIC, CERTAIN POWERS OF CHIROPRACTORS DEFINED.

December 20, 1961.

Dr. Frank K. Morris, Secretary,
Board of Medical Examiners.

This office has examined with care the mimeographed letter of December 9, 1961, from Mr. Adam C. Baer, Secretary-Treasurer of the Maryland State Board of Chiropractic Examiners, together with references made therein to prior opinions of this office.

The Board of Chiropractic Examiners concludes, erroneously, in its letter to you that there is nothing in either the chiropractic or medical practice laws which would authorize a prohibition of the use of the term "chiropractic physician."

In 1931, at 16 Opinions of the Attorney General 73, we stated as follows:

> "Mr. R. A. McDonnell
> State Board of Chiropractic Examiners
> 227 W. Monument Street
> Baltimore, Md.
>
> "Dear Sir: In your letter of October 27th you request an opinion as to whether a licensed chiropractor is a 'physician' in the State of Maryland.
> "The term 'physician' as used in our statutes means one who is authorized to practice medicine and surgery. Section 384 of Article 43 of the Code of Public General Laws, provides that licensed chiropractors 'shall not prescribe for or administer to any person any medicine or drugs now or hereafter included in materia medica, practice major

> or minor surgery, obstetrics, nor any other branch of medicine, nor practice osteopathy.'
>
> "In view of these provisions, a chiropractor is not a 'physician' in the State of Maryland."

"Chiropractic" is now defined in Article 43, Section 504(c) of the Annotated Code of Maryland (1957 Edition) thus:

> "Chiropractic is hereby defined to be a drugless health system, the basic principle of which teaches that disease is caused by interference with the transmission of nerve impulses. The practice of chiropractic is defined as diagnosis, the location of disaligned or displaced vertebrae of the human spinal column, the procedure preparatory to and the adjustment by hand of such misaligned or displaced vertebrae of the spinal column and its articulations, by any method not including the use of drugs, surgery, obstetrics, or osteopathy, nor any branch of medicine . . ."

And in the opinions of 1923 and 1939, at 8 Opinions of the Attorney General 418 and 24 Opinions of the Attorney General 172, respectively, both of which were addressed to the Maryland State Board of Chiropractic Examiners, the question to be decided was the power of that Board to revoke the license of a chiropractor for the use of the term "chiropractic physician." These opinions, *supra,* do not, however, go to the question of whether the use of the term "chiropractic physician" constitutes a violation of the Medical Practice Act, Code, Article 43, *supra,* Sections 119, et seq. (1957 Edition and 1961 Supplement), although the opinion at 24 Opinions of the Attorney General 172 does hold that the Chiropractic Board may revoke a chiropractor's license for use of the term "chiropractic physician", if such use is in an effort to deceive the public.

In 43 Opinions of the Attorney General 235, it was held that a licensed chiropractor is not within the meaning of "licensed physician" under Code, Article 62, Section 9, and that such chiropractor may not certify to a girl's pregnancy.

In 39 Opinions of the Attorney General 146, it was held that school authorities were justified, as an administrative measure, in refusing to accept the certificate of anyone but a licensed physician as an excuse for the non-attendance of a child because of illness. And in 15 Opinions of the Attorney General 62, it was held that a chiropractor could not issue death certificates.

Consequently, on the basis of the above authority, and upon detailed and full consideration of the Code, Article 43, Sections 119, et seq., it is my opinion that use by a chiropractor of the term "chiropractic physician" is in violation of the medical practice act, if such chiropractor is not, in fact, a "physician" and authorized to practice medicine and surgery in the State of Maryland.

ROBERT S. BOURBON, *Assistant Attorney General.*

CIVIL DEFENSE

BALTIMORE CITY—CIVIL DEFENSE—A DEPUTY DIRECTOR THEREOF—NOT APPOINTEE OF GOVERNOR—POSITION NOT SAME AS "ALTERNATE".

March 3, 1961

Mr. Sherley Ewing, Director,
Civil Defense.

You have requested an opinion as to whether the Deputy Director of Civil Defense of Baltimore City is an appointee of the Governor of the State of Maryland or an employee of the City Civil Defense Organization. I understand that all paid members of the City agency, except the Director, must be under the local merit system in order to obtain federal matching funds. You have attached a copy of an opinion given by the City Solicitor to the Secretary of the Civil Service Commission dated January 31, 1961.

As you are aware, Section 238, Article 41 of the Annotated Code of Maryland (1957 Edition), requires each political subdivision to establish a local organization for civil defense. The organizational structure, the plan for operation and method of administration are to be determined by the local subdivision within the over-all pattern of the State plan and program. Section 238 would require that, after the local subdivision has prepared an organizational structure and plan of operation and administration, it should be submitted to the State Director for review and approval to insure consistency with the State plan and program.

The only express organizational requirement laid down by Section 238 is that the local organization is to be headed by a director with an alternate as second in command. The director and the alternate are appointed by the Governor upon the recommendation of the local mayor or governing body. Your attention is invited to a letter opinion to Colonel Arthur L. Shreve, Manager of the Survival Project, dated February 27, 1958. The fact that the director's and the alternate's salary, if any, is determined and paid by the

local subdivision does not affect their status. The local mayor or governing body has immediate supervision over the director and his alternate but both are under the ultimate direction of the Governor. The other staff, administrative and clerical positions can be established in the local subdivision's organizational structure. There is nothing in the section which requires or prohibits the establishment of a position of deputy.

Your question resolves itself essentially as to whether the statutory alternate is the same as the position of deputy. This must be answered in the negative since there is no provision in the statute for changing the title of designated positions. The position of deputy is not the statutory position of alternate. From the data which you submitted in support of your inquiry, it is my opinion that the position of deputy is a local organizational position and is the third person in succession of command. If the alternate does not receive a salary there is no objection to the same person holding the position of alternate and the position of deputy and there is no problem under Article 35, Declaration of Rights, Constitution of Maryland. 42 Opinions of the Attorney General 307, 28 Opinions of the Attorney General 146, 20 Opinions of the Attorney General 587, 595 and 598.

I would suggest that you discuss with the City of Baltimore the desirability of amending their plan so as to provide for a paid director, a non-paid alternate and a paid deputy with the proviso that the position of alternate and deputy be held by the same person and thus comply with the federal requirement that only one employee of the paid staff be excluded from the local employees' merit system.

THOMAS B. FINAN, *Attorney General.*

CLERKS OF COURT

WORCESTER COUNTY—MICROFILMING RECORDS—COST OF MICROFILMING RECORDS SUBMITTED TO COUNTY COMMISSIONERS PURSUANT TO ARTICLE 25 SECTION 4 OF THE ANNOTATED CODE OF MARYLAND.

May 12, 1961

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

We have your letter of May 2, in which you inform us that a bill has been passed and signed, striking Worcester County from the list of counties exempted by Section 3, subparagraph (a) of Article 25 of the Annotated Code, from certain of the requirements of Article 25. You requested our opinion as to whether or not under Article 25, Section 4 of the Code, which is now applicable in regard to the County Commissioners of Worcester County, you may require the County Commissioners to pay the cost of microfilming the records submitted to you for filing by the County Commissioners.

This involves the consideration of two questions: first, whether the practice of microfilming all records in the office of the clerk of a circuit court is allowed under the Code, and secondly, whether or not a charge may be made to the County Commissioners for the cost thereof in regard to those records required to be filed and recorded on behalf of the County Commissioners.

Answering the first question, we are of the opinion that neither Article 17, Section 1, nor Article 17, Sections 57 and 62, specifically allow the microfilming of all records by your office.

Article 17, Section 1, provides as follows:

> "Every clerk shall have the custody of the books and papers pertaining to his office, and shall carefully keep current and preserve the same; he shall file all papers delivered to him to be filed, and

> shall record all judgments, decrees, deeds and writings which by law are required to be recorded in the office of which he is clerk; he shall issue all writs and process which by law may be issued from the court of which he is clerk; he shall give a copy of any paper or record in his office to any person applying for the same, upon being paid the usual fees for transcribing such paper or record, and shall annex thereto his certificate, under the seal of his court, if required; he shall make proper entries of all proceedings in the court of which he is clerk; and all entries and records shall be made in a fair, legible hand, or with a typewriter or by the use of appropriate printed forms, or by photostat machine, if approved by the court, or by a combination of one or more of the aforegoing, in well-bound books procured by him for the purpose; and he shall perform all the duties required of him, or which may hereafter be required of him, by law. The cost of photostat machine shall, upon approval by the court, be allowed as an expense of the office."

Although this section makes provision for photostating, it does not clearly make provision for microfilming, and seems to imply that it does not contemplate microfilming, since it refers to "well-bound books." Article 17, Sections 57 and 62, make specific provision for microfilming by referring only to those records which must be transmitted to the Commissioner of the Land Office.

However, Article 17, Section 51, certainly indicates that the Legislature contemplated that the clerks of court might record all instruments by the process of microfilming. In that section, which refers to the form of all recordable instruments, it is provided that:

> ". . . In those clerks' offices where such instruments are photostated or microfilmed no instrument upon which a rider or riders have been placed or attached in such a manner as to obscure,

> hide or cover any other part of the instrument shall be offered or received for record and no instrument not otherwise readily subject to photostating or microfilming shall be offered or received for record . . .".

On the basis of the above quoted portion of Section 51, it is our opinion that the microfilming of all records is allowable.

That brings us to the second question. It is clear that Article 25, Section 4, prohibits your charging the County Commissioners a fee for recording and indexing copies of acts, ordinances, and resolutions. This same prohibition is contained in Article 36, Section 12(42) of the Code. However, it is clear that Article 25, Section 4 makes a distinction between the charge for recording and indexing the aforesaid acts, ordinances and resolutions, and the cost of the volume in which they are to be recorded and indexed. That section provides that the "volume" is to be provided by the County Commissioners. This clearly indicates that the cost of such volume is not to be borne by your office as an expense. Since you will record such acts, ordinances and resolutions by the microfilming process, and since the statute requiring you to record them without charge also provides that the volume in which they are to be recorded should be provided by the County Commissioners, it is our opinion that you may require the County Commissioners to pay the cost of microfilming the papers which you must record in their behalf, although you may not charge any fees for the recording and indexing thereof.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

MARRIAGE LICENSE—APPLICATIONS IN REGARD TO INTERRACIAL MARRIAGES—MARYLAND STATUTORY PROHIBITION NOT SO CLEARLY UNCONSTITUTIONAL AS TO ALLOW CLERKS TO REFUSE TO COMPLY THEREWITH.

August 15, 1961.

Mr. Garland Greer, Clerk,
Circuit Court for Harford County.

You have asked our advice as to:

1. Whether or not your office should continue to refuse to issue marriage licenses for contemplated marriages between persons who are of the white and of the Negro race, or who may otherwise be of mixed races.

2. Whether an application for a marriage license is valid indefinitely in view of the fact that a license is valid only for six months.

In answer to your first inquiry, we wish to point out that Section 12 of Article 62 of the Annotated Code of Maryland provides that:

> "If in the course of the examination of any applicant for a marriage license it shall appear to the clerk of the court that any legal impediment exists under the laws of this State why the said parties shall not be joined in marriage, he shall withhold said license unless ordered by the court of which he is clerk to issue the same."

Section 398 of Article 27 of the Annotated Code of Maryland provides:

> "All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and

> shall be void; and any person violating the provisions of this section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years; . . .".

In light of the above statutory provisions, our reply to your inquiry proceeds not from an attempt to analyze the wisdom, the merit, or the necessity of the law, but rather from a reiteration of the functions of the various branches of the government of this State and of the powers and duties of the various officers thereof in carrying forward those functions. As was more fully pointed out in an opinion reported in 41 Opinions of the Attorney General 120, the basic theory of our State and Federal Constitutions is that the powers given by the people to the government are divided among three coequal branches, executive, legislative, and judicial. As was stated by Chancellor Bland, in *The Chancellor's Case,* 1 Bland 595, 672, the Declaration of Rights of Maryland declares that those three branches ought to be forever separate and distinct from each other. The court there said:

> "* * * Each of these several departments should be kept, and should feel it to be its highest honor, to keep strictly within the constitutional boundaries assigned to it. The Legislature should not encroach upon the judiciary, nor upon the Executive; nor should either of those departments trench upon each other or upon the legislative."

The judicial branch of the Government of the State of Maryland is the interpreter of the State Constitution, as the judicial branch of the Government of the United States is the interpreter of the Federal Constitution. Inherent in this power of interpretation is the exclusive power to pass upon the constitutionality of the laws enacted by the legislative branch of the government.

The Attorney General, under the provisions of Article V, Sections 1 through 6 of the Constitution of Maryland, as implemented by Article 41, Sections 2 and 171, and Article

32A, Sections 1 through 12 of the Annotated Code of Maryland, is head of the Department of Law, one of the executive and administrative departments of the State. As such, he has historically observed the prohibition against encroachment on judicial or legislative prerogatives. Although this office has, on many occasions, advised the Governor as to constitutional infirmities of Acts of the General Assembly prior to his signing them into law, it has scrupulously avoided usurpation of the power of the judiciary in denouncing existing laws as violative of the State or Federal Constitutions, and has rendered such opinions as to existing laws only where there has been the clearest indication that a decision of the courts of our State or of the United States is applicable to and invalidates those laws. In such instances, this office would not be invading the prerogative of the judiciary, but would, rather, be pointing out the fact that, and the manner in which, the judiciary has exercised that prerogative. In the absence of such clearly applicable judicial determination, the office of the Attorney General is without authority to substitute its opinion for that of the judiciary as to the constitutional validity of an existing law, nor should it in any case substitute its opinion for that of the Legislature as to the wisdom or necessity of such law.

There is no clearly applicable judicial determination invalidating the law here in question. Our Court of Appeals has spoken on the subject, by way of dictum, in 1895, in *Jackson v. Jackson*, 82 Md. 17, 30, as follows:

> "* * * The statutes of Maryland peremptorily forbid the marriage of a white person and a Negro and declare all such marriages forever void. It is, therefore, the declared policy of this State to prohibit such marriages."

And, again by way of dictum, the court said, in 1952, in *Henderson v. Henderson*, 199 Md. 449, 459:

> "* * * In *Jackson v. Jackson*, 82 Md. 17, 30; 33 A. 317, 319, the Court said that, although such marriages may be valid elsewhere, they will be

absolutely void in Maryland as long as the statutory prohibition remains unchanged."

As far as the Supreme Court of the United States is concerned, the question of the constitutionality of such laws has never been squarely faced. In 1955, a suit was brought in Virginia to annul the marriage of a white person and a Chinese. The marriage was held to be void on the basis of a Virginia law substantially similar to the one in force in Maryland. An appeal was taken to the Supreme Court of Appeals of Virginia, which held, in *Naim v. Naim,* 197 Va. 80, 87 S. E. 2d 749, that the law was valid and did not violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. An appeal was filed to the Supreme Court of the United States, which vacated the judgment and returned the matter to the Virginia court on the basis that the record was insufficient to present the question of the constitutionality of the law "in clean cut and concrete form . . .". *Naim v. Naim,* 350 U. S. 891, 76 S. Ct. 151, 100 L. Ed. 784. Upon reconsideration by the Virginia court, that court held that the record was adequate for the decision rendered, and that there was no provision in Virginia procedure for the reopening of the case and the gathering of additional evidence; the court then reaffirmed its previous decision. *Naim v. Naim,* 197 Va. 734, 90 S. E. 2d 849. The case was again taken before the Supreme Court of the United States, which refused to consider it further on the ground that there was no properly presented federal question involved. *Naim v. Naim,* 350 U. S. 985, 76 S. Ct. 472, 100 L. Ed. 852. As far as we can determine, the matter has not again come before the Supreme Court of the United States.

With the judicial decisions, both state and federal, in the status outlined above, we are in no position and, indeed, would be without authority to take the extraordinary action of advising you to ignore an Act of the General Assembly. See 37 Opinions of the Attorney General 424, 439.

It is therefore our opinion that unless, and until, there is a clear contrary indication from the judiciary or a change

in the law by the Legislature, you should comply fully with the provisions of Section 12 of Article 62 and Section 398 of Article 27 of the Annotated Code of Maryland.

In answer to your second inquiry, we refer you to an opinion in 26 Opinions of the Attorney General 266. In that opinion, the Honorable William C. Walsh, then Attorney General of the State of Maryland, stated that there was then no limitation upon the time within which an applicant must secure a marriage license after making application therefor, except the required waiting period of forty-eight hours. At the time of that opinion, our law did not contain any limitation upon the length of time for which a marriage license is valid. By Chapter 67 of the Laws of Maryland of 1945, the General Assembly imposed the present six-month limitation upon such validity. That amendment was made subsequent to the aforementioned opinion of this office and we must assume that it was made by the General Assembly with knowledge and understanding of that opinion. Since that is the case, and since the General Assembly at the time of the imposition of the six-month limitation upon the validity of the license itself did not see fit to impose a similar limitation upon the validity of the application for license, we must assume that it was the intention of the General Assembly that there should be no such limitation, and we therefore must reiterate our opinion given in 1941, that none should be implied.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

COMPTROLLER

COMPTROLLER OF THE TREASURY—AUTHORIZED UNDER ARTICLE 19, SECTION 30, CODE, TO ISSUE DIRECTIVE TO STATE APPLE COMMISSION PROHIBITING EMPLOYMENT OF OUTSIDE AUDITOR FOR THE PURPOSE OF REVIEWING THE AUDIT OF THE STATE AUDITOR.

February 6, 1961.

Mr. B. F. Nossel,
Chief Deputy Comptroller.

You have advised us that the State Apple Commission intends to hire an outside accounting firm to recheck its books and records after the State Auditor had completed its audit of the Commission's records and reported that the Commission was not acting promptly to collect delinquent excise taxes levied on commercial apples. The Commission takes issue with the State Auditor's report that it was not moving promptly to collect the delinquent taxes, and it now desires to contract for the services of an outside auditing firm in an attempt to contradict the State Auditor's report. Naturally, as you have indicated, this is an unnecessary expense of money by the Commission which should be avoided.

In our opinion, the office of the Comptroller is authorized by Article 19, Section 30, of the Annotated Code of Maryland to issue a directive to the Commission not to employ this outside auditor. This Section empowers the Comptroller to issue such directives to the various commissions throughout the State in regard to methods of conducting their offices, of keeping books and records, and such other similar internal operational aspects of the commission. This power in the Comptroller is not an empty one, and Article 19, Section 34, of the Annotated Code contains criminal sanctions which may be imposed upon members of any commissions who do not follow such orders issued by the Comptroller.

We are also of the opinion that such an expenditure by the State Apple Commission would be subject to criticism as being an expense not authorized by Article 97, Sections 71 through 83, relating to the State Apple Commission. Sections 73 and 79 of Article 97 indicate the purposes for which the monies collected by the Commission are to be used, primarily to effectuate the purpose of the creation of the Commission to increase the demand for the consumption of Maryland apples. Such an expenditure as is presently contemplated by the Commission does not seem to come within this purpose, especially since the auditing service has already been rendered to the Commission by the State Auditor, the state agency designed for this purpose.

We therefore advise you that your office is authorized under Article 19, Section 30, to issue a directive to the State Apple Commission stating that they should not employ an outside auditor for the purposes of repeating the work of the State Auditor. We further advise that a failure by the members of the State Apple Commission to follow this directive would be subject to criminal penalties.

THOMAS B. FINAN, *Attorney General.*

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

CONSTITUTIONAL LAW

MARYLAND STATUTES REQUIRING RACIAL SEGREGATION IN STATE TRAINING SCHOOLS FOR MINOR DELINQUENTS VIOLATE THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION. STATE DEPARTMENT OF PUBLIC WELFARE—AUTHORITY TO ESTABLISH POLICIES REGULATING ADMISSION TO TRAINING SCHOOLS AND TRANSFERS BETWEEN INSTITUTIONS.

February 28, 1961.

Mr. Thomas J. S. Waxter, Director,
State Department of Public Welfare.

We have your recent letter inquiring as to the constitutionality of Sections 657, 660 and 661 of Article 27 of the Annotated Code of Maryland (1957 Edition). These sections provide for the establishment of Boys' Village, Montrose, and Barrett Schools as public agencies for the care and reformation of minors committed thereto under the laws of this state. Specifically, the sections provide that Boys' Village shall be operated for Negro male minors, Barrett School for Negro female minors, and Montrose School for white female minors. The precise question presented is whether the statutory provisions which require racial separation in these institutions are constitutional.

In *State Board of Public Welfare v. Meyers,* 224 Md. 246, our Court of Appeals held that the Fourteenth Amendment to the Federal Constitution prohibited this State from maintaining Maryland Training School for Boys on a racially segregated basis, as required by Section 659 of Article 27 of the Code. This institution is, of course, a State facility identical in purpose to that of Boys' Village, Barrett and Montrose Schools. There being no material distinction between these institutions, it necessarily follows that none of them as presently constituted can continue in operation with legal sanction on a racially segregated basis.

Section 33 of Article 88A of the Code authorizes the State Department of Public Welfare to exercise supervision, direction and control over these institutions and to establish by rule or regulation standards of care, policies of admission, transfer and discharge. This section further provides that the general management of the schools shall be vested in a Board of Managers for each institution, but that the State Department of Public Welfare may order such changes in the policies, conduct or management of the schools as may seem desirable. In view of this authority you ask whether your Department may adopt and enforce an admission policy for the respective male and female institutions, whereby the age of the child to be committed determines the particular institution under your jurisdiction to which he is eligible for placement by the courts. By way of example, we understand that such plan contemplates establishing Maryland Training School as the institution accepting both the youngest and the oldest boys for placement, and Boys' Village as the institution for boys of the intermediate age group. It is our opinion that your Department is authorized to establish such a policy provided it does not exclude from placement in one or the other of the respective male and female institutions any child of an age subject to commitment under the Juvenile Court laws in force in this State. We would, however, call your attention to the provisions of Section 630 of Article 27 of the Code which permits confinement of children between the ages of 12 and 15 years who commit certain serious crimes, as therein enumerated, to be placed in either Maryland Training School or Boys' Village, at the discretion of the court.

You also inquire as to the authority of your Department under Section 33 of Article 88A to adopt policies governing the transfer of children from one to another of the training school institutions under your jurisdiction. It is our opinion that where commitment of the child is made direct to your Department, rather than to a specified institution under your jurisdiction, the child may be transferred in accordance with rules and regulations adopted by your De-

partment. Where the commitment is specifically made to a particular training school and such commitment, when made, was in accordance with the existing admission policies of your Department, we are of the opinion that any subsequent transfer of the child so committed can only be made with the full knowledge and concurrence of the committing juvenile court.

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

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

CONSTITUTIONAL LAW—OFFICE OF PROFIT AND TRUST—MEMBERS OF ZONING AND PLANNING COMMISSION OF WORCESTER COUNTY HELD NOT TO HOLD AN OFFICE OF PROFIT OR TRUST WITHIN THE MEANING OF THE PROVISIONS OF ARTICLE I, SECTION 6, OF THE CONSTITUTION OF MARYLAND.

August 29, 1961.

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

Re: Oath of Office—Zoning and Planning Commission.

We have your letter of August 15, 1961, concerning the Zoning and Planning Commission of Worcester County. In this letter, you point out that this Commission was appointed by the President of the County Commissioners of Worcester County, subject to authority contained in Article 66B, Section 10, et seq., of the Annotated Code of Maryland (1957 Edition).

You ask us if the members of this Commission hold an "office of profit or trust" within the meaning of the provisions of Article I, Section 6 of the Constitution of Maryland and if you, as Clerk of the Circuit Court for Worcester County, are required to administer an oath of office to these members.

The question of what is and what is not an "office of profit or trust" has been considered many times by the various Attorneys General of this State. The question has also been considered on quite a few occasions by the Court of Appeals of Maryland.

It is the consensus of the cases and opinions in these matters that there are five tests to be laid down to determine whether or not a particular position is an office of profit or trust.

1. Is there a specified term of office?
2. Does the holder of the office exercise some degree of sovereignty?

3. Does the holder of the office receive a commission of office?
4. Is the holder of the position required to take an oath of office?
5. Is there a salary or other financial emolument attached to said position?

In 1899, the Court of Appeals, in the case of *Board of County School Commissioners of Worcester County v. Goldsborough*, 90 Md. 193, held that a member of the Board of County School Commissioners of Worcester County was not a person holding an office of profit or trust, since the authority possessed by the Board was cloaked in the Board itself and not in any individual member. The Court of Appeals, in the later case of *Clark v. The Harford Agricultural and Breeders Association*, 118 Md. 608, again concluded that since the members of the Racing Commission of Harford County were not invested with any individual authority, they could not be considered persons who held an office of profit or trust.

In an opinion of this office, in 35 Opinions of the Attorney General 192, the Honorable Hall Hammond, then Attorney General, ruled that the members of the Anne Arundel County Sanitary Commission were not public officers in the accepted sense, since no member of that Commission had individual power and authority, but that such power and authority existed only in the actions of the majority of the members of the Commission acting in concert. And, in an earlier opinion in 32 Opinions of the Attorney General 143, Attorney General Hammond held: ". . . It has been held heretofore, not unreasonably, that one does not hold an office of profit if there is no salary attached to the office he holds."

In considering the case at hand, and applying the above-mentioned standards, we find that the statutes authorizing the County Commissioners to create a Zoning and Planning Commission do specify a term of office for the members of that Commission. Those statutes, however, do not prescribe that the members of the Commission shall take an

oath, nor that they shall receive a commission of office, and specifically provide that they shall serve without compensation.

We do not express an opinion as to whether or not the powers vested in the Commission are, in fact, a delegation of the sovereignty of the State. The Commission's authority, whether it be sovereign or otherwise, is vested solely in the actions of the majority of that body, and no individual member of the Commission, acting alone, has the right to exercise any of the functions delegated by Article 66B.

It is our opinion that the reasoning of the Court of Appeals in the *Worcester County* and *Clark* cases must apply to the case at hand, and that, by that reasoning, the members of the Zoning and Planning Commission of Worcester County cannot be held to be persons holding offices of profit and trust within the meaning of Article I, Section 6, of the Constitution of Maryland, and that you are not, therefore, required to administer to them an oath of office.

We believe that the above quoted opinion of Attorney General Hammond, regarding salary, substantiates our opinion in this matter. We think that the stipulation that the members of the Commission shall serve without compensation creates, at the least, a rebuttable presumption that the position they hold is not to be considered an office of profit.

Although we have concluded herein that the members of the Zoning and Planning Commission of Worcester County are not persons holding an office of profit or trust within the meaning of Article I, Section 6, of the Maryland Constitution, we should not be deemed to rule that no member of any commission or public body should be considered a public officer insofar as other constitutional questions are concerned (see *Nesbitt v. Fallon*, 203 Md. 534, *Sappington v. Slade*, 91 Md. 640 (1900), 35 Opinions of the Attorney General 232, 20 Opinions of the Attorney General 598, 12 Opinions of the Attorney General 156).

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

CONSTITUTIONAL LAW—TRIAL MAGISTRATES—ARE PUBLIC OFFICERS AND SALARY MAY NOT BE INCREASED DURING TERM OF OFFICE. BILL CREATING PEOPLE'S COURT OF PRINCE GEORGE'S COUNTY HAS EFFECT OF ABOLISHING TRIAL MAGISTRATE SYSTEM IN THAT COUNTY AS OF JANUARY 1, 1962.

October 10, 1961.

Mr. Lionell M. Lockhart,
Board of County Commissioners
of Prince George's County.

You have asked us to advise you as to when the terms of the present magistrates of Prince George's County are terminated, and as to the proper amount of their compensation subsequent to June 1, 1961.

Under date of April 19, 1961, in a letter of approval of legislation passed at the 1961 Legislature, this office advised the office of the Governor that the provisions of House Bill 644 (Chapter 757 of the Acts of 1961) could not apply to the incumbent magistrates in Prince George's County. That measure provided for a salary increase for the substitute magistrate for Prince George's County, but is inapplicable to the incumbent magistrate because of the provision of Section 35, Article III, of the Constitution of Maryland, that the salary of a public officer may not be increased or decreased during his term of office.

For the same reasons, it is our opinion that the provisions of House Bill 636 (Chapter 766 of the Acts of 1961), providing for a salary increase for the full-time trial magistrates in Prince George's County, also cannot be held to benefit the incumbents. The terms of all of the incumbent magistrates in your county commenced on the first Monday in May, 1961, and both of the measures above referred to were made effective on the first day of June, 1961.

You now ask us whether or not the passage of House Bill 947 (Chapter 675 of the Acts of 1961), creating a People's Court for Prince George's County and terminating

the trial magistrate system in that county, had the effect of terminating the term of office for the present trial magistrates as of June 1, 1961. You suggest that the effect of House Bill 947 might have been to terminate the terms of the incumbent magistrates as of June 1 and create a new "special" term of office for the interim period from June 1, 1961, until January 1, 1962. You ask us if those magistrates are, in fact, now fulfilling a "special" term, and, if so, whether they might be eligible to receive the increased compensation as provided by the passage of House Bill 636 and House Bill 644.

We have studied the provisions of House Bill 947 with a great deal of interest. We have noted that the effective date of that measure is set out as June 1, 1961, and that this Act, in Section 1, does abolish the trial magistrate system in Prince George's County.

We have also noted, however, that Section 2 of that bill provides:

> "The jurisdiction, powers, duties, responsibility and authority conferred upon the trial magistrates of Prince George's County as now provided by law shall continue in effect until January 1, 1962 . . .".

It is our opinion that the effect of the language above quoted is to continue the trial magistrate system in Prince George's County in being until January 1, 1962, and that the terms of the incumbent magistrates shall terminate on that date, and not on June 1, 1961, which was the effective date of House Bill 947. Those magistrates, therefore, are in effect serving an 8-month term, and since the legislation providing for the salary increase became effective during that 8-month term, they are debarred by the State Constitution from receiving the increased salary.

We might also point out that the office of "trial magistrate" is an office of legislative creation and it is well settled in this and other jurisdictions that the Legislature can modify, control or abolish any office which it has the power to create. (See *Calvert County v. Monnett,* 164 Md.

101; *Anderson v. Baker,* 23 Md. 531; *Warfield v. Baltimore County Commissioners,* 28 Md. 76.)

The office of justice of the peace, unlike the office of trial magistrate, is a constitutional office and cannot be abolished by the Legislature, nor can the term of office of any justice of the peace be reduced or diminished by the Legislature. The incumbent magistrates of Prince George's County, therefore, will cease to be magistrates as of January 1, 1962, due to the abolition of that office, but they shall continue to serve as justices of the peace until such time as their commission of office shall expire in May of 1963.

It is our opinion, therefore, that the term of office of the incumbent magistrates of Prince George's County commencing on the first Monday in May, 1961, will terminate on January 1, 1962, and that their salary shall not be increased because of the passage into law of House Bills 636 and 644 as such increase would be in violation of Article III, Section 35, of the Constitution of Maryland.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

CONSTITUTIONAL LAW—TERM OF JUDGE OF THE COURT OF APPEALS OF MARYLAND BEGINS ON DATE OF QUALIFICATION AND NOT ON DATE OF ELECTION. IN EVENT OF REAPPOINTMENT UPON EXPIRATION OF TERM, ELECTION TO THE OFFICE SHALL BE HELD AT THE NEXT FOLLOWING GENERAL ELECTION.

October 16, 1961.

Hon. J. Millard Tawes,
Governor of Maryland.

You have asked us to advise you as to whether the term of the Honorable William L. Henderson, Associate Judge of the Court of Appeals of Maryland, will expire 15 years from the date of the general election in which he was elected or 15 years from the date he qualified for office.

Section 3, Article IV, of the Constitution of Maryland, under the sub-title "Part I—General Provisions", provides:

> "Each of the said judges shall hold his office for the term of fifteen years from the time of his election . . .".

Section 14 of Article IV, as amended (Acts of 1960, Chapter 11, ratified November 8, 1960), which section is entitled "Part II—Court of Appeals", specifically provides:

> "* * * The term of each Judge of the Court of Appeals shall begin on the date of his qualification except that each of the Judges of the Court of Appeals in office at the time this amendment to the Constitution takes effect shall continue to hold office for the balance of the term for which he was elected or appointed or until he shall have attained the age of seventy years, whichever may first happen."

Judge Henderson was elected to his 15-year term on November 5, 1946. The Constitution at that time provided (Acts of 1943, Chapter 772, ratified November 7, 1944):

> "The Judges of the Court of Appeals shall be elected by the qualified voters of their respective

> Appellate Judicial Circuits, their terms to begin on the date of their qualification."

We are advised that Judge Henderson qualified for office on the 12th day of December, 1946, by accepting his commission of office and taking the prescribed oath. His term, therefore, will not expire at least until midnight, December 11, 1961.

We might point out that the Constitution differentiates between the term of office for Judges of the Circuit Courts of the State and for Judges of the Court of Appeals. It is our opinion that Section 3 of Article IV, *supra,* providing that judges shall hold their office dating from the time of their election, must be taken to mean that the term of office of the Judges of the Circuit Courts shall commence on election day, and not on the date of their qualification as in the instant case.

In the event that Judge Henderson shall be reappointed by you upon the expiration of his term, it is our opinion that he shall be a candidate for re-election at the general election of November 8, 1962. Section 5 of Article IV provides:

> "Upon every occurrence or recurrence of a vacancy through death, resignation, removal, disqualification by reason of age or otherwise, or *expiration of the term of fifteen years of any judge,* . . . the Governor shall appoint a person duly qualified to fill said office, who shall hold the same until the election and qualification of his successor; . . . *His successor shall be elected at the first biennial general election for Representatives in Congress after the expiration of the term of fifteen years (if the vacancy occurred in that way)* or the first such general election after one year after the occurrence of the vacancy in any other way than through expiration of such term." (Emphasis supplied.)

We believe this language to be clear and unambiguous, and controlling in this instance. We have reviewed the

opinions of this office concerning vacancies in the office of judge and election thereto, contained at 33 Opinions of the Attorney General 231 and 43 Opinions of the Attorney General 213. We have also carefully considered the opinion of the Court of Appeals in the case of *Hillman v. Boone, et al.*, 190 Md. 606. Those opinions do not concern themselves with the exact problem contained herein, but we find nothing in them contrary to the conclusion that we reach.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

DEPARTMENT OF GEOLOGY, MINES AND WATER RESOURCES

WATERS OF THE STATE—IMPOUNDMENT OF MORE THAN ONE MILLION GALLONS OF WATER AS CONSTITUTING RESERVOIR—PERMIT TO CONSTRUCT RESERVOIR MUST BE OBTAINED FROM DEPARTMENT OF GEOLOGY, MINES AND WATER RESOURCES—WASTE STABILIZATION LAGOONS FOR TREATMENT OF SEWAGE ARE RESERVOIRS.

June 6, 1961

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

We have your recent letter in which you advise us that treatment of sewage in waste stabilization lagoons has, under certain circumstances, been accepted by the State Department of Health as a satisfactory alternate to the conventional sewage treatment plant. You inquire whether such lagoons are subject to the provisions of Section 721 (a) of Article 66C of the Annotated Code of Maryland (1957 Edition).

Section 721 (a) provides in part that no person, including the State, any county, municipality, or other political subdivision, shall construct, reconstruct or repair any reservoir, dam, or waterway obstruction, without a permit from the Department of Geology, Mines and Water Resources in writing, previously obtained upon written application made therefor to your Department. This section further provides that it shall not be applicable "to any reservoir with a storage capacity of less than one million gallons." As we understand it, waste stabilization lagoons will in almost every instance constitute impoundments of more than one million gallons of water. Information received from the State Department of Health indicates that the stabilization process consists largely of the interactions of bacteria and algae, with bacteria digesting and oxidizing the organic constituents of sewage and rendering it innocuous.

The term "reservoir" in its usual and ordinary sense is defined by Webster's International Dictionary, Second Edition, as "a place where water is collected and kept for use when wanted." See *Bliss v. Dority,* 225 P. 2d 1007 (N. M.); *Twin Lakes Reservoir & Canal Company v. Sill,* 89 P. 2d 1012 (Colo.); *United States v. Water Company,* 48 F. 2d 689; *Howell v. Big Horn Basin Co.,* 81 P. 785 (Wyo.); *Hutchinson v. Chicago & N. W. Rwy. Co.,* 37 Wis. 582. In 41 Opinions of the Attorney General 161, we noted the cited definition of the term "reservoir" with approval, and held that the Legislature intended that any impoundment of water in excess of one million gallons would constitute a reservoir within the meaning of Section 721(a) and be subject to the jurisdiction of your Department. Specifically, we said:

> ". . . The Legislature clearly intended that where a quantity of water of a million gallons or more was impounded, the Water Resources Commission (Department of Geology, Mines and Water Resources) should possess the powers of control specified in this section, in view of the fact that public safety and welfare are obviously affected by the impounding in one location of large quantities of water."

Section 724 of Article 66C of the Code, provides that your Department set a day for a public hearing upon an application to construct a reservoir, and further provides that satisfactory notice thereof be given to the public and designated government officials. You inquire whether such provisions must be followed when an application to construct a waste stabilization lagoon is received by your Department. We have reviewed these provisions and find them to be mandatory. Accordingly, your inquiry as to the applicability of Section 724 with respect to waste stabilization lagoons must be answered in the affirmative.

We recognize that waste stabilization lagoons are unique sewage treatment facilities. We are further cognizant of the fact that the State Department of Health is vested

with broad control over the construction of sewerage systems and refuse disposal plants, including authority to pass upon the design, plans and construction specifications thereof, so as to protect the public health and comfort. Undoubtedly, the sanitary and engineering experts of the State Department of Health, in exercising these powers, necessarily do so with the fullest regard for the safety aspects of the construction and there may well be some practical duplication of effort between the function of your Department and that of the Health Department. Nevertheless, the powers vested in your Department by Section 721(a) are clear, and unless and until the Legislature changes the law to exempt waste stabilization lagoons from the provisions of the section, we hold that such lagoons must be treated by you as reservoirs, subject to the prior permit provisions hereinbefore specified.

THOMAS B. FINAN, *Attorney General.*

ROBERT C. MURPHY, *Assistant Attorney General.*

DRUGS

NARCOTIC DRUGS—PHYSICIANS—SURGEONS—OSTEOPATHS —VETERINARIANS—CHIROPODISTS—ADMINISTERING OF DRUGS DISPENSED ONLY UPON WRITTEN PRESCRIPTION.

May 17, 1961

Dr. Frank K. Morris, Secretary,
Board of Medical Examiners.

The Board of Medical Examiners has asked this office the following question: "Who are the practitioners licensed to administer a drug which shall be dispensed only upon written prescription?" It is our understanding that you wish our answer to this question to enumerate such practitioners in terms of their practice, such as osteopathic physicians and surgeons, dentists, chiropractors, veterinarians, chiropodists, etc.

In this connection, we should like to call to your attention the following provisions of Article 27, Annotated Code of Maryland (1957 Edition):

> *"Section 283. Use Restricted.*
>
> A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivision thereof, and the master (of a ship) or a person in charge of any aircraft upon which no physician is regularly employed, or a physician or surgeon duly licensed in some state, territory, or the District of Columbia, to practice his profession, or a retired commissioned medical officer of the United States Army, Navy, or Public Health Service employed upon such ship or aircraft who obtains narcotic drugs under the provisions of this sub-title or otherwise shall not administer, nor dispense nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this sub-title.

"Section 284. Sale by pharmacists.

A pharmacist in good faith, may sell and dispense narcotic drugs to any person upon the written prescription of a physician, dentist or veterinarian, provided it is properly executed, dated and signed by the person prescribing on the day when issued and bears the full name and address of the patient for whom or of the owner of the animal for which, the drug is dispensed, or upon oral prescription, in pursuance of the regulations promulgated by the Secretary of the Treasury of the United States, or his delegate, under the provisions of the Federal Narcotics Act as amended, and regulations promulgated by the State Department of Health as hereinafter set forth in § 299 of this sub-title, provided said oral prescription is promptly reduced to writing by the pharmacist, stating the name of the physician, dentist or veterinarian so prescribing, the date bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and in all instances, the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this sub-title. The prescription shall not be refilled.

"The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer,

wholesaler, pharmacist or pharmacy owner but only upon an official written order.

"A pharmacist only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes.

"Section 285. Professional use by physicians, dentists and veterinarians; return of unused portion of drugs not required by patient.

A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe on a written prescription, administer or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, providing he is required by those laws to be so registered.

"A veterinarian in good faith and in the course of his professional practice only and not for use by a human being, may prescribe on a written prescription, administer and dispense narcotic drugs and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is pre-

scribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered.

"Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient.

"*Section 286. Preparations exempted.*

"Except as otherwise in this sub-title specifically provided, this sub-title shall not apply to the following cases:

"(1) Administering, dispensing, or selling at retail any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation in one avoirdupois ounce, not more than one grain of codeine or of any of its salts, or not more than one-sixth grain of dihydrocodeinone or of any of its salts, or not more than one-fourth grain of opium when contained in compound opium and glycyrrhiza mixture as defined in the national formulary.

"(2) The exemptions authorized by this section shall be subject to the following conditions: (a) That the medicinal preparation administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and (b) that such preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this subtitle.

"(3) Nothing in this section shall be construed to limit the quantity of codeine or of any of its salts that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed or sold in compliance with the general provisions of this sub-title.

"Section 287. Records to be kept.

"Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such person using small quantities or solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solution or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

"Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of this sub-title.

"Pharmacists and pharmacy owners shall keep such records of narcotic drugs as the federal government now requires, or may hereafter require.

"The keeping of a record required by or under federal narcotic law, shall constitute the only record required to be kept by every person who purchases for resale or who sells narcotic drugs."

It is our view then, pursuant to the above sections, that a physician, dentist and veterinarian may prescribe on a written prescription, administer, or dispense narcotic drugs, subject to the limitations set forth herein.

In connection with chiropodists, we call your attention to 42 Opinions of the Attorney General 225 wherein, in connection with Article 43, Section 453 of the Annotated Code of Maryland 1956 Supp., and on the authority of 26 Opinions of the Attorney General 277, 278, we concluded that chiropodists are authorized to use narcotic drugs in preparing local anesthetics and medicated preparations to be used in connection with the treatment of the feet, but that they are not authorized to use or prescribe them for any other purpose.

Osteopathic physicians and surgeons, licensed under Article 43, Section 119, et seq. and Section 247, et seq. would also be entitled to prescribe on a written prescription, administer or dispense narcotic drugs, subject to the Code limitations. Osteopaths not licensed under both of the above indicated sections of Article 43 clearly may not prescribe on a written prescription, administer or dispense narcotic drugs.

It goes without saying that prescribing, administering or dispensing of narcotic drugs may be done by such practitioners only in the course of their professional practices.

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Assistant Attorney General.*

EDUCATION

CECIL COUNTY BOARD—STATUS OF ACT CREATING FIVE-MEMBER BOARD AFTER VETO OF ACT INCREASING TO FIVE THE NUMBER OF COUNTY COMMISSIONER DISTRICTS.

May 15, 1961.

Hon. Richard D. Mackie,
Member of the House of Delegates.

Mr. J. Evans McKinney, Chairman,
Democratic State Central Committee.

Each of you, in separate letters, has requested our opinion as to the legal status of Senate Bill 362, Chapter 657, of the Acts of 1961, which increased the membership of the County Board of Education for Cecil County from three members to five members. The question arose due to the fact that House Bill 568, vetoed, sought to increase the membership of the Board of County Commissioners from three to five, and to divide the County into five County Commissioner Districts, instead of three districts, which now exist. Although the latter bill passed both houses of the General Assembly, you have informed us that it was vetoed by His Excellency, Governor Tawes.

The problem which occurs to you, and which you have transmitted to us, seems to be as follows: Since Senate Bill 362 seems to contemplate the appointment of members of the Board of Education from each of the five new County Commissioner Districts proposed to be created by House Bill 568, can Senate Bill 362 be legal and operative when, in fact, those five County Commissioner Districts have not been created, and there are presently, and apparently will remain, only three County Commissioner Districts?

The Court of Appeals has stated a fundamental principle of statutory construction in *Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 95 A. 2d, 306. That principle is that "it is presumed that the Legislature intends to

impart to each of its enactments a meaning that will render it operative and effective, and in case of doubt the court will construe an enactment in such a way as to carry out that purpose."

Construing Senate Bill 362 in light of the above principle, we note that the General Assembly did not make that bill conditional upon the enactment of House Bill 568. Furthermore, it did not provide that the members of the County Board of Education should be appointed from each of the five County Commissioner Districts, but provided only that "one member of said board shall be appointed from each County Commissioner District in Cecil County". Under the circumstances, we must consider Senate Bill 362 without reference to House Bill 568, and must interpret it solely on the basis of the language contained therein.

Since Senate Bill 362 clearly states that the Board of Education shall be composed of five members, we must conclude that such was the intention of the General Assembly. Since the bill further provides that one member shall be appointed from each County Commissioner District, we must conclude that such five-member Board must include one member appointed from each of the three County Commissioner Districts in Cecil County. There is no other conclusion than that the remaining two appointments can be made at large.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

EDUCATION—STATE TEACHERS COLLEGE—TENURE OF INSTRUCTORS—TERMINATION OF CONTRACT AT END OF FIRST OR SECOND YEAR NOT DISMISSAL REQUIRING SPECIFIC CHARGES AND HEARING.

July 7, 1961

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

You have referred to this office the matter of the termination of the teaching contract of Dr. Sheila A. Moats, formerly a faculty member at State Teachers College, Bowie, Maryland, by the President of that institution, Dr. William E. Henry. You have indicated that Dr. Moats has served on the faculty for no longer than two years and that the termination of her contract occurred in the following manner: the Dean of Instruction at State Teachers College, Bowie, Maryland, did not recommend her to the President for reappointment, and the President in turn did not recommend her to the Board of Trustees for reappointment. No specific reasons were given for this action and you have asked us whether or not Dr. Moats, under the circumstances, is entitled to know the specific reasons for the termination of her contract and whether she is entitled to a hearing before the Board of Trustees in reference to the possibility of reappointment.

Section 165 of Article 77 of the Annotated Code of Maryland sets forth the duties of the Board of Trustees for each of the State Teachers Colleges and provides among other things that the Board shall "fix the salaries and tenure of all teachers". The same section also provides "they may dismiss any teacher or any assistant for immorality, dishonesty, misconduct in office, incompetency, insubordination and willful neglect of duty, but no teacher or professional assistant may be dismissed without being given a copy of the charges against him and an opportunity of being heard in person or by counsel, in his own defense, upon not less than ten days' notice." There is no other provision in the law applicable to the tenure of teachers at the State Teach-

ers Colleges. The initial inquiry, therefore, is whether or not the above quoted provisions of the statute in themselves create tenure for teachers, in the sense in which that term is universally recognized under laws relating to the employment of teachers in public institutions, whereby no teacher having attained such status may be dismissed or terminated without good cause and an opportunity to be heard. Ordinarily those sections would not have that effect since tenure is strictly a creature of statute and the right thereto exists only in accordance with and subject to the precise conditions laid down in a statute creating it. Nothing in Section 165 purports to create tenure or to set forth any conditions for the attainment thereof.

However, that section does authorize the Board of Trustees to fix the tenure of all teachers, and our next inquiry must be whether or not the Board of Trustees has exercised this duty and, if so, what conditions the Board has imposed upon the attainment of tenure. In By-law 66 the Board of Trustees has set forth a uniform contract for teachers in the State Teachers Colleges. That contract is in all important respects similar to the contract set forth in By-law 14 pursuant to Section 64 of Article 77 of the Annotated Code of Maryland, as the uniform contract for teachers in the public schools of the State. Each of these contracts contains the following clause: "And it is further agreed that either of the parties to this contract may terminate it at the end of the first or second school year by giving thirty days' notice in writing to the other during the month of June or July."

The contract embodied in By-law 14 provides: "This contract shall continue from year to year, subject to the aforegoing conditions, provided that if the teacher, on recommendation of the County Superintendent, is suspended by the County Board of Education in accordance with the provisions of Sections 64 and 102 of Article 77 of the Annotated Code of Maryland, 1957 Edition, said teacher shall have the right of appeal to the State Superintendent of Schools, if the decision of said board is not unanimous."

The contract set forth in By-law 66 contains similar language, as follows: "This contract shall continue from year to year, subject to the aforegoing conditions, provided that if the teacher is recommended for dismissal by the President of the College in accordance with the provisions of Sections 165 and 166 of Article 77 of the Annotated Code of Maryland, said teacher shall have the right of being heard by the State Board of Education and the State Superintendent of Schools sitting as the Board of Trustees of said college."

In 1933 the Court of Appeals of Maryland, in the case of *County Board of Education for Washington County v. Cearfoss, et al.*, 165 Md. 178, held that the standard teacher's contract set forth under By-law 14, together with Section 64 of Article 77 of the Annotated Code, and with due consideration to the Teachers' Retirement System of the State of Maryland, established tenure for teachers in the public schools of the State subject to the conditions of the contract. In construing the contract in relation to the law, the Court said at 165 Md. 187:

> "The agreement quoted in each of the declarations evidently contemplated a normally continuing tenure for the teachers thereby engaged. It was stipulated that either of the parties to the contract could 'terminate it at the end of the first or second school year by giving thirty days' notice in writing to the other during the month of June or July,' and that, if the teacher wished to vacate her position after the second year, thirty days' notice in writing should be given to the County Board of Education, during June or July, except in case of emergency, of which the board should be the judge. Subject to those conditions, it was expressly provided that the contract should continue from year to year, unless the teacher were suspended or dismissed under the provisions of Section 86 of Article 77 of the Code, which permits such action after hearing on charges of immorality, dishonesty, intemperance, insubordination, incompe-

> tency or willful neglect of duty. In view of the Teachers' Retirement System, with due regard to which the agreement was formulated by the State Board of Education, the contractual purpose to assure the teacher a continuity of service, in the absence of substantial reasons for its termination, becomes more significant. From the salaries of teachers becoming members of the retirement system there are annual contributions to a fund out of which they are to receive annuities after prolonged periods of teaching service. Consistently with this policy, the contracts with the teachers evidently designed that they might rely, after the first year, upon a tenure to continue until abrogated for sufficient cause. It would not be proper, however, to construe the contract as tending to assure to the teachers a permanency of employment. The officials in charge of the public school system would have no authority to assume for it the financial burdens which might result from such a contractual obligation. Changing conditions, such as the abandonment of certain courses of instruction, of the consolidation of schools, might reduce the number of positions for which teachers are required. In such event a teacher thus affected, whose tenure is of indefinite duration, could not rightfully demand payment for services not needed nor actually rendered. But it is the teacher's right, when complaining of a dismissal in breach of the contract of employment, to be presented with a valid reason for the discharge."

It is clear then that the Court of Appeals has held that under our laws as set forth in Article 77, and as implemented by By-law 14 relating to teachers' contracts, tenure has been created subject to the condition that a teacher's contract may be terminated at the end of the first or second school year by giving thirty days' notice as set forth in the contract. Tenure would begin, therefore, only after the failure of the County Board of Education to give notice of termi-

nation during the month of June or July at the end of the teacher's second school year. The provisions of the statute as to the grounds for suspension or dismissal and as to notice and opportunity to be heard must, therefore, apply only after such tenure has begun, or when such suspension or dismissal occurs during the term of the first or second year contract. Those provisions have no application to the termination of the contract at the end of the first or the second year which must be considered a probationary period.

Since the provisions of By-law 66 are substantially similar to those of By-law 14, it must be concluded that the same legal conclusion is reached thereunder and that Mrs. Moats was properly severed from the faculty and has no right to a hearing to determine the merits of that severance.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

EDUCATION—STATE BOARD—AUTHORITY TO REVIEW DECISION OF COUNTY BOARD—"VISITATORIAL POWER".

November 27, 1961.

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

On October 19, 1961, you reported to us that you have received a letter from Attorneys Juanita Jackson Mitchell and Tucker R. Dearing, as members of the Legal Redress Committee of the National Association for the Advancement of Colored People, presenting an appeal by a certain Mrs. Margaret Johns, as mother and next friend of Thomas Moorehead and Timothy Moorehead, infants, from the refusal of the Superintendent of Schools of Harford County to approve the application of the aforesaid infants for transfer to Aberdeen High School. You have reported further that on October 3, 1961, at your request, one of the appellants' attorneys sent you a supplemental letter elaborating to some extent upon the facts underlying the proposed appeal. As presented in that letter, those facts are as follows:

> ". . . this mother made a timely application in July, 1961, for the transfer of her sons, Thomas and Timothy Moorehead, 15 years of age, to the eleventh grade of the integrated Aberdeen High School from the segregated Havre de Grace Consolidated School.
>
> "After subjecting the twin boys to a series of tests, the Superintendent of Schools of Harford County, Dr. Charles W. Willis, informed Mrs. Johns on Wednesday, September 6, 1961, the day school opened, that because of the test results, the applications for transfer were not approved, whereupon this appeal was taken."

Although detailed particulars of the proposed appeal have not been furnished, we can gain some insight into the basic underlying facts from the three cases decided by the United States District Court for the District of Maryland: *Moore*

v. Board of Education of Harford County, 146 F. Supp. 91 (1956); *Moore v. Board of Education of Harford County*, 152 F. Supp. 114 (1957) and *Pettit v. Board of Education of Harford County*, 184 F. Supp. 452 (1960), in each of which cases the Court, Thomsen, C.J., considered and outlined the plan of orderly desegregation of the public schools of Harford County adopted by the Board of Education of that County, pursuant to the requirements of the Constitution, as declared by the Supreme Court of the United States.

A complete review of those underlying facts is necessary for proper consideration of the present proposed appeal.

Until June, 1955, the public schools of Harford County were completely segregated. On June 30, 1955, one month after the second decision of the Supreme Court in *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, a Citizens Consultant Committee, composed of thirty-one white and five Negro members, was appointed by the Harford County Board of Education to study the problems inherent in school integration and to recommend steps to be taken by the Board to carry out the Supreme Court's decision. This Committee, after dividing into subcommittees, presented its final report on February 27, 1956, and adopted a resolution recommending that any child, regardless of race, be allowed to make individual application to the Board for a transfer to a school other than that which he attended and that such application should be considered under rules and regulations of the Board in accordance with available facilities in such schools. It further recommended that this procedure become effective as of September, 1956. The County Board of Education adopted this resolution on March 7, 1956, and on June 6, 1956, adopted a "Transfer Policy", setting up certain procedural steps to be followed and certain limitations upon the right to transfer from school to school. On August 1, 1956, the County Board of Education adopted a "Desegregation Policy", the avowed purpose of which was to effectuate an "orderly, gradual transition, based on the solution of varied local school problems." Pursuant to the aforesaid policy, fifteen of sixty applications for transfer by Negro pupils were granted in August, 1956.

Prior to fruition of any of the above steps, twenty-one Negro children, through their parents and next friends, brought suit in the United States District Court for the District of Maryland against the County Board of Education, alleging a failure on the part of the Board to desegregate or devise a plan for desegregation (Civil Action No. 8615). That case was heard on a legal point on March 9, 1956, at which time the complaint was dismissed by stipulation of the parties, relying upon the resolution adopted by the County Board on March 7, 1956. Four of the infant plaintiffs therein, however, were among the forty-five children whose applications for transfer were later denied, in August, 1956. Those four instituted suit in the United States District Court for the District of Maryland (*Moore v. Board of Education of Harford County,* 146 F. Supp. 91) on August 28, 1956, seeking to have their transfer applications granted. The result of that case, insofar as it affects the present questions, was a holding by the Court that the plaintiffs could not achieve relief in the courts until they had exhausted their administrative remedies by means of an appeal to State Board of Education from the County Superintendent's refusal to allow their transfers, such appeal being prescribed by the Maryland law relating to public education. The Court further held that Harford County had made a prompt and reasonable start toward compliance with the ruling of the Supreme Court, but withheld opinion as to the propriety or sufficiency of the "Desegregation Policy" of August 1, 1956.

In accordance with the Court's holding, the infant plaintiffs appealed to the State Board of Education. While their appeals were pending, the Board of Education of Harford County adopted an "Extension of the Desegregation Policy for 1957-1958", dated February 6, 1957, applying to transfer in the elementary schools of the County, and requiring review of each transfer application by the County Board at its June, 1957, meeting. The State Board of Education, recognizing this "Extension", as well as the "Policy" of August 1, 1956, and finding that the County Superintendent had acted in good faith, dismissed the appeals after a hearing

as prescribed by law. Thereupon, the action in the United States District Court was rescheduled for hearing, the plaintiffs having exhausted their administrative remedy. That hearing was held on April 18, 1957, at which time the County Superintendent explained and amplified the "Extension" of February 6. That "Extension", as so explained and amplified, was tentatively held by the Court to be satisfactory for the elementary grades, but insufficient for the high school grades, and the parties agreed to attempt to work out a satisfactory plan. The County Board thereafter, on June 5, 1957, adopted a modified plan which was presented to the Court at a hearing on June 11. This modified plan added a program relating to high schools, whereby any student could apply for a transfer to a school nearer his home, during the period July 1 to July 15 of each year. Such application was to be evaluated by a committee consisting of the principals of the two high schools concerned, the Director of Instruction, and the County Supervisors working in the schools. The applications were to be granted or denied on an individual basis, by evaluation of the probability of success and adjustment of each applicant, such evaluation partly to be determined by the results of standardized intelligence and achievement tests.

This plan, as modified, was approved by the Court in its opinion in *Moore v. Board of Education of Harford County*, 152 F. Supp. 114 (1957), wherein the Court stated at page 119:

> "This plan is different from any to which my attention has been called or about which I have read. It is an equitable way of handling the transition period. My only doubt is whether it is necessary to postpone until September, 1958, the complete desegregation of the seventh grade. But I am not charged with the responsibility of administering the Harford County public school system. Although I think the reasons given for the delay of one year are less satisfactory than the reasons given for the rest of the plan, a federal court should be slow to say that the line must be drawn

> here and cannot reasonably be drawn there, where the difference in time is short and individual rights are reasonably protected, during the transition period, as they are by the June 5, 1957, modification."

The Court went on to say, however:

> "I will, therefore, enter a decree which will spell out the rights of individual children under the plan, *and will retain jurisdiction of the case, so that if any child or his parents feel that his application has been rejected for a reason not authorized by the modified plan, a prompt hearing may be granted.*"

Such approval was affirmed by the Court of Appeals for the Fourth Circuit, *Slade v. Board of Education,* 252 F. 2d 291, cert. den., 357 U. S. 906, 78 S. Ct. 1151.

In 1951, when all elementary schools of the County were desegregated, and the high schools were desegregated through the eighth grade, under the modified plan mentioned above, as well as through the normal advancement of Negro children through the desegregated elementary schools into the high schools serving their district, a certain George D. Pettit, a Negro, applied to transfer his son from an all-colored "consolidated" school in the County to the Aberdeen High School. His application was disapproved on the basis of his prior scholastic grade achievement and the results of certain tests. He appealed to the State Board of Education, under Article 77, Sec. 144, Annotated Code of Maryland (1957 Ed.), and was granted a hearing. The State Board, however, held that the application was denied by the committee constituted to consider transfer applications, not by the County Superintendent, and that the Court's decree in the second *Moore* case, *supra,* constituted that committee an arm of the court. Therefore, the Board concluded, since its appellate review power applies only to decisions of the County Superintendents, it had no power to review the denial of Pettit's transfer application.

Thereupon, having exhausted his possible administrative remedies, Pettit brought suit in the United States District Court seeking a determination (1) whether the plan for desegregation of the Harford County Schools was still equitable; (2) whether his son had properly been denied admission to Aberdeen High School in 1958 and 1959, and (3) whether the County Board should be required to admit his son to the tenth grade of Aberdeen High School in 1960.

The Court held that the plan of desegregation was still valid and need not (as of May, 1960) be disapproved, but that the pupil was improperly denied admission to Aberdeen High School in 1958 on the ground that the inferior curriculum at the segregated school which he was then attending entitled him to transfer both under the pre-*Brown*, "separate-but-equal" doctrine and under the *Brown* rule. On this basis it was unnecessary for the Court to consider the action of the Committee in denying the transfer under the criteria of the June, 1957, plan. See, *Pettit v. Board of Education of Harford County*, 184 F. Supp. 452 (1960).

In a strong dictum in its opinion in the above cited case, however, the Court noted its disagreement with the conclusion of the State Board of Education that the committee (to consider transfer applications) is an "arm of the court". The Court denied that its decree in the second *Moore* case had such effect, and stated that, under Maryland law, an appeal as to administrative problems involved lies to the State Board from the combined actions of (1) evaluation by the committee; (2) approval or disapproval by the County Board based on such evaluation, and (3) communication of the formal rulings thereon to the applicants by the County Superintendent.

The Court heightened the effect of this dictum by stating, at 184 F. Supp. 459:

> "I hope that the State Board will be willing to pass on such administrative and educational questions in the future; otherwise it would be futile

for this Court to continue to insist that applicants appeal to the State Board before seeking relief in this Court."

QUESTION INVOLVED HERE

The question which you have directed to us in the instant matter necessitates an answer as well to the implied question raised by the court in the *Pettit* case. That question, however, is not one of the willingness of the State Board to pass on the administrative and educational questions involved in such appeals, for the Board's willingness to do so cannot be doubted, but is rather whether the State Board has the authority and power to do so.

DISCUSSION

We readily agree with and adopt the statement of the Court that the "Committee" is not an arm of the court, although its exact status under the Maryland law is far from clear. With the deepest respect, however, we must here give further study to the authorities underlying the Court's statement that an appeal lies to the State Board, under Maryland law, from the approval or disapproval of the applications by the Board of Education of Harford County. We cannot take the position, as advocated by two members of the State Board, that the Court's statements in the *Pettit* case constitute a judicial finding that the State Board has jurisdiction in such cases (although this would indeed be the easiest path). This question was not before the Court in that case, and was not decided by it. The statements were, in our opinion, advisory rather than decisional.

The question, therefore, requires painstaking examination, and a clear statement of position, so that if, as the Court suggests, an appeal to the State Board be futile in such cases, due to a lack of power or authority in the Board, interested parties be made aware of this in order that they not encounter unnecessary delay in seeking relief. Although the Board may be the most appropriate forum to decide such educational and administrative ques-

tion, if it has no power to do so under the law, redress, if any, must be sought in the courts.

In *Robinson v. Board of Education of St. Mary's County*, 143 F. Supp. 48 (D.C. Md. 1956) the Court considered, on a motion to dismiss, the question raised by certain Negro children, through their parents and next friends, as to whether a prompt and reasonable start had been made by the school officials of St. Mary's County toward desegregation. The County Superintendent of Schools was named as a respondent in the case. One of the defenses raised by the county board was that the complainants had failed to exhaust their administrative remedies. At the request of the Court, the then Attorney General of Maryland appeared as *amicus curiae* and, in answer to specific questions of the Court, presented the following opinion, as summarized by the Court:

> "(1) No appeal lies to the State Board from the action of a County Board; but an appeal does lie to the State Board from the action of a County Superintendent who has decided a controversy or dispute; and since the County Superintendent is the executive officer of the County Board, in practice it often amounts to the same thing. (2) A Negro child whose application to attend a particular school is denied by the County Superintendent would have a right of appeal to the State Board, but not to the County Board."

The Court apparently accepted and adopted this opinion, stating:

> ". . . I concur in the opinion of the Attorney General that *individual Negro children now have the right to apply under sec. 124 for admission to a particular school, and that from the decision of the County Superintendent on such application an appeal lies to the State Board.*"

The question here involved, however, is not the right of appeal from a decision of the County Superintendent, which right is clearly given in Article 77, Section 150 of the

Annotated Code of Maryland (1957 Ed.), but rather the right of appeal from a decision of the County Board of Education. Under the "Modified" plan of Harford County, dated June 5, 1957, applications for transfer are made to the County Board and are approved or disapproved by it. As the Court pointed out in the *Pettit* case, the County Superintendent's action consists of transmitting the decision to the parties involved. This is not a decision on his part from which an appeal would lie. Article 77, Secs. 2 and 3, Annotated Code of Maryland (1957 Ed.) makes it clear the County Boards control educational matters affecting their respective counties, and the State Board controls those matters affecting the State.

On the other hand, a broader and more general duty and power than that of deciding appeals from decisions of the County Superintendents has been bestowed upon the State Board. Article 77, Sec. 21 of the Annotated Code of Maryland (1957 Ed.) provides:

> "The State Board of Education shall explain the true intent of the law, and they shall decide, without expense to the parties concerned, all controversies and disputes that arise under it, and their decision shall be final; . . ."

In commenting upon this grant of power, the Court of Appeals of Maryland has held that it constitutes a "visitatorial power of the most comprehensive character." See *Wiley v. School Commissioners,* 51 Md. 401. In *Shober v. Cochrane,* 53 Md. 544, a contest over the office of "legal secretary to the Board of County School Commissioners of Allegany County," the Court held that "the power to decide the matter in dispute was vested in the State Board of Education." The philosophy underlying this grant of power was expressed by the Court in the *Wiley* case, *supra,* as follows:

> "If every dispute or contention among those entrusted with the administration of the system, or between the functionaries and the patrons or pupils of the schools, offered an occasion for a

> resort to the Courts for settlement, the working of the system would not only be greatly embarrassed and obstructed, but such contentions before the Courts would necessarily be attended with great costs and delay, and likely generate such intestine heats and disvisions as would, in a great degree, counteract the beneficient purposes of the law. It is to obviate these consequences that the visitatorial power is conferred; and wherever that power exists, and is comprehensive enough to deal with the questions involved in an existing controversy, as in the case here, Courts of equity decline to interfere, and leave the parties to abide the summary decision of those clothed with the visitatorial authority."

This power, of course, is limited so as to proclude the State Board from deciding purely legal questions, *Board of Education v. Cearfoss*, 165 Md. 178, but is clearly not limited to appeals from decisions of the County Superintendents. In *Zantzinger v. Manning,* 123 Md. 169, 180, the court stated:

> "We have referred to the last mentioned case at some length because there, as in this case, the question determined by the State Board was which of two persons was to be recognized as the teacher of a school. The statute did not provide for an appeal to the State Board, and what is now section 55 of the Code of 1912 declared that the decision of the School Commissioners should be final. But the authority of the State Board to decide the question and to advise the School Commissioners was held to rest upon the provisions of the law conferring upon the former the visitorial power referred to, and Judge Boyd said that section 55 only meant that the decision of the School Board should be final as to the trustee."

In *Underwood v. School Board,* 103 Md. 181, the court stated:

"So regardless of the question whether there was, technically speaking, an appeal from the action of the County Board in this matter, it forwarded to the State Board copies of the letters of the trustee to Mrs. Nalley, which was all that was necessary for them to have, to determine that question, and the State Board by its resolution explained 'the true intent and meaning of the law', and advised the County Board of its action * * *".

CONCLUSION

Technically speaking, there is no "appeal" from a decision of the Board of Education of Harford County to the State Board of Education. However, under the broad visitorial power bestowed by Article 77, Sec. 21, the State Board has the power, whether it be considered a technical appeal or not, to review such decision. Where the matter in controversy affects the State or involves the general care and supervision of public education, the State Board has the duty, under Article 77, Sec. 2, to take appropriate action. The philosophy of the law as expressed in the *Wiley* case, *supra,* demands that the State Board exercise its power. The opinion of the United States District Court for the District of Maryland in the *Pettit* case, *supra,* directs the State Board to exercise its power.

Therefore, notwithstanding any technicalities as to the "right of appeal", it is our opinion that the State Board has the power to hear and determine the matters presented in the letter of October 19, 1961, and that the Board should exercise that power.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Asst. Attorney General.*

ELECTIONS

CONGRESSIONAL REDISTRICTING ACT SUBJECT TO REFERENDUM—IF ON REFERENDUM, CONGRESSMEN TO BE ELECTED AT-LARGE.

April 11, 1961

Hon. Blair Lee, III
Silver Spring, Maryland

Re: Senate Bill No. 271

We have your letter of April 6, 1961, asking for an opinion with respect to a possible referendum on the congressional redistricting bill that was enacted at the 1961 session of the General Assembly. You set forth four questions, as follows:

1. May a congressional redistricting act be made the subject of a public referendum?

2. If the bill is placed on referendum, would the candidates for Maryland's new congressional district have to run at-large in the 1962 elections?

3. If the above questions are answered in the affirmative, would the candidates for the at-large district be subject to the county unit voting system in the primary elections, or would they be nominated by popular vote?

4. If the winning candidate for an at-large seat in Congress were a resident of some part of the State other than Prince George's or Howard Counties, and if the redistricting bill were ratified by the electorate in 1962, would the winning candidate be able to serve out his term despite the fact that he was not a resident of the 8th district, as defined in the bill?

(1) Senate Bill No. 271 amends the provisions of Article 33, Sections 158 through 166, and creates a new Eighth Congressional District for the State of Maryland. This Bill, in its terms, is an ordinary piece of legislation and therefore, in our opinion, would be subject to the provisions of.

Article XVI of the Constitution of Maryland relating to referenda. We are supported in this conclusion by the case of *Ohio v. Hildebrant*, 241 U. S. 565, 60 L. Ed. 1172. In that case it was held that a congressional redistricting act passed by the General Assembly of Ohio, redistricting the state for the purpose of congressional elections, was subject to referendum as set forth in the Ohio Constitution. The court held as follows:

> "As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit."

Based upon this decision, it is our conclusion that the redistricting act may be made subject to a referendum.

(2) If the congressional redistricting act is placed on the ballot by way of referendum, it is our opinion that the candidates for the new congressional district will be required to run at-large. Title 2 U. S. C. A., Section 2a. provides in part as follows:

> "* * * Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: * * * (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; * * *".

The Supreme Court of the United States has come to the same conclusion in the case of *Smiley v. Holm,* 285 U. S. 355, 76 L. Ed. 795.

(3) It is our opinion that the candidates for election to Congress in 1962 would be at-large, and therefore would be subject to the unit voting system in primary elections. Article 33, Section 79 (b) provides that the candidates of the political parties for United States Senator, Governor, Attorney General and Comptroller shall be nominated in the manner prescribed in this Article by State conventions. Section 80 thereof provides that the candidates receiving the highest vote in any county or legislative district shall receive the vote of the delegates from such county or legislative district in the State convention. Although Congressman-at-large is not specifically enumerated in Section 79 (b), it is our opinion that since this candidate must run in the entire State, it was the intention of the General Assembly to require him to be subject to nomination by the State convention, and therefore said candidate would be nominated by the unit voting system set forth in Section 80. See also Title 2, USCA, Section 5.

(4) Assuming, as you do in your question, that the redistricting bill is ratified by the electorate in the 1962 general election, it is our opinion that the person elected from the State at-large would be allowed to serve out the entire term despite the fact that he may or may not be a resident of the Eighth District as set out in the redistricting act. Once an individual has been elected and qualified to the Congress of the United States, he serves for his full term under the provisions of the Constitution of the United States, and the subsequent approval by the electorate of the redistricting bill would not disqualify said individual from completing his term in Congress, regardless of his residence.

THOMAS B. FINAN, *Attorney General.*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

ELECTIONS—CANDIDATES FOR ELECTION AND RE-ELECTION FOR OFFICE OF JUDGE OF THE MUNICIPAL COURT OF BALTIMORE CITY MUST RUN IN PRIMARY ELECTIONS, BUT WITHOUT PARTY DESIGNATION, AND THE NAMES OF THOSE NOMINATED IN EACH PRIMARY SHOULD APPEAR ON THE GENERAL ELECTION BALLOT IN ALPHABETICAL ORDER AND WITHOUT PARTY DESIGNATION OF ANY KIND.

May 18, 1961

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

We have your letter of May 3, 1961, in which you asked certain questions pertaining to the recently established Municipal Court of Baltimore City. You have asked us if, under subsections (B) (1) through (4) of Section 41C of Article IV of the Maryland Constitution, candidates for the office of judge of the Municipal Court must run in the primary election, and if such candidates shall run in the primary election, should they have party designation, and if not, how is it to be determined which candidates shall run in the general election.

In answering the above questions it is necessary for us to consider subsections (3) and (4) of Section 41C(B), which provide:

> "(3) In order to qualify for election or re-election a candidate shall file a certificate of candidacy with the Supervisors of Elections of Baltimore City not later than midnight of the day which is ten weeks or seventy days prior to the day on which the primary election should be held.
>
> "(4) The names of all candidates for judge of the Municipal Court created herein shall be placed in the voting machines without any party label or other distinguishing mark or location which might

directly or indirectly indicate the party affiliation of any such candidate."

Neither of the subsections quoted above is entirely new to the law, but rather each is a rearrangement or restatement of previously existing law pertaining to elections in Maryland in general and to election to certain judicial offices in particular. Subsection (3), quoted above, is essentially the same provision pertaining to the time for the filing of certificates of candidacy for any elective office in Maryland, which provisions are contained in Article 33, Section 56(a), Annotated Code of Maryland (1957 Edition). Subsection (4), quoted above, is similar to the provision contained in Article 33, Section 94(e), providing that the names of all candidates for judge of the Circuit Courts for the several counties or the Supreme Bench of Baltimore City or for judge of the Court of Appeals shall be excepted from the general provision that the designation of the party which a candidate for public office represents or with which he is affiliated shall be placed on the ballot adjacent to the name of the candidate. We believe it obvious, therefore, that the purpose of subsections (3) and (4) of Section 41C(B) of Article IV of the Constitution is to place a candidate for the office of judge of the Municipal Court of Baltimore City in the same category as candidates for the judicial offices enumerated in Article 33, Section 94(e). Therefore, we believe it appropriate, in determining the answer to your question, to determine the effect of Section 94(e) of Article 33 insofar as primary elections are concerned.

The provisions of that Article were first enacted by Chapter 703 of the Acts of 1941. In 27 Opinions of Attorney General 126, the Honorable William C. Walsh, then Attorney General, concluded that the effect of the statute was not to excuse or eliminate candidates for the specified judicial offices from participating in a primary election, but rather to allow them to be nominated by both of the major political parties.

"The purpose of the proposal to have the sitting judges, concerning whom you inquire, nominated

> by both the major political parties in the primary . . . , is to eliminate, insofar as possible, any partisanship in the election of the members of the judiciary, and the passage of Chapter 703 of the Acts of 1941, . . . is an indication of legislative approval of this purpose. This purpose is highly commendable and should, if possible, be carried out."

It is true that Section 94(e) of Article 33 is contained in the section of the Code pertaining to general elections. In 31 Opinions of Attorney General 107, however, the Honorable William Curran, then Attorney General, determined that the provisions of that section also pertain to primary elections but interpreted that section as meaning not that the names of judicial candidates should not appear on the primary ballot, but that such names should appear without any party label or other distinguishing mark or location which might directly or indirectly indicate the party affiliation of any such candidate.

We believe that the above conclusions are substantiated by the provisions of Article 33, Section 60 (Chapter 739 of the Acts of 1957), which require that any candidate for a nomination in a primary election be affiliated with the political party whose nomination he seeks, but specifies that its provisions "shall not apply in the case of nominations made at primary elections for the office of judge", which language, we believe, clearly contemplates the participation of judicial candidates in primary elections. The purpose of primary elections is to permit the members of a political party to select their candidates. In *Hennegan v. Geartner,* 186 Md. 551, the Court of Appeals, at page 558, said:

> "The direct primary is a creature of the Legislature, designed for the purpose of permitting the members of a party to select their candidates under official supervision and control."

We believe that the provisions of Article IV, Section 41C (B) (3) and (4), taken together with Article 33, Sec-

tion 60, of the Annotated Code of Maryland (1957 Edition), allow the candidates for the office of judge of the Baltimore Municipal Court to file for the nomination with two or more political parties in the primary election. We believe that to avoid conflict with the provisions of Article IV, Section 41C(B)(4), the names of such candidates should appear on the primary ballot or voting machine without any indication thereon of their personal party affiliation.

We are advised that the course which we outline above is the practice now actually being followed, and which has been followed since the enactment of Chapter 703 of the Acts of 1941. We believe that the failure of the Legislature to prescribe any other course of conduct in those ensuing years is a further indication that this practice is in accord with their intention, insofar as the statutory provisions are concerned.

Accordingly, it is our opinion that candidates for the office of judge of the Municipal Court of Baltimore City must be allowed to file in the primary of every political party, and have their names listed on the ballot of said political party so that the members of that party may consider them for nomination. It logically follows, we believe, that each party shall nominate a number of candidates for the office of judge of the Municipal Court corresponding to the number of offices to be filled thereon, and that any person nominated by one or more such parties is entitled to have his name placed on the ballot in the general election. In accordance with the provisions of Article IV, Section 41C(B)(4), and with the requirements of Article 33, Section 94, of the Annotated Code of Maryland (1957 Edition), pertaining to form and arrangement of ballots, the names of those nominated should appear on the general election ballot in alphabetical order and without party designation of any kind.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

ELECTIONS — CONSTITUTIONAL AMENDMENT ALLOWING CANDIDATES FOR OFFICE OF JUDGE OF PEOPLE'S COURT OF BALTIMORE CITY TO FILE CERTIFICATE OF CANDIDACY NOT LATER THAN THIRTY DAYS BEFORE ELECTION DOES NOT REPEAL STATUTORY PROVISION THAT FORM AND ARRANGEMENT OF BALLOT BE AVAILABLE FOR INSPECTION THIRTY DAYS BEFORE ELECTION.

May 31, 1961

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

We have your letter of May 3, 1961, in which you asked certain questions pertaining to election to the office of Judge of the People's Court of Baltimore City. In your letter you point out that Section 41A(3), Article IV, of the Constitution of Maryland, provides that candidates for election or re-election to the office of Judge of the People's Court should file a Certificate of Candidacy with the Supervisors of Elections of Baltimore City not later than thirty (30) days before the date of the applicable election. You also note that Section 125(d) of Article 33 of the Annotated Code of Maryland (1957 Ed.) provides that the Supervisors of Elections shall, thirty (30) days before any election, have available for inspection the form and arrangement of the ballot label on the face of the voting machines to be used in such election.

You point out that the net result of the two provisions is to require your office, on one and the same day, to make available for inspection the final form of the ballot, and at the same time to accept Certificates of Candidacy from persons whose names shall appear on that ballot. You ask us to advise you regarding this seeming contradiction in the law.

A constitutional provision, of course, takes precedence over any legislative enactment.

> "The Constitution of the State is a higher authority than any act or law of any officer or body

> assuming to act under it, for such an officer or body must exercise a delegated authority subservient to the basic law by which the delegation was made. In case of conflict the Constitution must govern, and the act or law in conflict with it must be held to have no legal validity." *Johnson v. Duke,* 180 Md. 434.

Obviously, this conclusion is true whether the statute in question was enacted subsequent to the adoption of the Constitution, or prior to an amendment thereof, as in the case at hand. In the event of conflict, therefore, the constitutional provision that candidates for election or re-election to the office of Judge of the People's Court shall file not later than thirty (30) days before the date of election, must take precedence over the provisions of Section 125(d) pertaining to the posting of a sample ballot.

Certainly, the People's Court constitutional amendment must also take precedence over Article 33, Section 56(a) of the Code. The provisions of that section, requiring that candidates for public office shall file Certificates of Candidacy not later than the Monday which is ten (10) weeks or seventy (70) days before the primary election, clearly cannot apply to candidates for the office of Judge of the People's Court, in view of the constitutional amendment. The provisions of Section 56(a), however, must be carried out for all offices other than the office of Judge of the People's Court of Baltimore City, since the courts have consistently maintained that where a part of a statute is void, and yet the remainder will carry out the purpose for which it was enacted, the unobjectionable part should be enforced. See *Hagerstown v. Dechert,* 32 Md. 369; *Robey v. Broersma,* 181 Md. 325.

Repeal by implication is not favored by the courts. It is well settled that when two provisions are repugnant to, or inconsistent with, each other, every effort should be made to harmonize these provisions. Only when such harmonization is impossible should repeal by implication be deemed to have taken place. *Thomas v. Field,* 143 Md. 128; *Webb v. Ridgely,* 38 Md. 364.

Are, then, the provisions of Section 41A(3) of Article IV of the Constitution and Section 125(d) of Article 33 of the Code so repugnant to each other as to be incapable of reconciliation? We do not think so.

We believe that substantial compliance with a law may be had by preparing and making available for inspection, not less than thirty (30) days before the election, the form and arrangement of the ballot, showing the position on the ballot of every candidate and every question to be decided thereon, with the exception of candidates for the office of Judge of the People's Court of Baltimore City. It is our further opinion that, as soon as the allotted time for filing Certificates of Candidacy for Judge of the People's Court has expired, the names of the candidates for that office should be inserted on the sample ballot.

We believe that this action will carry out the purpose for which Section 125(d) of Article 33 was originally enacted; that is, to give to candidates for public office the opportunity, at an early date, to advise those interested in their candidacy the exact location of their names on the ballot, and to permit those candidates to prepare election literature advertising the appropriate lever number.

We believe, therefore, that the enactment of the constitutional amendment, now Section 41A(3) of Article IV, has not had the effect of repealing Section 125(d) of Article 33, but has only rendered that section inapplicable insofar as it concerns the office of Judge of the People's Court of Baltimore City.

It is our opinion that by displaying the final form and arrangement of the ballot for all offices other than Judge of the People's Court of Baltimore City not less than thirty (30) days before the election, your office will be complying, insofar as is possible, with the intent and purpose of the Legislature when it enacted Section 125(d) of the election laws.

We suggest that your Board direct the attention of the Legislative Council to this seeming conflict in the elec-

tion procedures in Baltimore City. It may well be that that group might recommend some corrective measures to the next session of the General Assembly.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

ELECTIONS—CONVICTION OF FELONY OR OTHER INFAMOUS CRIME IN FEDERAL COURT, OR COURT OF ANOTHER STATE, WILL DISQUALIFY PERSON CONVICTED FROM REGISTERING TO VOTE IN MARYLAND. MALFEASANCE IN OFFICE NOT INFAMOUS CRIME IN MARYLAND.

June 26, 1961

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

You have asked us if conviction of an infamous crime in the United States Federal Courts or the court of another state will disqualify a person from registering to vote in Maryland. You have also specifically asked us if a member of the Baltimore City Police Department, over 21 years of age, who is otherwise qualified to vote, is disqualified because of conviction of malfeasance in office.

In response to the first part of your inquiry it is our opinion that persons convicted in the United States courts or in the court of another state of the crime of bribery, of a felony, or of any other infamous crime, shall not be entitled to vote in this State. Section 186 of Article 33 of the Annotated Code of Maryland (1957 Edition) provides that persons convicted of such crimes in this or any other state, and not having been pardoned for such offense from the officer entitled to grant such pardon, shall be guilty of a felony if they shall thereafter vote or offer to vote at any general, special or primary election. Although this section of the Code does not specifically include convictions in the Federal courts, in 42 Opinions of the Attorney General 189, it was held that an individual who has been convicted of a felony under a Federal statute may not vote in the State of Maryland unless he has received a pardon therefor.

In an earlier opinion of this office contained in 11 Opinions of the Attorney General 135, we held the conviction of a crime which was infamous, even though not felonious, under Federal law, was within the prohibitions of the Maryland Constitution. We advise you, therefore, that conviction

in a court of another state, or in a Federal court, of a felony or of any other crime held by the authorities of this State to be an infamous crime shall debar the individual so convicted from his right to vote in Maryland, provided that such person shall have been convicted of said crime after attaining the age of 21 years, and further providing that he shall not have been pardoned by the Governor of the state wherein the conviction was obtained or by any other official having the proper jurisdiction to grant such a pardon. (*State v. Rappaport*, 211 Md. 523)

We do not believe that the crime of malfeasance in office by a police officer is an infamous crime within the meaning of the Constitution of Maryland, and therefore conviction of this offense does not affect the voting rights of the person convicted. At common law, this crime was a misdemeanor, and not deemed to be infamous, and it has not been made a felony by statute in this State. (See *State v. Bixler*, 62 Md. 354.) We believe that this conclusion is in accord with previous opinions of this office that conviction of the crimes of illegally selling narcotics, assault with intent to kill, and receiving stolen goods are not convictions of infamous crimes within the meaning of Article I, Section 2, of the Constitution of Maryland, and that persons convicted of such crimes are not debarred from the right to vote in this State.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

ELECTIONS — BOARD OF SUPERVISORS OF ELECTIONS — APPOINTMENTS—ONE MEMBER TO BE GOVERNOR'S PERSONAL APPOINTEE AND NEED NOT BE ON THE ELIGIBLE LIST FORWARDED BY ONE OF THE TWO LEADING POLITICAL PARTIES.

July 31, 1961

Hon. J. Millard Tawes,
Governor of Maryland.

You have previously made inquiry of this office concerning your prerogatives in appointing a successor to fill the vacancy on the Board of Supervisors of Elections of Baltimore City, created by the resignation of the Honorable Basil A. Thomas. Since your original inquiry, you have also received a letter from Mr. Thomas L. Fitzpatrick, Chairman of the Democratic State Central Committee for Baltimore City.

In Mr. Fitzpatrick's letter he has raised an objection to your appointment of Mr. Harry Silbert to succeed Honorable Basil A. Thomas, on the theory that before you can name a successor to Judge Thomas it is necessary for you to first request an eligible list from the Democratic State Central Committee of Baltimore City and make your appointment from said eligible list. I might also add, at this point, that in Mr. Fitzpatrick's letter to you, he does acknowledge that Honorable Basil A. Thomas was originally your personal selection as a member of the Board of Supervisors of Elections. His letter contains this language, "It is my understanding that no request for an eligibility list, as required by Sub-section (d), paragraph 1 of Article 33, has been made since the original list of recommendations was furnished to you, from which list you made the appointment of Thomas J. D'Alesandro, III. At the time of the appointment of Mr. D'Alesandro, you also appointed Basil A. Thomas *as your personal selection . . .*". (Underscoring supplied.)

In order to arrive at the correct conclusion in this matter, it is necessary to first refer to the original appointments

made by you to the Board of Supervisors of Elections of Baltimore City, shortly after you assumed the office of Governor in 1959, and which said appointments covered tenure of office from the first Monday of June, 1959 for a period of two years thereafter. At the time that these appointments were made, pursuant to Sub-section (d) of Section 1 of Article 33 of the Annotated Code of Maryland (1957 Edition), titled "Elections", and sub-titled "Supervisors of Elections and Employees", your office requested the State Central Committees of Baltimore City, representing each of the two leading political parties, to forward to you an eligible list containing the names of at least four individuals affiliated with the political party of the State Central Committees concerned. Mr. Eugene A. Sekulow, whose name appeared on the list of eligibles submitted by the Republican State Central Committee, was appointed as the representative of the Republican Party (Mr. Sekulow has been succeeded by Mr. Arthur Sherwood). Mr. Thomas D'Alesandro, III, whose name appeared as one of the four individuals submitted on the eligible list proposed by the Democratic State Central Committee, was appointed as representative of the Democratic Party. The third appointment to the Board of Supervisors of Elections of Baltimore City was the Honorable Basil A. Thomas who, although a Democrat, was appointed to the Board of Supervisors of Elections of Baltimore City as the Governor's appointee representing the public at-large.

This brings us to the question implicitly raised by Mr. Fitzpatrick's letter, namely, whether or not the Governor has a personal appointee, who represents the public at-large on the Board of Supervisors of Elections, or whether the Governor must appoint only those individuals recommended by the State Central Committee of the party of which the appointee is a member.

In order to answer this question it is necessary to review the language of the statute pertaining to the appointments on the Board of Supervisors of Elections and the construction which has been placed on the statute by the Court of Appeals of Maryland.

Sub-section (a) of Section 1 of Article 33 provides that the Governor shall appoint biennially three persons who shall constitute the Board of Supervisors of Elections and that *two of them* "shall always be selected from the two leading political parties of the State, *one from each of said parties.*" (Underscoring supplied.) This, of course, forces the conclusion that of the three members on the Board, it is mandatory that one be a Democrat and one be a Republican. The statute is silent as to which party the third member must or may belong. The third member is the Governor's personal appointee who is to represent the public at-large and the fact that he may belong to either the Democratic or the Republican party would, of course, usually depend upon the party identification of the Governor in office.

I further respectfully direct your attention to Subsection (d) of Section 1 of Article 33 which provides for the "Eligible list". In this section we find provided that ". . . the Governor shall request the State Central Committees representing *each* of the *two* leading political parties of the State . . . to designate at least four eligible candidates affiliated with the political party of such State Central Committee for each such position. The Governor shall appoint one of the persons so designated, . . ." (Underscoring supplied.)

The only reasonable construction to be placed upon this Sub-section (d) aforementioned, would be that the Governor is to appoint one person from each political party as the representative of that political party on the Board of Supervisors of Elections.

It is also necessary to turn attention to the language employed when a vacancy occurs because this particular provision concerning the filling of vacancies supports the contention that each of the major political parties will have one representative on the Board and that, in addition, one member shall be a personal appointee of the Governor, not necessarily representing any specific political party, but the public at-large. In Sub-section (c) it is provided as follows:

> "In case of any vacancy on any board of supervisors, whether as to a regular or a substitute

> member thereof, by reason of death, resignation or otherwise, occurring when the Senate is not in session, the Governor shall appoint some eligible person to fill such vacancy until the end of the next session of the General Assembly or until some other person is appointed to the same office, whichever shall first occur; provided, *however, that if the latter was appointed as the representative of a political party, then only a person belonging to the same political party shall be eligible as his successor.*" (Underscoring supplied.)

It should be noted that the language underscored above implicitly recognizes that there can be an appointee other than an appointee representing a specific political party. The above Sub-section (c) expressly states that where the appointee is a representative of a specific political party, then his successor must be of that same political party.

In Sub-section (c) it will also be noted that in the case of a vacancy " . . . the Governor shall appoint some *eligible* person to fill such vacancy, . . .". (Underscoring supplied.)

It is my interpretation that in this instance the word "eligible" means a person who is a resident and a voter in the political subdivision concerned, as provided in Sub-section (a) of Section 1; and that it does not mean a person whose name has appeared on the eligible list as required in Sub-section (d) of Section 1, wherein the language is referring to the eligible list presented by each of the two major political parties of those proposed individuals who are to represent the specific political party concerned.

I feel that my interpretation is buttressed by the language used by the Maryland Court of Appeals in the case of *Riggin v. Lankford*, 134 Md. 146 (1918) wherein Judge Burke, in the Opinion of the Court, said at page 150:

> "In January, 1918, the Democratic State Central Committee for Somerset County submitted to the Governor the names of four eligible persons, viz: Lorie C. Quinn, Jr., John W. Riggin, William

> J. Phillips and John W. Morris, with the request that he select one of said persons to represent the Democratic party of Somerset County as an Election Supervisor for that county for two years beginning the first day of May, 1918. From this list the Governor selected Lorie C. Quinn, Jr., to represent the Democratic party, and from a list submitted by the Republican State Central Committee for Somerset County, he selected George H. Ford. *These two persons, together with Henry J. Waters, who was the Governor's personal selection,* were, within fifty days from the commencement of the session of 1918, nominated to the Senate for appointment and confirmation as the Board of Election Supervisors of Somerset County for two years beginning on the first day of May, 1918, to succeed the Board of Supervisors of Election above mentioned, then holding office in Somerset County." (Underscoring supplied.)

And also at page 154 the Opinion of the Court further reads:

> "The statute creating the office clearly contemplates that the members of the board should be primarily appointed biennially by the Governor by and with the advice and consent of the Senate, and it further provides that two of its members shall be selected from the two leading political parties of the State from lists of four eligible persons submitted by the State Central Committees of said respective parties."

The *Riggin v. Lankford* case, *supra,* certainly confirms the interpretation of Section 1 of Article 33, which would provide that one of the three men appointed is strictly a personal appointee of the Governor who could be appointed by the Governor, subject to the confirmation of the Senate if it then be in session, but without the necessity of said individual coming from an eligible list proposed by any State Central Committee. A similar construction can be

drawn from the language used by Attorney General Alexander Armstrong in 5 Opinions of the Attorney General 147, at 148, wherein it is stated:

> "In this connection, however, the question whether Mr. Cooling was appointed as the representative of the Democratic party becomes important, by reason of the provisions of Section 4 of Article 33 of the Code, by which provisions the successor to any supervisor appointed as the representative of a political party must be appointed from a list furnished by the State Central Committee representing such political party in that county, as in the case of an original appointment."

The language employed by Attorney General Armstrong is pregnant with the idea that if the appointee is not a representative of a specific political party, then his successor need not come from a list furnished by the State Central Committee of any party.

In the instant case, you, as Governor, appointed Honorable Basil A. Thomas as a personal appointee, and his name did not appear on any eligible list. The matter before you now is the question of the appointment of Mr. Harry Silbert to fill the vacancy created by the resignation of Judge Thomas. Since Judge Thomas was originally your personal appointee, it is my opinion that his successor to fill that vacancy is your personal appointment, and accordingly can be appointed by you without reference to any eligible list from the Democratic State Central Committee. The representative of the Democratic Party is Thomas D'Alesandro, III, and he is still an active member of the Board. The Republican member is, of course, Mr. Arthur Sherwood. Mr. Harry Silbert, although a Democrat, will actually serve as the public's representative on the Board. Mr. Silbert's appointment must, of course, be confirmed by the State Senate at its next session pursuant to Section 11, Article II of the Constitution of Maryland.

THOMAS B. FINAN, *Attorney General.*

ELECTIONS—CONSTITUTIONAL AMENDMENT ALLOWING CONTEST FOR OFFICE OF JUDGE OF PEOPLE'S COURT DOES NOT ALLOW CANDIDATES TO BE EXCUSED FROM PRIMARY, NOR ARE SUCH CANDIDATES ALLOWED TO FILE IN THE PRIMARY OF MORE THAN ONE POLITICAL PARTY.

September 19, 1961

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

We have your letter of August 24, 1961, in which you ask certain questions pertaining to the election to the office of judge of the People's Court of Baltimore City. The Legislature of Maryland, by virtue of the Acts of 1959, Chapter 575, proposed a constitutional amendment pertaining to elections to that office, which amendment was voted upon affirmatively by the voters of this State at the general election of November 8, 1960. This amendment has now become Section 41A of Article IV of our Constitution. According to the terms of this amendment, persons not now incumbent judges will be allowed to seek election to the office of judge of the People's Court. Heretofore the judges of that court ran "against their record": the name of the judge would appear on the ballot and the voter would have the choice of voting for or against continuance in office.

As you know, the provisions of the amendment do not apply to judges holding office at the time of its passage. Those judges shall be entitled to be continued in office subject to the terms of the prior language of the Constitution.

The questions you ask us, therefore, pertain to future elections, wherein it will be possible for persons other than incumbent judges to seek that office. You have specifically asked us if, under the terms of the amendment, such candidates are required to file their certificate of candidacy thirty days prior to the primary election and run in the primary election, or if they are excused from the primary election and need not file their certificates until thirty days prior to the general election. You have also asked us, in the event

that candidates for this office are required to run in primary elections, if they shall be permitted to file in the primary election for more than one political party.

Section 41A(3) of Article IV, as amended, provides:

> "In order to qualify for election or re-election all candidates shall file with the Supervisors of Elections of Baltimore City not later than thirty days before the date of the applicable election a certificate of candidacy in a form to be supplied by the Supervisors."

In order for us to answer your question, therefore, it is necessary for us to determine what is meant by the use of the words "applicable election".

Section 41A, *supra*, in three instances, makes mention of a "Congressional election"; in the second paragraph of that section it is provided that:

> ". . . upon the creation of any additional office on said Court by increase in the number of Judges pursuant to this Section, (the Governor) shall appoint an Associate Judge for such term, not exceeding eight years and expiring on the 31st day of December immediately following a *Congressional election*, as the law creating such office shall prescribe."

The third paragraph of this section provides:

> "Any incumbent Judge of said Court shall be eligible, at the *Congressional election* immediately preceding the expiration of his period of appointment or term, for election or re-election to succeed himself . . .";

and the fourth paragraph provides:

> "Whenever a vacancy shall occur on said Court from any cause, the Governor shall appoint to said Court a Judge who shall hold office under such ap-

> pointment until the 31st day of December immediately following the first *Congressional election* occurring six months or more after the date of his appointment."

The sixth paragraph of this section defines *Congressional election* as follows:

> "* * * As used in this section, *Congressional election* means any of the biennial elections at which members of the House of Representatives are regularly chosen."

It is obvious, of course, from all of the foregoing, that elections to this office shall be held with the biennial Congressional election whether or not such Congressional election occurs simultaneously with the quadrennial election held for the office of Governor and members of the General Assembly. It is our opinion that such is the only significance of the use of the term "Congressional election", and that it cannot be taken, by itself, to designate either a Congressional primary election or a Congressional general election.

It is true, of course, that nowhere in the Article is there an express requirement that incumbent judges or other candidates for the office of Judge of the People's Court shall run in the primary election. More noteworthy, however, is the fact that we find nothing in the Article which would allow such judges or candidates to be excused from running in a primary.

This office has previously held that candidates for judge of the Circuit Courts in the several counties or the Supreme Bench of Baltimore City, or for judge of the Court of Appeals, must engage in primary elections. We have reached that opinion even though the election statutes provide that the names of candidates for those offices shall appear on the ballot or voting machine without any party label or other distinguishing mark or location which might directly or indirectly indicate the party affiliation of such candidate. So, too, in 46 Opinions of the Attorney General 93, we held that judges of the Municipal Court of Baltimore City must

run in the primary election, although again without party designation.

In an opinion of Attorney General William Curran, found in 32 Opinions of the Attorney General 160, it was held that candidates for judge of the Orphans' Court must engage in the primary election, and further that such candidates could not seek the nomination of a party other than that with which they were affiliated. By letter of August 23, 1961, we advised you that we had reviewed that particular opinion and concurred in that conclusion.

We find nothing in the language of Article IV, Section 41A, of the Constitution, as amended, which would place the candidates for the office of Judge of the People's Court in the unique classification of being candidates only in a general election. On the contrary, we believe that Section 94(a) of Article 33 of the Annotated Code of Maryland (1957 Edition) permits you to place on the general election ballot only the names of those candidates whose nomination for office has been certified to and filed according to the provisions of Section 54, of Article 33. That section provides that nominations shall be made by primary election, primary meeting, or by petition. We do not believe that it was the intent or the effect of the constitutional amendment to add a fourth classification to those set out in Section 54.

We can come to no other conclusion than that the "applicable election" referred to in paragraph (3) of Section 41A of Article IV of the Constitution, is the primary election prior to a Congressional election, and that the candidates for the office of Judge of the People's Court must file their certificate of candidacy not later than thirty days before said primary election and engage therein.

Having determined that those candidates must run in the primary election, it is our further opinion that they shall not be allowed to file in the primary election of any party other than that with which they are affiliated. The office of Judge of the People's Court is not included among those offices enumerated in Section 94(e) of Article 33, candidates for which are allowed to have their names ap-

pear on the ballot without party affiliation adjacent. We have several times expressed the opinion that only those specific judicial offices set out in Section 94(e) are to be included within the meaning of the word "judge" as contained in Section 60 of Article 33, which provides that no one shall seek the nomination of a party other than that with which he is affiliated except "in the case of nominations made at primary elections for the office of judge."

Obviously, there is no specific provision in the constitutional amendment in question which would allow candidates for Judge of the People's Court to cross-file or to have their names appear without party designation, similar to the provisions in the Constitution relating to candidates for Judge of the Municipal Court of Baltimore City.

It is, therefore, our opinion that all candidates for the office of Judge of the People's Court (with the exception of those incumbents at the time of the passage of the Act, *supra*) are required to participate in the primary election, but that they are not permitted to seek the nomination of any party excepting the one with which they are affiliated.

We believe that your Board might direct the attention of the Legislative Council to our opinion in this matter, in order that that body might consider any changes in the law which would allow candidates for the office of Judge of the People's Court to file for the nomination of more than one party.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

ELECTIONS—FEDERAL GOVERNMENT RESERVATIONS—UNDER EXISTING LAW, RESIDENTS OF FEDERAL RESERVATIONS AT PERRY POINT ARE NOT RESIDENTS OF STATE OF MARYLAND FOR VOTING PURPOSES—CONSTITUTION OF MARYLAND MUST BE AMENDED TO CONFER THIS PRIVILEGE ON SUCH PERSONS.

December 27, 1961

Hon. Frank Harris,
Member of House of Delegates,
Perryville, Cecil County.

We have your letter of November 29, 1961, in which you ask if there is any way that persons now residing on the Federal Government Reservation known as Perry Point, which is within Cecil County, could register and vote.

The office of the Attorney General has considered this same question on four previous occasions. See 10 Opinions of the Attorney General 107, 11 Opinions of the Attorney General 120, 17 Opinions of the Attorney General 139 and 36 Opinions of the Attorney General 129. In each of those previous opinions this office expressed the belief that residents of Perry Point were not entitled to register and vote, as the Federal Government has taken exclusive jurisdiction of the reservation on which they live.

The Maryland Court of Appeals in the case of *Lowe v. Lowe* at 150 Md. 592 also considered this question. In that case the court held that residents of that reservation were not residents of the State of Maryland, and said at page 600:

> "The great weight of authority is to the effect that lands acquired in accordance with the provisions of the federal constitution cease to be a part of the state, and become federal territory, over which the federal government has complete and exclusive jurisdiction and power of legislation. It is therefore clear that persons residing upon the government reservation at Perry Point are not residents of the State of Maryland *for the purpose of exercising the right of franchise,* for taxation

purposes, or for school purposes, for the reason that they reside upon territory belonging to the United States and not the State of Maryland; . . ." (Emphasis supplied.)

In 1951 the Honorable John Grason Turnbull, then a State Senator from Baltimore County, requested the opinion of this office regarding a bill which he proposed to introduce to correct this situation. That bill would have provided that all persons residing on the property lying within the physical boundaries of Cecil County, but on property over which jurisdiction is exercised by the United States, would be considered as residents of Cecil County, and would be permitted to register and vote. The Honorable Hall Hammond, then Attorney General of Maryland, replying to Senator Turnbull, 36 Opinions of the Attorney General 129, *supra*, expressed the view that this bill would be unconstitutional as it would amount to a legislative amendment to the Constitution of Maryland, which Constitution can only be properly amended with the consent of the people of the State by referendum. Attorney General Hammond expressed the opinion that the bill then in question would alter the provisions of Article I, Section 1, of the Constitution, which gives the elective franchise to residents of this State, by adding a classification of residents not previously included in that article of the Constitution.

It was Attorney General Hammond's opinion that the end desired to be achieved by Senator Turnbull could only be brought about by an amendment to the Constitution of Maryland. He further expressed the view that such an amendment could not be restricted to those persons residing on the Federal Reservation at Perry Point but must include all persons residing on any federal reservation in this State over which the United States Government exercised exclusive jurisdiction.

We concur in that opinion.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

EMPLOYEES' RETIREMENT SYSTEM

THE MANDATORY RETIREMENT AGE AS IT AFFECTS ELECTED OR APPOINTED OFFICIALS.

April 26, 1961

Hon. J. Millard Tawes,
Governor of Maryland.

This is in reply to your inquiry as to whether it would be proper to appoint Dr. H. C. Byrd, who is over the age of 70 years, to the position of Director of the Department of Tidewater Fisheries in view of House Bill No. 887, which was enacted during the 1961 session of the General Assembly. Under the provisions of Article 73B, Section 3(1) of the Annotated Code of Maryland (1957 Ed.), every person who enters employment with the State of Maryland must become a member of the State Employees' Retirement System, and pursuant to Article 73B, Section 11 (1) (b), it is mandatory for members of the Retirement System who are not elected or appointed officials to retire when they reach the age of 70 years.

The Court of Appeals of Maryland has considered on many occasions the requirements which are essential to a finding that a public office exists. The various criteria which the Court has held to be indicative of the legislative intent to create an office and which should appear in the Constitution, state or ordinance creating an office are (1) a fixed term of office, (2) the giving of an official bond, (3) the receiving of a commission, (4) a designated salary, (5) the taking of a prescribed oath of office, and (6) the specification of duties, the performance of which necessitates the exercise of some portion of the sovereignty of the government. *School Commissioners v. Goldsborough*, 90 Md. 193; *Baltimore v. Lyman*, 92 Md. 591; *Truitt v. Collins*, 122 Md. 526; *Buchholtz v. Hill*, 178 Md. 280; *Jackson v. Cosby*, 179 Md. 611; *Hetrick v. County Commissioners of Anne Arundel County*, 222 Md. 304; *Gary v. Board of Trustees*, 223 Md. 446.

Although it has been decided that it is not necessary for all of the stated characteristics to be present in the law in question, at least a sufficient number must exist as evidence of the legislative purpose to establish an office; the two last above mentioned elements being the most important. A careful perusal of Article 66C, Sections 6-13 of the Annotated Code of Maryland, 1957 Edition, and 1960 Supplement, which pertain to the Department of Tidewater Fisheries and the Director thereof, discloses that none of the characteristics of a public office exists. While many of the duties of the Director are of a serious nature, they are to be exercised under the supervision of the Commission of Tidewater Fisheries. (Article 66C, Section 6). This factor together with the complete absence of any of the usual criteria, leads to the inevitable conclusion that the Legislature did not intend to create a public office when the position of the Director was established. Furthermore, it is not believed that House Bill 887 altered the situation in any regard. There is no dispute that the post is an appointive one, and now has been further dignified by reposing the authority for the appointment in the highest officer of the State. However, the position remains one devoid of the cloak of attributes which denote the existence of an office. Regrettable as it may be in the instant case, it would not be appropriate to appoint Dr. Byrd to the position of Director.

THOMAS B. FINAN, *Attorney General.*

FACTOR'S LIEN

MARYLAND FACTOR'S LIEN ACT—SMALL BUSINESS ADMINISTRATION, AN AGENCY OF THE UNITED STATES, IS A "PERSON" WITHIN MEANING OF ACT, AND MAY SECURE ITSELF BY A CONTINUING GENERAL FACTOR'S LIEN FOR LOANS OR ADVANCES MADE TO BORROWERS ON THE SECURITY OF MERCHANDISE—DESCRIPTION OF MERCHANDISE SUBJECT TO FACTOR'S LIEN—EXTENT REQUIRED—DESCRIPTION OF BORROWER'S INVENTORY BY MAIN CLASSIFICATION.

July 19, 1961

Mr. Meredith Hoffmaster,
Small Business Administration.

We have your recent letter inquiring in two particulars as to the proper interpretation of the Maryland Factor's Lien Act, Sections 21-29 of Article 2, Annotated Code of Maryland (1957 Edition). Specifically you have asked:

1. Is Small Business Administration, an independent agency of the United States Government, included within the definition of a "factor" as defined in Section 21?

2. Is a general description of a borrower's inventory by main classification (e.g., (a) bearings of all kinds, including ball, roller and sleeve-bearings, (b) transmission materials, including pulleys, gears, belts, motors, chains, sprockets and other transmission materials and (c) industrial rubber products) sufficient to create a continuing general lien as provided for in Section 22 of said Article 2?

Section 21 defines the terms "factor", "merchandise" and "borrower" to mean:

> ". . . persons, firms, banks, and other corporations, and their successors in interest, lending or advancing or agreeing to lend or advance money on the security of merchandise, or the proceeds of sale thereof, whether or not they are employed to sell

> merchandise. The term 'merchandise,' wherever used in this sub-title of this article, shall mean any personal property intended for sale, whether or not after further manufacturing or processing, and does not include fixtures or other trade or manufacturing equipment of any borrower. The term 'borrower,' whenever used in this sub-title of this article, shall mean the owner of merchandise, or his agent, who creates a lien in favor of a factor."

Section 22 provides that the factor and borrower may, by written agreement, create a continuing general lien "upon all merchandise described in such agreement . . . or if so provided in said agreement, all merchandise from time to time designated in separate written statements, dated, signed, and delivered by the borrower to the factor, in which agreements, memoranda or statements is set forth the property to be covered by the lien, whether or not such merchandise is in the constructive, actual or exclusive occupancy or possession of the factor, . . ." Section 22 further provides that such lien shall secure the factor for all his loans and advances made or to be made to or for the account of the borrower.

Section 23 provides for the recording of such agreement within fifteen days after execution. Additionally, this section provides that the agreement between the factor and the borrower set forth, *inter alia*, the following:

> "(c) The general character of merchandise subject to the lien, or which may become subject thereto, and the period of time, whether definite or indefinite, during which such loans or advances may be made under the terms of the agreement providing for such loans or advances and for such lien. Said agreement shall contain a general description of the place where the merchandise or any substantial portion thereof is or (is) intended to be located, kept or stored, and such other and additional terms and conditions as factors and borrowers may elect.

> Amendments may be filed from time to time to record any changes in the agreement or recorded memorandum. Such lien shall be valid from the time of such recording, whether such merchandise shall be in existence at the time of the execution of the written agreement creating the lien or shall come into existence subsequently thereto, or shall subsequently thereto be acquired by the borrower. The clerks of the said courts shall accept for recording every such agreement or memorandum presented for that purpose and shall endorse thereon the time of its receipt; such agreement or memorandum shall be recorded in a special book for that purpose entitled 'Factors' Liens.' . . ."

Section 24 deals with lien priorities and specifies additionally that the borrower and factor may, under the agreement, provide that the merchandise subject to the lien may be sold by the borrower in the ordinary course of business, in which event the lien is terminated as to such merchandise, and attaches to the proceeds resulting from the sale.

It is our understanding that Small Business Administration has pending before it an application for a loan filed by a Maryland manufacturer who proposes to grant a factor's lien to the Government covering the manufacturer's product inventory, both present and future, acquired (a constantly "shifting" inventory) for the life of the loan. We further understand from you that Small Business Administration is authorized by 15 U.S.C.A., Section 631, *et seq.* to make loans to such borrowers on the security of the borrower's merchandise. Thus it would appear that Small Business Administration falls squarely within the statutory definition of a "factor," provided it can qualify under Section 21 as a person, corporation, firm or bank.

Small Business Administration is obviously not a bank or firm, nor is it a corporation. See *Finch v. Small Business Administration of Richmond, Virginia,* 112 S.E. 2d 737 (N. C.). Whether it is a "person" within the meaning of the statute cannot be abstractly declared. It has been held that in common usage the term "person" does not include

the sovereign, and that statutes employing that term are ordinarily construed to exclude it. *United States v. Cooper Corporation,* 312 U. S. 600; *State v. Ambrose,* 191 Md. 353. There is, however, no hard and fast rule of exclusion and it has many times been held that the United States is a "person" within the meaning of a statutory provision applying to "persons". See *Comptroller v. Kaiser Aluminum,* 223 Md. 384 and *John McShain, Inc. v. Comptroller,* 202 Md. 68, both cases declaring the United States to be a "person" within the meaning of statutes of this State. It is frequently said that in the final analysis whether the term "person" includes a State or the United States, or agencies thereof, depends upon its legislative environment. *Sims v. United States,* 395 U. S. 108; *Georgia v. Evans,* 316 U. S. 159. The purpose, subject matter, context, legislative history and executive interpretation of a statute are aids to construction which may indicate an intent, by the use of the term, to bring a State or the United States within the scope of the law. *Ohio v. Helvering,* 292 U. S. 360; *United States v. Cooper Corporation, supra,* 82 C.J.S., Statutes, Section 317. In *United States v. Coumantaros,* 165 F. Supp. 695 (D. C. Md.), Judge R. Dorsey Watkins, after a full study of this question, made these observations: (p. 698)

> "By analyzing those decisions holding that the sovereign is a person or body corporate, it may be found that one or more of the following factors are present and it may be concluded that their presence determines the reasonableness of such a construction of the statute in question and the manifestation of legislative intent to include the sovereign. Generally the sovereign entity involved is acting not in its sovereign capacity but rather is engaging in commercial and business transactions such as other persons, natural or artificial, are accustomed to conduct. Usually, in addition, when a statute is construed so as to include the sovereign within its terms no impairment of sovereign powers results thereby and rights and remedies are given rather than taken away. . . ."

In light of the above, and after full consideration of the purposes of the Act, including Section 28, which provides that the Act shall be "construed liberally to secure the beneficial interest and purposes thereof", we think it is reasonable and consistent with the legislative intent to hold Small Business Administration to be a "person" within the meaning of Section 21.

Considering now your second question, Sections 22 and 23 do not specify the scope or extent of the description of the borrower's merchandise required in order to create a continuing general lien. Section 22 merely refers to "merchandise described in such agreement," and Section 23 (c) requires only that the agreement set forth the "general character" of the merchandise subject to the lien. It would seem, therefore, that a description of the merchandise which is reasonably comprehensive and detailed, bearing in mind the nature of the borrower's business, and the purposes to be served by the description, (to apprise creditors of the merchandise subject to the lien) would suffice under the Act. It would seem preferable to us in describing the general character of the merchandise to describe the same by main classification where, as is implicit in your second question, such merchandise may not otherwise reasonably or practically be described, or where an attempted description, article by article, or item by item, would serve to promote boundless confusion and uncertainty rather than fair and reasonable disclosure to creditors. In this connection, see *Colbath v. Mechanics National Bank*, 70 A. 2d 608 (N. H. 1950), where under that State's Factor's Lien Act it was held improbable that the Legislature intended "that a general store borrower, for example, must separately consign each spool of thread, can of beans or package of gum to a lender bank in order to maintain a lien."

While we have limited our answers strictly to the specific questions raised by you, we nevertheless call your attention to an article by Shale D. Stiller of the Maryland Bar entitled "Inventory and Accounts Receivable Financing: The Maryland Maze" in 18 Maryland Law Review (1958). The

author discusses in some detail the Maryland Factor's Lien Act at pages 224-233, collects cases, and cites authorities dealing with various problems encountered in connection with factor's lien acts in other jurisdictions.

THOMAS B. FINAN, *Attorney General.*

ROBERT C. MURPHY, *Assistant Attorney General.*

INSURANCE

BROKERS—BROKER LICENSED AS NON-RESIDENT NOT EXCUSED FROM EXAMINATION FOR LICENSE AS RESIDENT BROKER.

May 19, 1961

Mr. F. Douglass Sears,
State Insurance Commissioner.

You have advised us that an insurance broker who had been licensed as a resident broker by the District of Columbia, and who had been licensed as a nonresident broker by Maryland prior to September 1, 1960, has become a resident of Maryland. The broker now wishes to be licensed as a resident broker by Maryland. You have asked our opinion as to whether this broker is required to take the qualifying examination required by Code (1960 Supp.), Article 48A, Section 121, subsection (b), which reads in part as follows:

> ". . . Any licensed agent, solicitor, broker or brokers' solicitor, who had a license issued by the State of Maryland as insurance agent, solicitor, broker or brokers' solicitor in force on September 1, 1960; . . . shall not be required to submit to an examination for license to sell the same kind of insurance for which he then had a license covering the same kind of insurance . . ."

Based on a reading of Section 121 as a whole, in relation to other sections of the insurance law, it is our opinion that the subject broker must pass the qualifying examination to be licensed as a resident broker.

The types of licenses issued by the Insurance Commissioner, for which Section 121 makes passage of an examination a prerequisite, are licenses under Sections 109, 117 and 118. These relate to agents, solicitors, brokers and brokers' solicitors. However, a separate section, Article 48A Section 119, treats the subject of nonresident brokers. As we read Section 121(b), the provision excusing from examina-

tion "any licensed agent, solicitor, broker or brokers' solicitor, who had a license issued by the State of Maryland as insurance agent, solicitor, broker or brokers' solicitor in force on September 1, 1960," relates to agents, solicitors, brokers and brokers' solicitors licensed under Sections 109, 117 and 118. We do not believe that the term "broker" in Section 121(b) is intended to include a "nonresident" broker, since that is a classification which is specially treated under Section 119, but which is not expressly mentioned in Section 121(b).

Further, the policy of an examination prerequisite would seem to be that an applicant demonstrate, in accordance with standards set by Maryland, a minimum knowledge of the type of insurance for which he seeks to be licensed. The exclusion from this requirement of insurance representatives previously licensed by Maryland would seem to reflect a consideration that such persons have already met Maryland standards of minimum knowledge, particularly if licensed by Maryland since examinations have been required. However, a nonresident broker's license is issued under Section 119 based purely on a basis of reciprocity. 34 Opinions of the Attorney General 169 (1949). Since Maryland has never tested the knowledge of a nonresident broker by its standards, we believe that an interpretation requiring examination before licensing as a resident broker is consistent with the policy of the act.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

INSURANCE — PREMIUM TAX — NO DISCRETION TO WAIVE PENALTY AND INTEREST FOR LATE PAYMENT.

May 19, 1961

Mr. F. Douglass Sears,
State Insurance Commissioner.

You have requested our opinion on two matters involving the tax on premiums imposed by Section 136 of Article 81, Code (1957 Edition), which is collected by your department. Under Section 139 an annual report is required to be filed with you on or before March 15th in each year. Section 140 provides that the taxes shall be paid to the Insurance Commissioner at the time fixed for filing the report and provides further that, "All such taxes not paid when the report is filed shall be subject to a penalty of 5 per cent. and interest at the rate of 1 per cent. per month from the date the report was due."

One insurance company has failed to pay the premium tax due at the time of filing its annual report on the asserted ground that the company believed the tax was not to be paid until the report had been audited and a bill sent. Another company had prepared a check for transmittal with the annual report form but, through inadvertence, failed to do so. You ask whether you have any discretion to waive or remit interest or penalties under the aforesaid Section 140.

It is our opinion that the Insurance Commissioner is not authorized by this statute, at his discretion, to waive or remit the interest or penalties for late payment. The statute does not, in terms, confer such a discretion and we cannot interpret it as conferring the power to waive. Where the General Assembly has intended to confer such a power, it has usually done so in express terms. As an example, comparison can be made with the provisions of Section 252 of Article 81, relating to the penalty for failure by a corporation to file on time, its annual report with the State Department of Assessments and Taxation. This Section provides:

> "* * * The State Tax Commission (now State Department of Assessments and Taxation) shall have power on good cause shown to it to abate or reduce any penalty imposed as aforesaid, and in that event the State Tax Commission shall forthwith notify the Comptroller of such abatement or reduction, and only the balance, if any, of the penalties remaining after such abatement or reduction shall be collected as aforesaid."

It is generally held that a tax collector has no authority to waive, abate or remit all or a portion of interest or penalties in the absence of statutory authorization. 85 C.J.S. *Taxation,* Sec. 1054(i), Sec. 1031; 51 Am. Jur. *Taxation,* Sec. 978.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

INSURANCE—COMBINED COMPANY—MAY AMEND CHARTER TO INCREASE CAPITAL STOCK.

June 22, 1961

Mr. F. Douglass Sears,
State Insurance Commissioner.

You have requested our opinion concerning the following facts. An insurance company was incorporated under the laws of Maryland in November of 1938 as a combined mutual and stock company. Such combined companies were then authorized under Code (1924 Ed.), Article 48A, Section 13. By Chapter 529 of the Acts of 1939, the provision for combined companies was repealed. The subject company has continued in the combined form since the 1939 act was prospective only in its effect. The company has now presented to you for your advance approval, as required by Code (1957 Ed.), Article 48A, Section 18, proposed articles of amendment by which its capital stock would be increased from 100,000 to 200,000 shares of the par value of $1.00. You ask whether the subject company must retain its status quo because of the 1939 change in the insurance laws.

A quite similar question was presented in *State v. Texas Mut. Life Ins. Co. of Texas*, Texas Civ. App., 51 S.W. 2d 405 (1932). The insurance company there involved was incorporated in 1905 under the general corporation law of Texas. It contended that at the time of its creation it was a "mutual relief association" within the meaning of two sections of the Texas statutes defining such companies and providing that they should be exempt from regulation under the general insurance laws. By an amendment in 1907, the section of the general corporation law, under which the company there involved was formed, was amended to provide expressly that all companies formed thereunder would be subject to the general insurance laws. In 1909 and 1911 the two statutes relating to mutual relief associations were repealed. In 1929 the Attorney General of Texas brought a *quo warranto* proceeding to forfeit the Texas Mutual charter because of its failure to comply with the general insur-

ance laws of Texas. Among these provisions was a requirement that the company have capital stock of at least $100,000. The company contended that it was permitted to continue to operate on the basis of the statutes in force at the time of its incorporation. The trial court entered judgment in favor of the company. On appeal, the intermediate appellate court stated, on the question of the effect of the repeal, at 51 S.W. 2d 405, 413, as follows:

> "It is a well-recognized principle that: 'Repeals (of charters) by implication are possible, but are not favored, and the act will not be held to repeal the charter unless there is an express intention to do so or a necessary implication to that effect arising from the enactment.' 14a C. J. p. 1102.
>
> "A leading case upon this subject is Bibb v. Hall, 101 Ala. 79, 14 So. 98.
>
> "The principle is applied where a general act under which corporations have been chartered is repealed; in which case, in the absence of express intention to the contrary, 'the corporations continue to exist and be governed by the provisions of the act, under which they were organized.' See 1 Thompson on Corporations, p. 468; 14a C. J. p. 1102; 2 Spellman on Private Corporations, p. 1214; Moravitz on Corporations, § 1110.
>
> "We think it clear that it was not the legislative intent to repeal the charter of any corporation created under article 642, subd. 46."

However, the intermediate appellate court reversed and remanded the case on another ground. On further appeal the Commission of Appeals reversed the intermediate appellate court on this collateral point so that the judgment of the trial court was affirmed. *Texas Mut. Life Ins. Association v. State*, 58 S.W. 2d 37 (1933).

The principles above quoted are also recognized in *Smock v. Farmers' Union State Bank*, 22 Okla. 825, 98 P. 945 (1908); 7 Fletcher, *Cyclopedia Corporations* (Perm. Ed.), Section 3733.

The 1939 amendment to the Maryland insurance laws does not evidence a legislative intent to effect any repeal of the charter of then existing combined companies, and indeed the Act has not been so interpreted and applied by your department. Nor does the Act manifest any legislative intent to circumscribe the power of then existing corporations to amend their charters. It is our opinion that the subject company is permitted to continue to function under the law existing as of the time of its incorporation with respect to its corporate form, and that its power to amend its charter is not limited by virtue of the 1939 repeal. To rule otherwise would in essence be to rule that a partial repeal of the existing charter was effected insofar as the power of amendment is concerned.

Our opinion is based solely on our interpretation of what the Legislature has done and we intimate no opinion on possible limitations of legislative power in this area.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

INSURANCE — PUBLIC ADJUSTER SOLICITOR — APPLICANTS FOR CERTIFICATE OF AUTHORITY REQUIRED TO TAKE WRITTEN EXAMINATION.

November 7, 1961

Mr. F. Douglass Sears,
State Insurance Commissioner.

You have requested our opinion on a question of the proper construction of Section 120 of Article 48A of the Annotated Code (1957 Edition), relating generally to public adjusters, and in particular, of sub-sections (g) and (n) thereof.

Sub-section (g) provides as follows:

> "(g) *Same — Examination.* — The Insurance Commissioner shall in order to determine the trustworthiness and competency of such applicant for a certificate of authority to act as a public adjuster or public adjuster solicitor, require such applicant to submit to a written examination."

Sub-section (n) provides as follows:

> "(n) *Same—Same—Persons in business.*—The State Insurance Commissioner shall issue a public adjuster solicitor's certificate to any person in the employment of a public adjuster without examination, provided said application is made by a person, partnership, association or corporation engaged in the public adjusting business."

You ask whether an applicant for a certificate of authority to act as a public adjuster solicitor is required to take an examination.

The whole scheme of Section 120 clearly manifests a legislative intent that an applicant for a public adjuster solicitor's certificate of authority be required to take an examination. Sub-section (c) provides that such certificate shall be issued to those whom the Insurance Commissioner

deems to be both trustworthy and competent. Sub-section (f), relating to the application for the certificate of authority, provides that the applicant furnish such information as the Insurance Commissioner may require to enable the Commissioner to determine trustworthiness and competency. Sub-section (g), as above set forth, specifically requires a written examination. It therefore appears that the result of construing sub-section (n) as meaning that any person in the employment of a public adjuster shall be issued a public adjuster solicitor's certificate without examination would be to negate the clear legislative intent of the preceding sub-sections.

Sub-section (n) may be considered as applicable only when the application is made by a person, etc., engaged in the public adjusting business or a person in the employment of a public adjuster. However, under sub-section (a), one element of the definition of "public adjuster solicitor" is full-time bona fide employment with a public adjuster. Since the applicant for a solicitor's license would therefore have to at least anticipate soliciting for some public adjuster, there would always be some person engaged in the public adjuster business who would make the application. Thus no purpose is served from the standpoint of a determination of the applicant's competency by the Commissioner. Further, the element in sub-section (n) of employment with a public adjuster is not limited to employment in types of work which would indicate an intent to substitute experience for the written examination. Thus viewed, sub-section (n) again appears inconsistent with the scheme.

It is a general rule of statutory construction that apparent inconsistencies in a statutory scheme should be interpreted in such a way as to give effect to all of the provisions. The Legislature is considered to have meaningfully used all of the language in a statute, and repeals by implication or inconsistency, particularly within the same statute, are not favored, where there is a reasonable alternative construction.

In view of these principles, and in view of the clear legislative intent that an examination be required, as shown

from a reading of the statute as a whole, it is our opinion that sub-section (n) should be read as applying only to those persons in the employment of a public adjuster at the time of the enactment of the statute. Present Section 120 was enacted by Chapter 636 of the Acts of 1941. Sub-section (m), as originally enacted as part of Chapter 636 of the Acts of 1941 and amended by Chapter 310 of the Acts of 1943, sets forth a type of "grandfather" provision, exempting from the examination requirement for a public adjuster's certificate those persons who had practiced public adjusting of specified claims, either for themselves or in the employment of another public adjuster, for a period of two years prior to June 1, 1941. Immediately following sub-section (m) in the statutory scheme is sub-section (n). We believe that sub-section (n) should be read as a "grandfather" provision, intended to exempt from the examination requirement for a public adjuster solicitor's certificate only those persons in the employ of a public adjuster as of June 1, 1941, where the application was made by a person, partnership, association or corporation engaged in the public adjusting business.

Phrased conversely, it is our opinion that persons currently applying for a public adjuster solicitor's certificate are required to take the written examination.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

LABOR AND INDUSTRY

EMPLOYMENT OF MINORS—PLACES OF PUBLIC ENTERTAINMENT.

May 5, 1961

Mrs. Shelley L. Murphy, Public Relations Consultant, Department of Economic Development.

We have received your letter of May 2, in which you inquired as to whether or not there is any legal restriction on the use of young children in a fashion show to be conducted at the Hotel Alexander on June 22 by a manufacturer of children's clothing to encourage new business and industry in Hagerstown.

Prior to 1950, the Maryland Code provisions regarding the employment of minors, Article 100, Sections 4 through 51, made no reference to the employment of minors in such presentations as fashion shows, and an opinion had been rendered by this office that such employment would be a violation of Section 4 of the above article, prohibiting the employment of any child under 14 years of age in any "gainful occupation." See 19 Opinions of the Attorney General 320 (1934). However, in 1950, the Maryland Code provisions as to employment of minors were amended by Chapter 8 of the Laws of 1950, and by Section 6 of that chapter, a new provision was added relating generally to the employment of minors in "places of public entertainment." This section has been codified as Section 11 of Article 100. Particularly applicable to the question which you have posed is the following provision of that section:

> "* * * As distinguished from professional performers as designated in subsection (a) of this section a minor not less than 6 years of age may participate in professional performances and non-professional amateur performances for modeling, appearance in fashion shows, radio or television pageants or for charitable purposes, not to exceed

twelve performances in any one year, for a performance not to exceed 20 minutes before the public? Permits for such performances to be issued by the Department of Labor and Industry upon the written approval of the principal of the school attended by the minor and by and with the written consent of the minor's parent or legal guardian and under the same terms and conditions as prescribed for professional performers as designated in subsection (a) of this section."

Accordingly, minor children not less than 6 years of age may appear in the fashion show for a performance not to exceed 20 minutes before the public, conditioned upon the obtaining of permits for such performances from the Department of Labor and Industry, which permits require the written approval of the principal of the school attended by each minor and the written consent of the minor's parent or legal guardian, and upon the satisfaction of the Commissioner of the Department of Labor and Industry that the environment in which the fashion show is to be produced is proper, that the conditions of employment are not detrimental to the health or morals of the minor, and that the minor's education will not be neglected or hampered by participation in the fashion show.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

LICENSES

MOVING PICTURE THEATRE OWNERS—AMENDMENT OF LAW AS OF JUNE FIRST NOT TO BE APPLIED UNTIL COMMENCEMENT OF NEXT LICENSE YEAR.

May 11, 1961

Mr. Edward J. Dyas, Chief Inspector,
State License Bureau.

You have inquired as to whether or not moving picture theatre owners will be required to take out licenses, as provided in Article 56, Section 158, for the year 1961. Article 56, Section 158 was amended by Chapter 386 of the Acts of 1961 to remove the requirement that moving picture theatre owners must pay a certain license fee, but confusion arises from the fact that this amendment takes effect June 1, 1961, whereas your license year begins on May 1, 1961.

After a careful review of the law on this question, we are forced to conclude that all moving picture theatres will be required to take out licenses for the license year beginning May 1, 1961, and that the amendment to this section will be effective only for license years starting on May 1, 1962.

The former license provisions under Article 56, Section 158 stated that "the following license fees *shall be annually paid.*" This indicates that the tax was for a full license year, and there is no provision provided for proration as to this fee. Our Court of Appeals has held that when a law is amended imposing an additional tax, and such law becomes effective on June 1, whereas the license years start on May 1, the new tax will not be applied until the beginning of the next license year. *Read Drug and Chemical Company v. Claypoole*, 165 Md. 250. This case would seem to be further authority to indicate that if a provision relieving the moving picture theatres of tax is enacted after the beginning of the license year, the relief provision will only go in effect at the start of the next license year.

As an aid to construction of statutes, Article 1, Section 3 of the Annotated Code of Maryland (1957 Ed.) states in part:

> "The repeal . . . of any statute . . . shall not have the effect to release, . . . liability . . . which shall have been incurred under such statute . . . unless the repealing . . . act shall expressly so provide."

Thus, since the liability for the license tax arose on May 1, this liability would not be extinguished by the amendment to this section, which did not specifically so provide, applying the foregoing rule of construction.

We also call to your attention the fact that the Maryland Legislature, when it has amended provisions relating to the license taxes in the past, has clearly stated that these amendments will take effect on May 1 of some year, thus coinciding the legislation with the start of the license year. See Chapters 631, 632, and 633 of the Acts of 1959, for example. Therefore, we feel that the Legislature could have provided for this present act to take effect May 1, to alleviate the imposition of the license tax for the year 1961, but that it failed to do so.

We are appreciative of the fact that Chapter 386 of the Acts of 1961 is a relief measure on behalf of the movie owners, whose business is somewhat depressed. Nevertheless, the authorities we have examined leave us no other possibility but to conclude that the relief provision will not go into practical effect until May 1, 1962, and that all moving picture theatres should pay the full license fee for the year 1961.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

LICENSES—TO WHOM LICENSE FEES ARE PAYABLE WHEN LAW DOES NOT DESIGNATE PAYEE.

May 16, 1961

Mr. Edward J. Dyas, Chief Inspector,
State License Bureau.

You have referred to us two bills recently enacted by the Legislature providing for additional license fees, but each of the bills is silent as to whom the license fees are to be paid by the clerks of the courts. Your question, in each case, relates to this question of payment.

Prior to 1947, all license revenues under Article 56 were paid to the State. In 1947 the Legislature enacted Article 56, Section 3, specifying that receipts from certain license fees would be paid over to the local subdivisions. Unfortunately, none of these enumerated types of licenses appearing in Article 56, Section 3, is involved in either of the two bills you have had me review.

In our opinion, at 42 Opinions of the Attorney General 272, we recognize the practice that if a bill is silent as to whom the license fee should be paid, after its collection by the clerk, if the bill is a public local law, the funds are turned over to the local subdivision, and those collected under a public general law are turned over to the State. This, as stated above, is a rule of thumb applied when the bill itself gives no indication as to whom the fee should be paid.

With this basic background in mind, let us examine the two specific bills you presented. House Bill 937, Chapter 588, of the Laws of 1961, imposes an additional $10.00 license in Harford County on "music boxes". The State already imposes a statewide $10.00 license on this type of device. In the text of the new bill, a person keeping a music box is required to "obtain an additional Harford County license therefor". This language seems to us to indicate that it was the intention of the Legislature that House Bill 937 was strictly a revenue measure for Harford County and that the fees for these licenses should be paid to the County Commis-

sioners of Harford County. We feel that this is a case where the bill is not actually silent as to an indication to whom the fee should be paid, and, in fact, it is our opinion that the bill demonstrates that the fees should be payable to Harford County for this "annual Harford County license."

We have more trouble with Sections 134A and 134B of Article 56, requiring licensing of palm readers and the like in Cecil County and Charles County. These laws are both public general laws, and impose a license fee where no statewide fee has been levied. We are unable to find any indication in the text of these laws as to whom the fees should be paid, such as we were able to find in regard to the Harford County music box license fee. Thus, we feel we must fall back on general principles that fees imposed under public general laws must be paid to the State if no provision for payment is made in the creating legislation, especially since historically all fees were payable to the State until 1947 when only certain special enumerated fees were excepted from this rule.

It is our opinion, therefore, that the Harford County music box fee should be payable to Harford County, and that the fortune teller fees in Cecil County and Charles County are payable to the State.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

LICENSES—OPERATOR OF FROZEN FOOD STORAGE LOCKER PLANT MUST TAKE OUT STORAGE WAREHOUSE LICENSE.

June 19, 1961

Mr. Edward J. Dyas, Chief Inspector,
State License Bureau.

We have your recent inquiry as to whether or not the operator of a frozen food storage locker plant is required to obtain a storage warehouse license under the provisions of Article 56, Section 176 of the Annotated Code of Maryland (1957 Edition).

Article 56, Section 176 provides in its pertinent part:

> "Every person, firm or corporation who shall keep for compensation any house for storage or impounding shall pay an annual sum for said privilege by first taking out a license therefor . . ."

This section then provides for certain fees to be paid depending upon the location of the warehouse.

The general plan of operation in a frozen food storage locker plant involves the renting of refrigerator lockers contained in the building to patrons who place food in or take food out of their own lockers from time to time without application to the operator of the premises. It appears to us that this is certainly a form of storage and that the person is operating a house for storage within the meaning of Article 56, Section 176. See our opinion in 18 Opinions of the Attorney General 325 where we held that this type license was required for operation of cold storage warehouses. What we have here is a modern form of a cold storage warehouse. The fact that certain technical changes and improvements in the storage industry have been made does not make the instant plant any less of a storage warehouse. See *Director of the Department of Assessments of Baltimore City v. Javodick,* Harlan, J., Daily Record, December 24, 1960, in which the Court recognized the principle that changes in technique in the industry do not affect the basic

characterization of an item for certain statutory purposes. In *Javodick* the Court held that a modern laundromat would be considered as a laundry within the provisions of certain taxation statutes. We therefore advise you that the operator of a frozen food storage locker plant must take out a storage warehouse license. The fact that he may also be required to pay another type license to the State Board of Health does not affect his liability for the warehouse license. See 18 Opinions of the Attorney General 325.

See 45 Opinions of the Attorney General 69.

46 Opinions of the Attorney General 5.

THOMAS B. FINAN, *Attorney General.*

WILLIAM J. MCCARTHY, *Assistant Attorney General.*

MENTAL HYGIENE

DEPARTMENT OF MENTAL HYGIENE — REIMBURSEMENT — RATE CHARGEABLE TO FAMILY OF PATIENT IN STATE MENTAL HOSPITAL NOT TO BE REDUCED UNTIL PATIENT HAS REMAINED IN INSTITUTION FOR 30 CONSECUTIVE MONTHS.

July 27, 1961

Dr. Isadore Tuerk,
Commissioner of Mental Hygiene.

We have your recent letter in which you requested our opinion as to whether the 30-month provision contained in Article 59, Section 5(a), of the Annotated Code of Maryland (1960 Cum. Supp.) relates to a cumulative or consecutive period of time. This section provides, in pertinent part:

> "The Department of Mental Hygiene shall fix a rate to be chargeable to all persons who have been or are hereafter committed or admitted to State institutions under the jurisdiction of the Department of Mental Hygiene, not to exceed the actual cost per capita for maintenance of such persons the actual cost per capita to be determined annually between September 1 and December 1, by the Commissioner of Mental Hygiene, the State Comptroller, and the State Budget Director; except with respect to those patients who have been or shall remain in such institution for a period in excess of thirty (30) months, the rate chargeable to the family of the patient shall thereafter not exceed 25% of the per capita cost. . . ."

Since the 30-month provision was added in 1958, the Department of Mental Hygiene has consistently interpreted it to require 30 consecutive months in an institution. A regulation to this effect was adopted by the Department of Mental Hygiene in 1958 and was approved by the Attorney General. You have asked whether the present "restricted interpretation" is correct, or whether the 30 months should

be construed as a cumulative period of time after which a rate chargeable to the family should be reduced.

Article 59, Section 5, of the Code establishes the machinery by which the State obtains reimbursement for the expenses of providing care and maintenance in State mental hospitals from those patients and their families who are financially able to pay all or part of the per capita cost. This section also authorizes the Department of Mental Hygiene to make claims against the estates of deceased patients. It is the underlying purpose of this section that the State shall be reimbursed in full by those patients who have the means to pay for their care, no matter how long they remain in the institution. Where the patient is unable to pay for his care and the burden falls upon his family, however, an exception was made with respect to the families of those patients "who have been or shall remain" in a State mental hospital for a period in excess of 30 months.

It is our opinion that it was the intention of the General Assembly that in order for the family of a patient to qualify for a reduction in rate to 25% of the per capita cost, the patient must have remained, or must remain, in an institution for 30 consecutive months.

THOMAS B. FINAN, *Attorney General*

THOMAS W. JAMISON, III, *Assistant Attorney General.*

MERIT SYSTEM

COUNTY ROADS EMPLOYEES—EMPLOYEES OF ST. MARY'S COUNTY ROADS DEPARTMENT ARE IN FACT EMPLOYEES OF STATE ROADS COMMISSION AND ARE ELIGIBLE FOR PERMANENT STATUS IN THE CLASSIFIED SERVICE.

September 1, 1961.

Mr. Russell S. Davis,
Commissioner of Personnel.

You have pointed out a possible conflict between Chapter 169 of the Laws of Maryland, 1961, and Chapter 347 of the same Laws. Chapter 169 amends Section 5 of Article 89B of the Annotated Code of Maryland and Section 18 of Article 64A to provide for the adoption into the State Merit System of all highway maintenance men who have held this classification as of June 1, 1961, and to provide for status in the State classified service of all employees of the State Roads Commission who have been continuously employed in maintaining State roads and/or county roads, or on roadside beautification work, under State supervision during the preceding one year. Chapter 347 provides for the establishment of a classified system of employment in St. Mary's County to include, among others, "all employees of the County Roads Department". This Act also gives the County Commissioners the authority to adopt rules and regulations governing various subjects, such as standards and qualifications for positions, minimum and maximum salary schedules, and conditions of employment, such as hours of employment, holidays and leave.

The specific question raised is whether the "employees" of the St. Mary's County Roads Department, who are under the supervision of the State Roads Commission are really county employees subject to the authority of the County Commissioners as specified in Chapter 347, or are State employees subject to State rules and regulations and eligible for permanent status in the State classified service as provided in Chapter 169.

The Maryland Court of Appeals has laid down five criteria for determining whether an employer-employee relationship exists. They are:

1. Selection and engagement of the employee.
2. Payment of wages.
3. Power of discharge.
4. Power to control conduct.
5. Whether the work is part of the regular business of the employer.

In *Kreitz v. National Paving and Contracting Company*, 214 Md. 479, the Court of Appeals said:

> "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.*"

See also *Sun Cab Company v. Powell*, 196 Md. 572, 578. The *Kreitz* opinion also points out that it is not the manner in which the alleged master actually exercises 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 will discuss these criteria with respect to the employees of the County Roads Department:

1. We are advised that it is the practice of the County Commissioners of St. Mary's County to make recommendations to the Resident Engineer of the State Roads Commission for the position of Highway Maintenance Man or other county roads worker. The Resident Engineer generally accepts this recommendation and hires the person so recommended. However, if the Resident Engineer knew that the person was not qualified, he would not be under any obligation to hire him. In other words, the Resident Engineer of the State Roads Commission has the final word as to who will be hired for this position.

2. The county roads workers are not on the county payroll. They are paid by checks of the State Roads Commission out of the county's share of the revenue from the State gasoline tax. However, equipment time of State Roads Commission vehicles and materials, such as rock salt, which are devoted to the maintenance of county roads are also paid for from the same fund. The rate of pay of these individuals is set by the State Standard Salary Board.

The county roads workers have been brought into the State Retirement System. For the purpose of eligibility for retirement pensions, the word "employee" is defined in Article 73B, Section 1(3), of the Annotated Code of Maryland as follows:

> "*Employee* shall mean any regular classified or unclassified officer or employee of the State for whom compensation is provided for by State appropriation, or whose compensation is paid from State funds, including all regular employees of the State Roads Commission, whether classified or unclassified, and whether paid on an annual, daily or hourly basis, *and shall expressly include those engaged in work on the maintenance of county roads under the supervision of* the State Roads Commission . . ." (Emphasis supplied.)

It is our opinion that the above-quoted provision indicates that in the contemplation of the General Assembly, persons engaged in work on the maintenance of county roads under the supervision of the State Roads Commission are State employees, at least for the purpose of qualifying for retirement benefits.

3. We are advised that the State Roads Commission has the right to fire these workers unilaterally and has in the past discharged certain of these men without obtaining permission from the County Commissioners of St. Mary's County.

4. The State Roads Commission supervises the work of these workers and directs them in the performance of their work and in the manner in which the work is to be done.

5. Under the provisions of Section 220 of Article 89B of the Annotated Code of Maryland, the maintenance of the roads of certain counties, including St. Mary's County, is part of the regular business of the State Roads Commission.

We are not unmindful of the fact that this office has in the past expressed the opinion that county road employees were not State employees and were not eligible to come under the State Merit System or the State Retirement System. See 30 Opinions of the Attorney General 130 and 22 Opinions of the Attorney General 488, 581, and 615. However, at the time these opinions were written the employees in question were generally considered to be county employees. The State Employment Commissioner so considered them. They were on the county payroll. The opinions in 22 Opinions of the Attorney General were in part based on the fact that the law under which the county road workers were employed by the State Roads Commission was temporary in nature, and no one may enter the State Merit System unless permanently employed by the State.

Section 220 of Article 89B of the Annotated Code of Maryland (1957 Edition) provides that the State Roads Commission is authorized to undertake and perform the construction, reconstruction and maintenance of county roads in certain counties, including St. Mary's County. There is no time limit on this provision and it is therefore a permanent one. However, Section 222 provides that a county in which the State Roads Commission is authorized to perform the construction and maintenance of county roads may request the State Roads Commission to permit it to take over and perform these functions on its own behalf. If the Commission finds that such county has or is reasonably assured of obtaining adequate facilities for constructing, reconstructing and maintaining roads, and that such county has or is reasonably assured of obtaining the services of a qualified roads engineer, then the Commission shall relinquish and transfer to the county these functions. Unless the county does so request, however, the operation

of constructing, reconstructing and maintaining county roads in these counties is a permanent obligation of the State Roads Commission. In this important respect, therefore, the law governing the operations of the State Roads Commission in these counties is distinguishable from that under which it operated at the time the previous opinions of this office were written. Furthermore, unlike the law in effect in 1937, the present law does not *require* the State Roads Commission to give "due consideration to any recommendations made by the County Commissioners" with respect to hiring county roads workers.

We believe that the law and the facts governing these employees have changed sufficiently so that the former opinions of this office are no longer controlling. It is our opinion that these employees may properly be considered employees of the State of Maryland and of the State Roads Commission and are, therefore, eligible for permanent status in the State classified service as provided in Chapter 169 of the Laws of Maryland, 1961.

THOMAS B. FINAN, *Attorney General.*

THOMAS W. JAMISON, III, *Asst. Attorney General.*

MERIT SYSTEM—HANDICAPPED EMPLOYEES—SPECIAL ELIGIBLE LIST—COMMISSIONER OF PERSONNEL IS PRIMARILY RESPONSIBLE FOR THE QUALIFICATION OF STATE EMPLOYEES REGARDLESS OF ARTICLE 64A, SECTION 13 OF THE ANNOTATED CODE OF MARYLAND.

December 5, 1961.

Mr. Russell S. Davis,
Commissioner of Personnel.

In your recent letter you have posed several questions regarding the employment of handicapped persons in the State classified service. You pointed out that in most cases the prospective employees referred for placement on special lists of eligibles by the Division of Vocational Rehabilitation of the State Department of Education do not meet the minimum requirements set forth in the job specification for the particular class of position certified. These minimum requirements refer to the amount of education, training and experience the individual has which qualify him for the position.

Article 64A, Section 13, of the Annotated Code of Maryland (1957 Edition) provides:

> "The Commissioner is authorized and empowered to prepare, without examination, special lists of eligibles of persons certified by the Division of Vocational Rehabilitation of the State Department of Education to be physically capable and adequately trained to qualify for a position in the classified service. The use of such special lists of eligibles shall be optional with the appointing authority; provided that the Commissioner, in his discretion, may fix the maximum number of persons who may be appointed from such special lists of eligibles by any appointing authority."

In our opinion the quoted section is directory, not mandatory. The Commissioner of Personnel is not required to prepare such special lists of eligibles. Furthermore, it is

clear that the use of such lists is optional with the appointing authority. We conclude from this that the Legislature did not intend to change your primary responsibility for the qualifications of persons seeking employment in the State service. On the other hand, we believe that the Legislature did intend to provide a means for handicapped persons trained and certified by the Vocational Rehabilitation Division of the Department of Education, to obtain employment with the State even though they may not meet the minimum requirements set forth in the job specification.

We would therefore answer your specific questions as follows:

1. The Commissioner is not required to place on the special eligible list any person certified by the Division of Vocational Rehabilitation without regard to minimum requirements on the job specification.

2. Even though a handicapped but certified individual may not meet the minimum requirements on the job specification, he may be certified as qualified on the special eligible list if, in the opinion of the Commissioner, he is in fact qualified to perform the work of the position.

3. We believe that Section 13 is applicable to promotional applicants in the classified service as well as the entrance classification. Since the Commissioner is not required to prepare a list of eligibles if he does not believe the individual is qualified for the promotional class, and since the appointing authority is not required to use a special list of eligibles which may be prepared by the Commissioner, there are adequate safeguards to protect both the integrity and the morale of the classified service.

THOMAS B. FINAN, *Attorney General.*

THOMAS W. JAMISON, III, *Asst. Attorney General.*

MOTION PICTURE CENSORS

TRAILERS (OR "PREVIEWS") OF MOTION PICTURES MUST BE SUBMITTED TO MOTION PICTURE CENSOR BOARD FOR APPROVAL BEFORE BEING EXHIBITED IN MARYLAND.

October 25, 1961

Mr. Norman C. Mason, Chairman,
Motion Picture Censor Board.

We have at hand your letter of October 18 in which you ask us certain questions pertaining to the authority of your Board.

You have asked us whether your Board has the right to examine and license each trailer (i.e., excerpts of films to be subsequently shown at the same theatre, also known as "previews") and all duplicates thereof, which are exhibited in Maryland.

You point out that on at least two occasions within recent months, several trailers which had never been licensed by your Board have been exhibited in local theatres, and that, on occasion, trailers are exhibited containing scenes which do not, in fact, appear in the motion picture itself.

You suggest that there might be some ambiguity existing in Rule 12 of the rules adopted by the Maryland State Board of Motion Picture Censors, pursuant to authority granted by Section 16 of Article 66A of the Annotated Code of Maryland (1957 Edition), which rule provides:

> "All trailers used as advance advertisements of uncensored films must be submitted to the Board before being exhibited in public. Trailers containing scenes approved in films are permitted. Trailers which are duplicates of censored and approved trailers need not be submitted for censorship."

We have carefully considered the provisions of the law pertaining to the authority of your Board, and it is our opinion that all trailers, and duplicates thereof, should be

submitted to your Board for licensing before being exhibited in the State. Section 2 of Article 66A provides:

> "It shall be unlawful to sell, lease, lend, exhibit or use *any motion picture film or view* in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this Article called the Board." (Emphasis supplied.)

Since a trailer is obviously "a motion picture film or view", and since such trailers are not elsewhere in the article excepted from its provisions, they are required to be submitted to your Board for approval before being exhibited in the theatres.

In a previous opinion of this office concerning this same question, and found in 14 Opinions of the Attorney General 222, it was said:

> "The above language (Section 2, *supra*) is clear and free of ambiguity. If it be held that an excerpt from a picture may be shown without censorship, then it would be possible for exhibitors to select and exhibit to the public obscene and objectionable features without any censorship whatsoever. The object of the law is to prohibit the showing of such pictures to the public and the only method by which this object can be accomplished is by requiring the excerpts as well as the pictures in full to be censored."

We subscribe to the views expressed in that opinion, and believe that the same reasoning must apply to the question at hand.

Your Board, of course, has the full right and authority to amend Rule 12 of the "Rules Adopted by the Maryland State Board of Motion Picture Censors", *supra*, and to henceforth require all trailers and duplicates thereof to be submitted to your Board for censorship. Section 16 of

Article 66A, permitting your Board to adopt such reasonable rules as it may deem necessary to carry out and enforce the purpose of this Article, also stipulates that

> "Such rules shall not be inconsistent with the laws of Maryland."

We believe that, in permitting the exhibition of these trailers prior to submission to your Board for censorship, Rule 12 is inconsistent with and repugnant to Section 2 of Article 66A, quoted above.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Assistant Attorney General.*

MOTOR VEHICLES

MOTOR VEHICLE LAW WHICH PROVIDES MANDATORY PENALTY WITH NEITHER MINIMUM NOR MAXIMUM ALLOWS ONLY ONE FINE.

November 21, 1961

Mr. Edward S. Starkloff, Chief Clerk,
Municipal Court of Baltimore City.

We wish to acknowledge receipt of your letter of November 15, 1961 relative to a standard fine established by the old Traffic Court, whereby a person who received a summons for certain offenses could make prepayment in advance of trial. In an opinion of this office reported in 40 Opinions of the Attorney General 635, it was held that a traffic offender could, upon written plea, admit his guilt and pay his fine by mail. Apparently, this is the procedure that has continued to be followed by and in the Municipal Court of Baltimore City. You now desire to know whether the fine of $10.25 for violation of Ordinance #1234 of the Mayor and City Council, approved February 7, 1958, as amended by Ordinance #1364, approved April 23, 1958, known as the Snow Emergency Route Ordinance, is valid.

Ordinance #1234 created the snow emergency routes and provided that any person violating the provisions of the ordinance shall, upon conviction, pay a penalty provided in Article 38 of the Baltimore City Code (1950 Edition). Thereafter, Ordinance #1364 was passed, which changed the penalty provision and provided that any person violating the provisions of the ordinance shall, upon conviction, pay a penalty in the amount of $25.00. No minimum or maximum penalty was set, but merely the firm penalty of $25.00.

It has been consistently held by this office that trial magistrates could not assess a fine for traffic violations in an amount less than the minimum set by statute. See 24 Opinions of the Attorney General 436, 26 Opinions of the Attorney General 493. Of course, trial magistrates could suspend sentence at the time that the sentence was imposed. This still appears to be true.

We have also examined the provisions of Article 4, Section 41C of the Constitution of Maryland, which created the Municipal Court of Baltimore City, together with Chapter 14 of the Laws of the Special Session of the General Assembly of 1961, and nowhere do we find authority for the judges of the Municipal Court of Baltimore City to impose a lesser fine than the minimum fine established by the Code.

Since the violators of the Snow Emergency Route Ordinance, by pleading guilty, have submitted to the punishment of the court, the court can only impose the fine of $25.00. We therefore believe that the previous practice of allowing the payment of $10.25, under these circumstances, was improper and that the new Municipal Court of Baltimore City should establish the fine in the amount of $25.00.

THOMAS B. FINAN, *Attorney General*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

PUBLIC IMPROVEMENTS

DEPARTMENT OF PUBLIC IMPROVEMENTS—STATE IMPROVEMENTS NOT SUBJECT TO LOCAL REGULATION FOR BUILDING PERMIT UNLESS EXPRESSLY PROVIDED BY STATUTE.

July 6, 1961

Mr. Albert P. Backhaus, Director,
Department of Public Improvements.

I wish to acknowledge receipt of your letter of June 29, 1961, in which you enclosed copies of letters received by the general contractor on the Department of Motor Vehicles Building project, as well as his sub-contractor, and copies of letters from the Plumbing Commission for Anne Arundel County.

You specifically wish to know whether a plumbing permit is required for the construction of the Department of Motor Vehicles Building in Anne Arundel County.

In reviewing the various opinions of former Attorneys General, I find some conflict regarding the obtention of permits from local authorities for construction of State projects. In 19 Opinions of the Attorney General 134, it was held that a contractor engaged in construction work for Rosewood State Training School was not required to obtain a Baltimore County Building Permit. In 23 Opinions of the Attorney General 399, it was held that an Anne Arundel County Plumbing Permit is necessary to install new plumbing in a State institution, but that the plumbing work is not subject to inspection and approval by the local plumbing commission after the permit has been issued. In a subsequent opinion, reported in 23 Opinions of the Attorney General 400, it was held that the State was not required to obtain a plumbing permit for work done at the Rosewood State Training School. In that opinion the Attorney General limited the application of the previous Opinion reported in 23 Opinions of the Attorney General. Subsequently in an opinion reported in 35 Opinions of the Attorney General at page 273, Judge Hall Hammond, then Attorney General,

held that the Baltimore City Zoning Regulations did not apply to State construction in the absence of a contrary intent expressed in legislation dealing with a particular State agency involved.

Since there is some confusion in the field of permits for State construction, I have thoroughly reviewed the problem and believe that the reasoning in 23 Opinions of the Attorney General, page 400, *supra,* is applicable here. Unless specifically directed by some statute, I now feel that State institutions in the various counties do not require local permits since to exact a license fee from a contractor engaged in such an enterprise would increase the cost to the State government. Applying the principle of sovereignty of the State, I believe that the State should be free from all such regulation and control by local authorities unless an express mandate of the Legislature directs to the contrary.

I therefore advise that in my opinion, the contractor on the Department of Motor Vehicles Building in Anne Arundel County is not required to obtain a plumbing permit for that project and to the extent that the previous opinion, reported in 23 Opinions of the Attorney General 399, holds to the contrary, the former opinion is overruled.

THOMAS B. FINAN, *Attorney General.*

PUBLIC WELFARE

STATE WELFARE PROGRAM—DEPARTMENT OF PUBLIC WELFARE OF BALTIMORE CITY UNDER SUPERVISION, DIRECTION AND CONTROL OF STATE DEPARTMENT OF PUBLIC WELFARE—PURCHASES OF EQUIPMENT BY CITY DEPARTMENT TO BE MADE THROUGH CITY PURCHASING DEPARTMENT RATHER THAN STATE DEPARTMENT UNDER PROVISION OF CITY CHARTER.

September 19, 1961.

Mr. Thomas J. S. Waxter, Director,
State Department of Public Welfare.

You ask in your recent letter whether purchases of equipment for the Department of Public Welfare of Baltimore City are to be made through the City Purchasing Department or through the State Department of Budget and Procurement. You advise us that such purchases are now and have for many years in the past been made through the City Purchasing Department. You state, however, that by a recent change in the law the financial participation of Baltimore City in the State welfare program is limited to 10 cents on its tax rate, so that now "it will be all State money in the program over and above the 10c on the tax rate". Under these circumstances, you advise us that your Department wishes to supervise equipment expenditures for the City Department more closely by having them executed through the State Department of Budget and Procurement, rather than the City Purchasing Department.

The Department of Public Welfare of Baltimore City was created by Section 82 of the Baltimore City Charter (Charter and Public Local Laws of Baltimore City, 1949 Edition). This section provides, *inter alia,* for the appointment of a director of the department "who shall direct its operations" and who "shall perform the duties and exercise the powers imposed or conferred by the Charter upon the Department of Welfare . . .". One of the duties imposed upon the department, as a municipal agency of the City of

Baltimore, is that it comply with the requirements of Section 44 of the Charter, and purchase its supplies and equipment through the City Purchasing Department.

By the provisions of Section 3 of Article 88A, Annotated Code of Maryland (1957 Edition), the Department of Public Welfare of Baltimore City, like each of the County Welfare Boards, is "subject to" the supervision, direction and control of the State Department of Public Welfare, which is constituted by this section as "the central, coordinating, and directing agency of all welfare activities in this State". Section 16 of this Article provides, however, as follows:

> "The organization, rights, powers, duties, obligations, and functions of the Department of Public Welfare of Baltimore City as prescribed in Section 82 of the Baltimore City Charter (1949 Edition) shall not be affected by this Article, except as hereinbefore provided . . .".

The Department of Public Welfare of Baltimore City, being expressly "subject to" the supervision, direction and control of the State Department of Public Welfare, is, generally speaking, subservient and subordinate to it. See *Coffey v. Superior Court,* 82 P. 75 (Cal.). The specific authority of the State Department to "supervise, direct and control" the City Department vests in the former, in our opinion, the authority to oversee for direction, to superintend, to issue authoritative instruction, to order or command, to regulate, govern, administer, to command what shall be done and require obedience, and to inspect with authority and direct the work of the City Department. See *Fluet v. McCabe,* 12 N.E. 2d 89 (Mass.), *Hutchins v. City of Des Moines,* 157 N.W. 881 (Iowa); *Way v. Patton,* 241 P. 2d 895 (Ore.); *Greene v. Wheeler,* 29 F. 2d 468; *Pacific Emp. Ins. Co. v. Hartford Accident and Indemnity Co.,* 228 F. 2d 365; *Speirs & Co. v. Underwriters,* 191 P. 2d 124 (Cal.); *Coffey v. Superior Court, supra.* This authority is not tantamount, however, to a grant of powers, express or implied, to require the City Department, whose rights,

powers, duties, obligations and functions under the Charter are not otherwise to be affected, to ignore an express provision of law imposed upon it by the Charter to make its purchases through the City Purchasing Department. In other words, the authority in this instance "to supervise, direct and control" must be exercised within the framework of existing law and does not itself confer power to change an express provision of such law. The law does not favor repeals by implication unless there is a manifest inconsistency between an earlier and a later statute, or unless their provisions are so repugnant and irreconcilable that they cannot stand together. See *Renz v. Holding Company*, 223 Md. 34; *Kirkwood v. Provident Savings Bank*, 205 Md. 48; *Pressman v. Elgin*, 187 Md. 446.

It is nevertheless clear that the authority of the State Department "to supervise, direct and control" the City Department empowers it to direct what shall be purchased, and the expediency, necessity or desirability of such purchase. Once having approved a purchase, however, the State Department has no authority to dictate its execution other than through the City Purchasing Department. The fact that in the main State funds are used to make such purchases is, under existing law, a fact without legal consequence.

THOMAS B. FINAN, *Attorney General.*

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

RACING

RACING COMMISSION—WHEN RACES ARE LOST BY REASON OF THE CONDITION OF THE RACING TRACK, COMMISSION IN ITS DISCRETION MAY AUTHORIZE TRANSFER OF DAY LOST TO ANOTHER TRACK.

April 17, 1961

Mr. James A. Callahan, Acting Secretary,
Maryland Racing Commission.

We wish to acknowledge receipt of your letter of April 10, 1961, whereby you advise that the Commission has received a request from the Bowie Race Course seeking to run races an extra day this year at one of the other mile tracks to compensate for the races lost on February 11, 1961. According to the request of Bowie, the day was lost when the last seven races were cancelled by the Jockey's Guild due to the condition of the track.

According to our information, Bowie completely refunded its gate and incurred additional expenses due to the cancellation. You desire to know whether it is within the authority of the Racing Commission to, in its discretion, allow a substitute day to compensate for the day lost as a result of the action of the Jockey's Guild.

Article 78B, Section 7(a), provides that an association desiring to conduct races during any calendar year shall apply to the Commission for a license to do so; also, that the application shall specify the days on which racing is desired to be conducted and shall contain such other information as the Commission shall prescribe.

Subsection (b) directs the Commission to award all dates for racing in the State of Maryland within the current year, provided the dates of award shall not exceed 120 days in the aggregate.

Subsection (c) further limits the power of the Commission so that no one association shall be given a license to

conduct racing for more than 54 days, nor shall more than an aggregate of 72 days be held in any one year on any track.

Subsection (d) provides that the Commission "may, at any time or times, in its discretion, authorize any * * * association to transfer its racing meet or meetings from its own track, or place for holding races, to the track, or place for holding races, of any other * * * association now conducting racing in the State of Maryland * * * ".

Since Bowie lost a day by reason of the termination of races, it is our opinion that the Commission, acting under the provisions of Section 7(d), may in its discretion authorize the transfer of this day to another track, if the other provisions of Article 78B are not contravened.

THOMAS B. FINAN, *Attorney General.*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

RACING COMMISSION—RACING FUND—COMMISSION MAY NOT GIVE NUNC PRO TUNC ORDER FOR PAYMENTS FROM FUND.

October 25, 1961

Mr. James A. Callahan, Acting Secretary,
Maryland Racing Commission.

We wish to acknowledge receipt of your letter and enclosures relating to the request from the Laurel Race Course for approval of refund of certain monies from the Racing Fund that have been spent in the period from 1956 through 1959. The sum involved is approximately a half million dollars. It appears that during this period the Laurel Race Course applied to and received approval for certain capital improvements to the Race Course. At the time of the request and approval, the Race Course advised the Commission of the estimated cost of improvements. The additional costs are greatly in excess of the estimated cost and the Laurel Race Course desires approval of the excesses that have been spent during the period involved. You specifically wish to know whether the Commission, in its discretion, can grant approval of these excess costs at this time, to be paid from the Racing Fund.

Article 78B, Section 12(c) provides, in part:

> "*Grants to Commission; reversion to State.*—The amount of the Racing Fund on hand at any time, representing the deductions made by any particular licensee from the mutuel pool, previously deducted by such licensee and paid to the State as a tax, may, *with the prior written and express permission of the Commission,* upon such terms and conditions as it may prescribe, be granted by the Commission to that particular licensee as a contribution to its capital for any substantial alterations, additions, changes, improvements or major repairs to or upon the property owned or leased by such licensee and by it used for the conduct of racing. * * *"

In construing these provisions, the Honorable Hall Hammond, then Attorney General, in an opinion in 35 Opinions of the Attorney General 257, held that the test of "prior written express permission" is mandatory and that the Commission could not make *nunc pro tunc* reimbursement for expenditures made previously without approval. In construing this, it was said:

> "* * * Next, if the purpose and nature of the legislation are considered, it is clear that a non-mandatory construction would permit the very evil which the Racing Commission and the Legislature sought to cure by the passage of the law. It was to avoid the uncertainty and difficulty attendant upon giving blanket approval of expenditures and then attempting, after they were made, to decide whether they were proper or not, that the requirement of 'prior written and express' approval was inserted."

Subsequently, by the provisions of Chapter 422 of the Laws of 1953, subsection (e) was added and it clearly states that prior written and express permission of the Commission is required for expenditures for capital improvements to the plant of the racing licensee. Therefore, the General Assembly, having had knowledge of the previous opinion of Attorney General Hammond, ratified and confirmed that opinion. It seems clear that the Legislature desired the Commission to not only approve the nature and scope of the improvements, but also required the Commission to approve the exact amount to be expended before final approval was given. Otherwise, it would allow a blanket approval of amounts to be spent and permit unauthorized additional improvements or the increase in cost of the proposed improvements without Commission approval. We believe that the Legislature made the terms for reimbursement from the Racing Fund mandatory and that the Commission has no discretion other than to give prior written and express permission for the improvements to be made and the expenditures to be allowed.

For the reasons above set forth, it is our opinion that the Commission cannot approve the request of the Laurel Race Course for excesses that have been spent over their estimated costs.

THOMAS B. FINAN, *Attorney General.*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

REAL ESTATE COMMISSION

REAL ESTATE COMMISSION—REAL ESTATE BROKERS' BONDS —CONTINUOUS BOND PERMISSIBLE WHERE SURETY IS MADE LIABLE FOR FULL PENALTY IN EACH YEAR BOND IS IN EFFECT.

April 5, 1961.

Mr. Edward J. Dyas, Chairman,
Real Estate Commission.

In your letter of March 23, 1961, you stated that you have been requested to adopt a continuous form of bond for real estate salesmen and brokers. You have requested an opinion as to whether a continuous bond similar in form to one enclosed with your letter could be adopted by rule of the Commission.

Past opinions of this office have suggested that fidelity bonds of State employees should be written on an annual basis, as distinguished from a continuous bond, so as to afford greater protection. See 13 Opinions of the Attorney General 138; 14 Opinions of the Attorney General 118; and 21 Opinions of the Attorney General 534. It was thought that an annual bond would give greater protection because the entire penalty would be available for each year, while in the case of a continuing bond the penalty is applicable for an indefinite period and the liability of the bonding company is ordinarily limited to the penalty of the bond even though there may have been losses in excess of said penalty during each year that the bond has been in effect. In other words, where the penal sum of a continuous bond is $1,000, and where defalcations in the amount of $1,000 occur in each of several years during which the bond is in effect, the liability of the bonding company would normally be limited to $1,000.

However, if the language of a continuous bond is so phrased that it is clear that the liability of the bonding company shall extend to the full penalty of the bond in each year the bond remains in effect, the protection afforded by

the bond would be as great as that afforded by a series of annual bonds.

The wording of the proposed continuous bond which you forwarded to us would not overcome the previous objections of this office. In our opinion, if the language of this bond were changed to read, "Provided further, that the Surety shall be liable in the full amount of the penal sum of this bond in each and every separate year this bond shall remain in full force and effect", the objections would be met. Such a bond could then be adopted by rule of the Commission.

THOMAS B. FINAN, *Attorney General.*

THOMAS W. JAMISON, III, *Asst. Attorney General.*

REGISTERS OF WILLS

INITIATION OF PETITION FOR REAPPRAISAL OF PERSONALTY —"GOOD CAUSE" JUSTIFYING REVALUATION—REGISTER OF WILLS AS AGENT ON EXECUTORS' BONDS—LIABILITY OF EXECUTORS' BONDS FOR UNPAID TAXES.

January 9, 1961

Mr. Leo J. Parr,
State Auditor.

You have asked advice as to three questions which came to light during your audits of the various Registers of Wills of the State.

1. *Reappraisals*—Chapter 36 of the Acts of 1958 amended Section 153 of Article 81 of the Code, so as to allow a reappraisal of the personal inventory within 15 months after the grant of letters. Under the present state of the law, the inheritance taxes are to be paid upon the inventory or date of death valuation. However, Section 153 further provides that for "good cause" a reappraisal may be ordered and such revaluation will control. The request is made by Petition to the Orphans' Court and it may be initiated either by the Register of Wills or by an executor or administrator. As we said in 42 Opinions of the Attorney General 309: ". . . the propriety of a reappraisal is a matter for the court to determine." The section provides that the court "may direct" a reappraisal, thus it is a discretionary rather than a mandatory matter. We hesitate to recite specific circumstances which establish "good cause", because a variety of causes might warrant such action.

In 42 Opinions of the Attorney General 309, we considered a case where ". . . notes which purport to be fully secured by real estate in Montgomery County have been valued at only one-fourth of their face amount." There we ruled:

> ". . . when circumstances such as those involved here have been brought to the attention of the Reg-

> ister of Wills, it is the duty of the Register of Wills to apply to the court to have it determined that the inheritance tax is being imposed on the actual clear value of the estate."

Obviously any substantial appreciation or depreciation in value of personalty which occurs within the 15 month period and prior to distribution, would also justify the filing of a Petition for Reappraisal.

Without commenting at length on the preamble to Chapter 36 of 1958, we recognize that its recitals may be inartfully stated, but the provisions of the body of the Act clearly state the law as interpreted herein.

2. *Register of Wills as Agent on Executors' Bonds.*— You question the practice of the Register, his Deputy and/or other personnel in that office acting as agent for various surety companies on the executors' and administrators' bonds required by Article 93, Sections 43, 55, 69 and 82 of the Code. We find no express statutory prohibition which bars such a practice. The provisions of Sections 298, 299, 302, 303 and 306, of Article 93 do not seem to cover this area. We would note in passing that any such agents are required to be licensed under the insurance laws. Article 48A, Sections 121, 123, etc., of the Code. In ruling this practice not to be illegal, we are not holding it to be free from doubt as to its propriety. We merely find that the State has no interest in any fees or commissions so earned. In 37 Opinions of the Attorney General 319, we cited the prior opinion of 21 Opinions of the Attorney General 564, which held at page 567:

> "* * * It is not for us to regulate the administration of the office of Register of Wills in its general functioning. This office is an adjunct of a Court—the Orphans' Court of Baltimore City—and the Court may give approval or disapproval to certain of the practices, just as other Courts pass upon practices in the respective Clerks' offices—which practices affect the administration of justice in the Court."

3. *Liability of Executors' Bonds for unpaid taxes.*—An executor or administrator is charged with the primary responsibility for the payment of inheritance taxes. Article 81, Section 152, Code. The condition clause of his bond subjects the surety to liability if he fails to "discharge the duties of him required" or fails "in the faithful performance of the said office." If the administration account is not filed when due and the taxes are not paid, the Orphans' Court, on motion of the Register, should direct the executor to appear and show cause why his letters should not be revoked. If this action also fails to produce results and the tax remains unpaid, a claim, and suit if necessary, may be filed against the surety on the executor's bond. *State v. Dalrymple,* 70 Md. 294, 301; *Fisher v. State,* 106 Md. 104, 119; *Helser v. State,* 128 Md. 228, 233.

C. FERDINAND SYBERT, *Attorney General*

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

REGISTERS OF WILLS—FUNERAL EXPENSES OF DECEASED WIFE IN EXCESS OF HUSBAND'S DISTRIBUTIVE SHARE PAYABLE FROM HER ESTATE—NON-ALLOWANCE OF MEDICAL EXPENSES FROM SUCH ESTATE.

July 19, 1961

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

You inquire concerning the estate of a certain Margaret M. Hughes, who died intestate, survived by her husband, from whom she had been separated for over thirty years. A brother of the decedent, who is now administrator of the estate, made the necessary arrangements for the funeral and the bill therefor remains unpaid at this time.

Subsequently, the administrator presented a petition, praying authorization for him to pay the funeral expenses, in the sum of $840.34, an order for which the Orphans' Court signed. In such order, the court also ordered that the distributive share of the husband of the decedent be charged with the amount of said expenses.

In addition, there is also due Church Home and Hospital the sum of $121.50 for medical services rendered to decedent during her last illness. The surviving husband, you tell us, is financially irresponsible.

An auditor from your office has examined proposed final administration account in the estate, and has declined to approve the same on the ground that the decedent's husband is primarily liable for the funeral expenses of his wife, and that the said funeral expenses and the amount due Church Home and Hospital cannot be charged against the estate unless the husband's distributive share is at least equal to or in excess of the funeral expenses and the amount due Church Home and Hospital.

Article 93, Section 9, of the Annotated Code of Maryland (1957 Edition) states:

> "Whenever any married woman dies, or shall have died, her estate, providing it be solvent, shall

be liable for the payment of her funeral expenses, to be allowed in the discretion of the court according to the conditions and circumstances of the deceased, not to exceed three hundred ($300) dollars, except by special order of court. It shall be the duty of the executor or administrator of such a deceased wife's estate to pay said funeral expenses out of her estate and to thereafter collect from the deceased wife's surviving husband a sum sufficient to reimburse said decedent's estate for the amount so paid out of it to cover said funeral expenses. The provisions of this subtitle are not intended to relieve a surviving husband of his liability for the payment of his deceased wife's funeral expenses, but is intended to make a deceased wife's estate, providing it be solvent, a primary source from which her funeral expenses may be paid."

Section 6 of said Article 93 (1960 Supplement) provides, *inter alia*:

"On the other side shall be stated the disbursements by him made, and which are to be made in the following order and priority: First, funeral expenses, to be allowed at the discretion of the court according to the condition and circumstances of the deceased, not to exceed five hundred dollars ($500.00) except by special order of the court, and provided the estate of the decedent be solvent; . . . fifth, charges for medical attendance, including nursing attendance in last illness, to be allowed at the discretion of the court according to the conditions and circumstances of the deceased, not to exceed one hundred dollars ($100.00), not more than fifty dollars ($50.00) of which shall be paid to the physician or physicians furnishing said medical attendance and not more than fifty dollars ($50.00) of which shall be paid to the nurse or nurses furnishing said nursing attendance . . ."

There is no question but that the husband is liable under common law for the medical attendance upon his wife and

for her funeral expenses. *Barnes v. Starr*, 144 Md. 218, 124 A. 922. And it had not been the practice to allow the husband any credit on the settlement of the administration of the wife's estate for such expenditures. *Stonsifer v. Shriver*, 100 Md. 30, 59 A. 139; *Barnes v. Starr, supra.* Nor is it to be doubted that where funeral expenses are advanced by an administrator of a married woman, such monies may be reimbursed out of her estate and charged against the husband's distributive share thereof. *Anderson v. Carter*, 175 Md. 540, 2 A. 2d 677.

We are familiar with the comment at Section 701 of Volume 1 of Sykes *Probate Law & Practice*, to wit:

> "Although the husband is liable for his wife's funeral expenses and they constitute no charge upon her separate estate, it is provided by statute that when a married woman dies and leaves a solvent estate it is the duty of the executor after the court fixes the amount of the funeral bill to pay the same out of her estate, and thereafter to collect from the surviving husband a sum sufficient to reimburse the estate. This provision was not intended to relieve a surviving husband of his liability for the payment of his deceased wife's funeral expenses, but to make her estate, provided it be solvent, a primary source from which her funeral expenses may be paid. Ordinarily the amount allowed should not be in excess of the husband's distributive share . . ."

However, notwithstanding the view of Sykes, *supra*, (and which is unsupported), and that Article 93, Section 9 of the Annotated Code, appear to be in derogation, to a degree, of the common law, we can find no justification under the clear words of the law to hold that the amount allowable for funeral expenses should not be in excess of the husband's distributive share. Under the indicated section of the Code, *supra*, the husband is not relieved of his common law obligation for payment of his deceased wife's funeral expenses,

but rather her estate is made a primary "source" therefor, if solvent.

An interpretation which limits the wife's estate's primary availability for payment, up to an amount not exceeding the husband's distributive share, breaks down, where, for whatever reason, there is no distributive share to him, or his share is minute or small in relation to the funeral expense due and owing.

It would appear that the purpose of the statute was to facilitate the payment of funeral expenses, since, to say the least, funeral arrangements are matters which require a degree of promptitude that ought not to be complicated by difficulty in determining who is to pay for such, and when. This is especially so where, as here, the husband was in another State, impecunious and apparently unable and/or unwilling to return to assist in the burial of his wife.

That Article 93, Section 9, *supra,* requires the administrator of a deceased wife either to pay the funeral expenses out of her estate and to thereafter collect from her husband a sum sufficient to reimburse the estate therefor, certainly indicates a legislative intent to pay such expenses originally, in an amount which might exceed the husband's distributive share. See *Bliss v. Bliss,* 133 Md. 61, 74, 105 A. 467.

The better practice might well be for the Orphans' Court, where the question arises as to allowance over the normal limit for payment of a wife's funeral expenses, to inquire into the readiness or ability of the husband to pay for such expenses, and the relation such total expenses bear to his distributive share which might be available for payment.

The Register of Wills is under no duty, as such, in this type of situation, to protect against diminution of the distributive share of persons other than the husband, when to do so flies in the face of the clear words of the statute.

In considering the allowance of medical expenses, it seems clear that since funeral expenses will be greater than any distributive share to the husband, such medical ex-

penses may not be offset against such share, as was permitted in *Anderson v. Carter, supra.* That being the case, we are of the opinion that medical expenses may not be payable out of the estate here, the husband being primarily indebted therefor, *Anderson v. Carter, supra; Barnes v. Starr, supra* (and cases cited therein), and there being no Code provision akin to Article 93, Section 9, making the wife's estate the "primary source" for payment thereof. On this point, however, the conclusion conceivably could be to the contrary, if it is determined that the intestate, expressly, or by implication, was given the credits for such medical expenses. See *Pickett's Estate,* et al. *v. Pickett,* 162 Md. 10, 158 A. 29. In such case, the husband might well not be liable for a debt contracted upon the wife's sole credit.

THOMAS B. FINAN, *Attorney General*

ROBERT S. BOURBON, *Assistant Attorney General.*

REGISTERS OF WILLS—SALE OF REAL PROPERTY AT PRIVATE SALE—EXECUTOR, UNDER POWER IN DECEDENT'S WILL, MAY SELL SUCH FOR LESS THAN VALUE ESTABLISHED IN LAST APPRAISAL WITHOUT PRIOR ORDER OF ORPHANS' COURT—DUTY IMPOSED ON EXECUTOR IN CONDUCT OF SALE.

August 3, 1961.

Mr. E. Clyde Walls,
Register of Wills
for Queen Anne's County.

This will respond to your letter of July 28, 1961, in connection with the estate of H. F. McPherson, wherein you ask whether the executor may, under power of sale in the decedent's will, sell certain real property at private sale, for less than the value established at the last appraisal, without prior order of your Orphans' Court. Apparently, a reappraisal of the property in question set the value thereof at $13,500, and the executor is requesting immediate ratification of a private sale made by him for the sum of $8,000. He did not apply for authority to sell at private sale. The executor is given power in the Will to sell at public or private sale.

Article 93, Section 316, Annotated Code of Maryland (1957 Edition), provides, *inter alia,* as follows:

> "In all cases where an executor may be authorized and directed to sell the real estate of a testator, such executor may sell and convey the same, and shall account therefor to the orphans' court of the county where he obtained letters, in the same manner that an executor is bound to account for the sales of personal estate; . . . but each such sale shall not be valid or effectual unless ratified and confirmed by the orphans' court, after notice by publication given in the same manner as practiced in cases of sales of lands under decrees in equity . . ."

The Court of Appeals, in *Lochary v. Corrigan*, 132 Md. 371, 372; 103 A. 1006, said:

> "When an executor is authorized by will to sell real estate, he does not require an order of the Orphans' Court prior to the sale to enable him to execute the power thus conferred. The sale must be reported to and ratified by the Court, but a preliminary order authorizing the sale is not essential to its validity . . . That this provision (now Code, Article 93, Section 310, relating to certain sales without order of court, being void) has no relation to sales of real estate which the will authorizes and directs the executor to sell, has heretofore been stated by this Court in the case of *Brooks v. Bergner*, 83 Md. 354." (Explanation in brackets supplied) Accord: *Goldsborough v. DeWitt*, 171 Md. 225, 252, 189 A. 226.

Nor is the fact that the private sale price is less than the appraised value of the realty necessarily a disqualifying factor. See *Goldsborough v. DeWitt, supra,* at page 244. In *Webb & Knapp v. Hanover Bank*, 214 Md. 230, 243, 244; 133 A. 2d 450, the court stated:

> "In speaking of the duties of a conventional trustee, as distinguished from a judicial trustee, this Court said in *Kramme v. Mewshaw, supra,* (at 147 Md. at 548) 128 A. at 473: 'A conventional trustee, * * * who is proceeding without the assumption of jurisdiction by the court, is not affected by the regulations of the mode of sale in chancery, but he is bound in the effort to secure the fair market value of the property, to employ that degree of care which a reasonably prudent man would exhibit in the conduct of a similar sale. *Miller's Equity,* secs. 493, 495, 488. If a sale should be made by a conventional trustee in good faith and according to his best judgment, the sale will not be set aside unless there exists an inadequacy of price that, under the circumstances, is

directly attributable to some failure of reasonable diligence or effort in the making of the sale'.

"Later in the same case the Court said (147 Md. at 550-551): 'While a private sale, without public advertisement, does not require the same degree of inadequacy of price and of a reasonable expectation that a re-sale will produce a better result as are necessary to defeat a sale by public auction, yet both an inadequacy of price and a justifiable expectation of securing a higher price must co-exist before a court will set aside a contract of private sale made in good faith by a conventional trustee in the exercise of a discretion which was incident to an express power of sale.' " (Citations omitted.)

Consequently, it appears to us that the executor may move for immediate ratification of sale of the parcel in question, assuming, under Code, Article 93, Section 327, that all parties in interest are *sui juris* and their consent is given, and assuming further that the court is satisfied that the executor exercised care, prudence and reasonable diligence in obtaining an adequate price for the property. See *Webb & Knapp, supra,* 214 Md. at 242. These things, your court must inquire into and determine.

We also are of the opinion that the executor need not apply to your court for authority to sell the real estate at less than the appraised value. The court may exercise considerable, and ultimate, control over this sale by ratifying and confirming, if it approves thereof, or by refusing so to do if it does not.

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Asst. Attorney General.*

REGISTERS OF WILLS—ESTATE CONSISTING OF ONLY ONE MOTOR VEHICLE—SPOUSE ENTITLED TO OPERATE SUCH UPON HIGHWAYS OF STATE DURING COURSE OF ADMINISTRATION IN NAME OF DECEASED SPOUSE WITHOUT NEW REGISTRATION OR CERTIFICATE OF TITLE—SUCH OPERATION TO CONTINUE IN ANY EVENT NO LATER THAN EXPIRATION OF CURRENT ANNUAL REGISTRATION.

August 10, 1961

Mr. James M. Roby,
Register of Wills for Allegany County.

Your recent question asks regarding the legal right of a widow having only one automobile accruing out of her husband's estate and not needing to take out letters of administration or letters testamentary, to operate the motor vehicle under Article 66½, Section 51(cc), Annotated Code of Maryland (1960 Supplement).

Code, Article 66½, Section 51(cc) provides:

> "*Passage of title by testamentary disposition or intestate devolution.*—Whenever the title or interest of an owner in or to a registered vehicle shall pass to the spouse of the deceased as a result of testamentary disposition or intestate devolution, said survivor, during the course of the administration of the estate, shall be entitled to operate such vehicle upon the highways of the State until the expiration of the current annual registration in the name of the deceased spouse, without the necessity of applying for or obtaining the registration and certificate of title required by law."

Code, Article 93, Section 260 (1960 Supplement) provides:

> "When the only assets of a decedent's estate consist of not more than two motor vehicles, the Commissioner of Motor Vehicles may, upon proof

> satisfactory to him that all debts and taxes owed by the decedent have been paid, transfer the title to such motor vehicles to the person entitled thereto and, upon application of such person, refund the amount of license fees for the unused portion of the year, calculated on a semi-annual basis; and, in such case, no administration of the decedent's estate need be had."

Reading together the above cited sections of the Code, it seems clear that the intent of the Legislature, where a formal administration is not required, was to allow a surviving spouse to operate a vehicle received by him or her "as a result of testamentary disposition or intestate devolution . . . upon the highways of the State until the expiration of the current annual registration in the name of the deceased spouse, without the necessity of applying for or obtaining the registration and certificate of title required by law."

The allowance to the survivor of this privilege of operation of such vehicle applies to such survivor on the same basis where the deceased spouse left no estate as where he did leave an estate; certainly, use of the words "intestate devolution" in Section 51(cc) of Article 66½ confirms this interpretation. So long as the surviving spouse is legally entitled to the motor vehicle by virtue of death of the deceased spouse, such vehicle may be operated, as indicated, "until the expiration of the current annual registration".

"During the course of administration" means all through the time and until the completion of actual administration and not beyond the expiration of the current annual registration, whichever occurs first. Where formal administration is not required, by virtue of Code, Article 93, Section 260, *supra,* "during the course of administration" would seem to mean for that period which would have been allowed to the surviving spouse to complete administration had he or she not been absolved from such because of this cited section, provided however, that in no event might such vehicle operation continue beyond the current registration

year. Thus, "until the expiration of the current annual registration", if necessary, seems to be the maximum period during which such operation might be sanctioned, in all cases where the survivor legally took the vehicle or vehicles from the deceased spouse.

An inquiry made of the Maryland Department of Motor Vehicles reveals that since the passage of Code, Article 66½, Section 51(cc), (1960 Supplement), Chapter 107, Laws of Maryland 1960, which took effect June 1, 1960, the administrative practice has been as above indicated. This having been the administrative practice, albeit one of short duration, and being in conformity with what appears to have been the legislative intent, we see no reason to disturb it.

THOMAS B. FINAN, *Attorney General*

ROBERT S. BOURBON, *Assistant Attorney General.*

SHERIFFS

Sheriff May Not Forcibly Enter Dwelling House to Execute Writ of Fieri Facias.

August 30, 1961.

Mr. W. Kenneth Tyler,
Sheriff of Worcester County.

We have your recent letter regarding your rights and potential liabilities with respect to making a levy and sale under a writ of *fieri facias*. You advise that on July 13, 1961, the Clerk of the Circuit Court for Worcester County forwarded to you a writ of *fieri facias* against a man and wife who own a furnished home in the county but who are presently residing out of the State. The attorneys representing the judgment-creditor have instructed you to levy upon the real estate owned by the judgment-debtors, as well as on all personal property contained in the premises. Because of the existence of a prior mortgage, it is questionable whether there is sufficient equity in the real estate to satisfy the judgment, and, therefore, the attorneys for the judgment-creditor are particularly anxious to have the personal property levied upon and sold.

You further advise that the house is locked and that there is no key available to gain entry to levy upon and sell the personal property. You specifically ask whether you are permitted to forcibly enter the premises in order that you might levy upon the personal property therein. In addition, you wish to know if you advertise the real estate for sale whether you may force open the doors of the house in order to allow prospective buyers to inspect the interior, and, as a result of said entry, thereupon levy upon the personal property contained inside the house.

It is the general rule that an officer such as a sheriff or constable, in the execution of a writ of *fieri facias* on personal property, may not break an outer door of a dwelling to levy upon personal property contained therein; however,

when entry through an outer door is gained without force, then interior doors may be forced to seize goods of the judgment-debtor. See Anderson on *Sheriffs*, Section 442; and Annotation, 57 A.L.R. 210.

The early Maryland case of *Cate v. Schaum*, 51 Md. 299, seems to follow this rule. In that case, Cate was the landlord and Schaum the tenant of a house situate in Baltimore City. The tenant was substantially in arrears in rent and an agent of Cate went before a Justice of the Peace and swore out a distraint warrant against the goods of the tenant. The Justice of the Peace delivered the warrant to a constable who broke into the demised premises and took away certain goods which were subsequently sold. An action of trespass for breaking and entering the dwelling house of Schaum was instituted and a judgment was entered in favor of Schaum. The Court of Appeals stated at page 307:

> "From an early time it has been settled that neither the landlord nor his bailiff, in order to make distress of the tenant's goods, can lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling house or other building, or enter by a window which is found shut though not fastened; but it seems the landlord or his bailiff may open the outer door by the usual means adopted by persons having access to the building, and therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt. (Citing cases.) And it is clearly established, as it will abundantly appear from the authorities just cited, that the unlawful entry upon the premises by the landlord or his bailiff to make the distress will render the seizure of the goods altogether void, and the party making it a trespasser *ab initio*."

The Court finally determined that the judgment for damages against the landlord was proper and that the landlord was responsible for the acts of the constable.

The aforementioned rule was followed in more recent cases. In *Bogert v. May,* 55 N.W. 2d 115 (Mich., 1952), it was held that the sheriff, in executing and making a levy on personal property, could not force entrance to the home of the judgment-debtor through the outer door. In that case, the court reiterated the principles aforementioned.

Considering the authorities above cited, it is our conclusion that you, as sheriff, have no right to forcibly gain entry to the house in question in order that you might levy upon the personal property contained therein, and that any forcible entry would subject you to a possible suit and resulting damages for trespass to the property of the judgment-debtors.

THOMAS B. FINAN, *Attorney General.*

JOSEPH S. KAUFMAN, *Deputy Attorney General.*

STATE PROPERTY

FUNDS REALIZED FROM SALE THEREOF, WHERE PROPERTY IS CAPITAL ASSET, ARE APPLIED TO STATE ANNUITY BOND FUND ACCOUNT EXCEPT WHERE SUCH CAPITAL ASSET WAS ORIGINALLY ACQUIRED WITH SPECIAL FUNDS—FUNDS PROVIDED BY GENERAL CONSTRUCTION LOAN ACT OF 1960 ARE SPECIAL FUNDS.

December 11, 1961

Dr. Wilson H. Elkins, President,
University of Maryland.

We have your recent letter in which you advise us that early in 1961 the University acquired certain improved real estate in the vicinity of its Baltimore campus, the funds therefor being provided in the General Construction Loan Act of 1960 (Chapter 86, Laws of 1960). You state that this property is within the boundaries established for an urban renewal project cooperatively planned by the City of Baltimore and the University, the same being designated as University of Maryland Urban Renewal Project II. You further state, in connection with such Urban Renewal Project, and particularly in connection with the financing thereof, that certain advantages would accrue to the University and the City, if the City were to purchase this property from the University; and that in light thereof, the City has recently indicated its desire to so purchase the property at the same price as that paid for it by the University, this being $336,250.00. You inquire as to the proper disposition to be made of the money paid by the City to the University in the event the University agrees to sell the property to the City.

Section 15 of Article 78A of the Annotated Code of Maryland (1957 Edition) relates to sales of State property by State agencies and provides, in pertinent part, as follows:

> "* * * If the consideration received for any such disposition is cash, in whole or in part, the proceeds shall be accounted for and remitted to the State Treasurer; except that any consideration re-

> ceived in cash for the disposition of an asset of a substantial permanent nature, commonly called a capital asset, shall be applied solely to the State Annuity Bond Fund Account for the payment of the principal and interest of the bonded indebtedness of the State and if such capital asset shall have been originally purchased with any special funds, the proceeds thereof shall revert to such fund only."

The property in question being a capital asset, it is manifest from the above that cash received upon a sale thereof must be applied to the State Annuity Bond Fund Account unless (a) the property was originally purchased with "any special funds", in which event the money reverts to such fund only, or (b) the Legislature, by later enactment, made other provision for the use or reversion of such funds.

The funds for the University's acquisition of this property were provided through the sale of the State's general obligation bonds pursuant to the provisions of the General Construction Loan Act of 1960 which, in Section 5 (O) (2), provides the sum of $1,450,000.00 to the University of Maryland for the following specific purpose:

> "Acquisition of land for expansion of the Baltimore campus and assisting the Mayor and City Council of Baltimore in defraying the costs of redevelopment in the area in which any land shall be acquired for such expansion, and for the acquisition of other land and properties for the Baltimore campus (3rd step in campus extension)."

Section 5 (A) of this Act provides that the actual cash proceeds realized from the sale of the bonds shall be used "exclusively" for the purposes named and specified in the Act; and Section 10 provides that such proceeds "shall be used only for capital improvements and for no other purpose". Section 8 provides that if any projects listed in Section 5 shall not be contracted for within two years from the effective date of the Act (June 1, 1960), then such project shall be deemed abandoned, in which event the proceeds

from bonds actually issued, and allocable to the abandoned project, are to be transferred to the Annuity Bond Fund Account. Section 9 of the Act directs the Board of Public Works to certify to the governing bodies of each county and Baltimore City the rate of State tax to be imposed on each $100.00 of assessable property necessary to produce revenues to meet all payments of principal and interest on the bonds so issued to finance the State's capital improvement and construction program. It is thus clear that the Act provides that the funds so appropriated can be used only for the specific named purposes, and for no other purpose, and that if the funds are not so used within two years from the effective date of the Act, they revert to the Annuity Bond Fund Account to be applied to the debt service requirements of the State.

As aforesaid, Section 15 of Article 78A provides that if a State agency sells a capital asset which it originally acquired with "any special funds", the proceeds thereof shall revert to such fund only. Whether the bond funds used by the University to originally acquire the property in question are properly to be classified as "any special funds", within the meaning of Article 78A, Section 15, depends entirely upon the definition of "special funds" which the Legislature had in mind in employing such term in the said Section. In contradistinction to general funds, which are those raised through general State taxation for use in meeting the general expenses of operating the State government, special funds in a strict budgetary sense are those usually produced through the imposition of special taxes, or through the rendition of special services, or the imposition of special fees, for the exclusive support of particular State activities, and generally designated by the Legislature in the Bill appropriating the same as a "special fund appropriation". In a strict sense, the funds realized through sale of the State's general obligation bonds for financing the State's capital improvement program constitute neither a special fund nor a general fund appropriation. Nevertheless, the funds in question, having been originally appropriated "exclusively" for specific capital projects, to be used within a limited time

"only for capital improvements and for no other purpose", and the tax levied to fund payment of principal and interest of the bonds being in the nature of a special tax, we think these funds must be considered as falling within the definition of "any special funds" within the meaning of Article 78A, Section 15. Accordingly, the proceeds realized by the University from the sale of this property would revert to the University's credit in that fund, their ultimate expenditure or reversion to be governed solely by the provisions of the General Construction Loan Act of 1960.

If, following its acquisition and subsequent sale of the property, the University has completed the project authorized by the aforesaid Section 5 (O) (2) of the Act, then by Section 6 thereof the funds so realized from the sale would constitute "unexpended funds" remaining from such completed project and would, by the provisions of Section 6, be transferred to the Annuity Bond Fund Account. If, following its acquisition and subsequent sale of the property, the University has abandoned the project authorized by said Section 5 (O) (2), then by Section 8 of the Act the funds so realized from the sale would likewise be transferred to the Annuity Bond Fund Account. The language of Section 5 (O) (2), however, does not designate any particular properties to be acquired by the University, but rather vests a large discretion therein as to what properties, within the total funds made available, it is so authorized to acquire. Considered thusly, and bearing in mind that the funds do not expire through non-use until June 1, 1962, it is our opinion that the University has neither completed nor abandoned any part of its project, and the money realized from the sale of the property would stand to the University's credit in that fund, and remain available to it, until June 1, 1962, on which date it will revert to the Annuity Bond Fund Account unless "contracted for" by the University prior to that date (unless extended beyond this date by subsequent act of the Legislature).

THOMAS B. FINAN, *Attorney General*

ROBERT C. MURPHY, *Assistant Attorney General.*

TAXATION

TAXATION—INHERITANCE TAXES—COMPUTATION OF VALUE OF LIFE ESTATE CREATED PRIOR TO 1951 IS BY EQUITY RULES OF SUPREME BENCH—INTER VIVOS TRANSFER BY REVOCABLE DEED OF TRUST—NOT A TRANSFER SUBJECT TO TAX UNDER LAW PRIOR TO 1935.

January 10, 1961.

Mr. Leroy C. Shaughnessy,
Register of Wills for
Baltimore City.

Re: Estate of Louis Kann

Certain questions as to inheritance tax consequences relating to the above estate have been propounded to us. The facts given indicate that there was an inter vivos revocable deed of trust of 1918, by the decedent, who died in 1920, by which a life estate was established for his widow, who died in 1960. The remainder interest, as to one-half, passed equally to two stepdaughters, and, as to the other half, second life-estates with powers of appointment were given the two stepdaughters, followed by a remainder to their descendants. The decedent's will established a trust following the same pattern.

In calculating taxes here it is necessary to note that the law in effect at the time of the decedent's death controls. 42 Opinions of the Attorney General 384. At the time of death there was no tax as to direct descendants and collaterals were taxed at 5%. The tax applied as to property of which the decedent died "seized and possessed", or which was transferred before death but "intended to take effect after death".

Since the Direct Inheritance Act of 1935 had not yet been enacted when the decedent died in 1920, no tax was due on the life estate of the widow under the will. The widow having now died, those testamentary estates passing to the

stepdaughters, who are collaterals, are taxable. The life estates of the latter should be calculated on the basis of the Equity Rules of the Supreme Bench of Baltimore City in effect in 1920. 37 Opinions of the Attorney General 385. See also Chapter 620, Section 2, Acts of 1951.

Upon vesting of the remainder interest created under the will, a tax will be due upon the balance after deduction of the proportion taxed to the life tenant. 31 Opinions of the Attorney General 237. The correct method of making such computation is fully discussed in 27 Opinions of the Attorney General 417, where it is stated at 419:

> ". . . Under the law in effect at the death of the testator, which is the law controlling in this case, credit is given the remaindermen by Section 137 of Article 81 of the Code of 1924 (1929 Supp.), for proportions of the estate already taxed. This credit, however, is properly given only by a ratable reduction of the quantum of the interest vesting in possession, and not by the dollar amount of taxes previously paid.
>
> * * *
>
> ". . . The value of the second life estate must be determined as of the time it vests in possession, having due regard for the age of the life tenant and the value of the property at that time. This is not affected by any tax paid by the prior life tenant. The apportionment contemplated by the statute is effected when the remainder falls in, and allows deduction of all previous proportions taxed, but credit should not be given until that time. See 24 Opinions of the Attorney General, 881."

As stated, the question of taxes due by reason of the deed of trust is to be judged in the light of the pre-1936 law. In the instant case there was a 1918 *inter vivos,* revocable deed of trust. The right of revocation terminated by death of the grantor in 1920. In *Downes v. Safe Deposit*

& Trust Co., 163 Md. 30, our Court of Appeals held an identical deed of trust not to be subject to tax under the old tax statute which is likewise applicable here. For this reason, we find no tax to be due presently as to the estates created under the deed of trust.

The life estates of the stepdaughters under this deed of trust, which have now come into possession, were coupled with powers of appointment. One of the life tenants has released her power, while the other gave a partial release which still allows testamentary appointment to some collaterals as well as direct descendants. Exercise of such power may occasion a tax liability. It is unnecessary for us to consider this question at the present time.

C. FERDINAND SYBERT, *Attorney General.*

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

TAXATION—INHERITANCE TAX—PASSING OF REMAINDER UNDER DEED, DATED IN 1935, AND RESERVING TO GRANTOR POWER TO SELL, MORTGAGE, ETC., DURING HIS LIFE, IS TAXABLE.

January 30, 1961

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

Re: Estate of John T. Brennan, 2 S. Culver Street

We have been asked to review the effect of a deed to the above property in regard to its tax aspects. In 1935, John T. Brennan, conveyed by deed leasehold property to his daughter and son-in-law, "reserving, however, the absolute right to grant, convey, sell, mortgage, limit or dispose of the herein described property, absolutely, during the term of my natural life, as if this deed had never been executed." The ground rent was redeemed by the grantees in 1942. Mr. Brennan died in October, 1957. It is contended that no tax applied upon the death of Mr. Brennan, because the deed of transfer was effected prior to the change in the application of the inheritance tax, as enacted in 1936.

In support of the position advanced, we are referred to *Downes v. Safe Deposit and Trust Co.*, 163 Md. 30, and to 24 Opinions of the Attorney General 847. The transfers involved in each of those cases differed significantly from the present one. The *Downes* case, and the case discussed in the above opinion of this office, were both concerned with transfers by a grantor *to another person* for life (not a life estate reserved in the grantor himself), with remainder over. In *Downes, supra,* the grantor retained only a power of revocation, while in the opinion cited, the life tenant was given full power of sale. In each of these instances it was held that no tax was payable under the pre-1936 law.

The effect of the deed in question here was to reserve to the grantor himself a life estate with full powers of sale.

Where the grantor and the life tenant are different persons, we can justly say that the remainder interest, which is derived from the grantor, vests in interest as of the date of the deed. However, where the life tenant and the grantor are the same, as here, the grantor did not divest himself of his interest at the time of the deed so as to make a completed gift to the remainderman. In such cases as this, the instrument is of an ambulatory nature and the transfer to the remainderman is incomplete until the death of the life tenant. This difference is described in 40 Opinions of the Attorney General 629.

The present case is identical to the situation reviewed in 27 Opinions of the Attorney General 443, where we ruled:

> ". . . We believe it too obvious for discussion that the reservation by the mother of the power to transfer the property absolutely during her lifetime in the same manner as if the deed had never been made, constitutes dominion retained by the decedent during her lifetime within the meaning of the above quoted language of Section 111. This being the case, a tax of seven and one-half per cent became due by the daughter-in-law on the full value of the property at the time of the mother's death, even though the deed was made prior to the effective date of Chapter 124 of the Acts of 1936, which added the above quoted language to Section 111. See *Mylander v. Connor,* 172 Md. 329. Since it could not possibly be determined until the death of the mother whether she would exercise the right of dominion retained by her in the deed, the gift to her daughter-in-law was necessarily incomplete until that time and, therefore, the mother's death was a taxable event. 25 Opinions of Attorney General 581; and compare 21 Opinions of Attorney General 741."

For the reasons stated, it is our opinion that one-half the value of the property is subject to the direct tax and half

taxable at the collateral rate. The tax applied upon the death of the grantor in October 1957; therefore, interest and penalty may be assessed.

THOMAS B. FINAN, *Attorney General.*

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

TAXATION—PROPERTY—ARTICLE 81, SECTION 67, "FIRST SENTENCE," TREATS COLLECTOR—GOVERNMENT RELATION—DUTY OF COLLECTOR.

February 21, 1961.

Hon. Harrison L. Winter,
City Solicitor of Baltimore City.

You have requested our opinion concerning the proper interpretation of the first sentence of Article 81, Section 67, of the Annotated Code (1957 Edition), which provides:

> "The county commissioners in each county and the department of assessments in Baltimore City, as to local taxes, and the Comptroller upon certificates of the county commissioners or department of assessments in Baltimore City, as to State taxes, shall make all just allowances to the respective collectors for insolvencies and removals and for refunds of taxes made in accordance with the provisions of law."

You inquire particularly as to the application of that sentence in the following types of cases, in all of which the assessment is final and conclusive:

1. Where the taxpayer is the subject of formal proceedings under the Federal Bankruptcy Act.

2. Where the taxpayer is the subject of dissolution proceedings under the equity jurisdiction of the courts of Maryland.

3. Where the taxpayer is the subject of a voluntary dissolution arrangement which is not under the jurisdiction of any court.

4. Where the taxpayer requests an abatement of taxes on the ground that his balance sheet shows the liabilities exceed the assets, although the taxpayer proposes to continue in business and is paying trade creditors in full as trade obligations mature. This raises the question of whether the

term "insolvencies" in Section 67 refers to the bankruptcy or the accounting test of insolvency.

While this office is the adviser to State agencies only, because the provisions of the first sentence of Section 67 of Article 81 of the Code are statewide in application, and relate to the various collectors of both State and local taxes, we believe that we should undertake to answer your inquiry.

It is our opinion that the first sentence of Section 67 (hereinafter called "the sentence") does not deal with the relationship between the collector and the taxpayer at all, but rather that it deals with the relationship between the collector and the government, state or local, to which the collector remits. The sentence is part of the subtitle of Article 81, Sections 51 through 69, dealing with collectors and collections. Section 51 imposes on the collector the duty ". . . to collect as certified to him all State and county taxes levied or to be levied for the current year". By Sections 52 and 53 the collector is required to post bonds, the conditions of which are that he ". . . shall well and faithfully execute his office . . .". Under Section 62 the collector is liable for interest should he fail to remit his collections at the time required. Sections 63 and 64 provide a summary remedy on the collector's bond. These sections, including the sentence, are companion sections and were Sections 50 through 66 of Chapter 26 of the Acts of 1929, which was the general revision of Article 81 as a result of the work of the Maryland Tax Revision Commission. The remainder of Section 67 following the sentence was first enacted by Chapter 732 of the Acts of 1949. The language subsequently added provides for the revision of an assessment under certain circumstances after the date of finality. Baltimore City is not within the operation of this subsequent language.

Viewed in this light, we believe that the language of Section 67 which provides that "The county commissioners . . . shall make all just allowances to the respective collectors . . ." must be construed as dealing with those instances in which the collector will be excused from further effort to collect a tax account. The "just allowances" are deduc-

tions made to the collector to relieve him of possible personal liability, and/or liability on his bond, where a tax account has not been collected. The "just allowances" are not made to the taxpayer directly. This construction is supported by 18 Opinions of the Attorney General 487 (1933) where a collector who had held a tax sale of property which no one, including the county commissioners, would buy in, was advised to apply to the county commissioners and to the Comptroller for a "just allowance" under Article 81, Section 66 of the Code (1929 Supp.) (the sentence).

If a just allowance is made to the collector so that he is excused from further efforts to collect the account, it would seem, as a practical matter, that the taxpayer will not have to pay the tax. However, as a legal matter, the liability of the taxpayer will continue and would be collectible, at least in theory, until limitations have run on the claim.

The question then resolves as to the types of situations intended to be covered by the sentence when, in addition to allowance for legal refunds, provision is made for allowances "for insolvencies and removals". We believe the term "insolvencies" is intended to cover those instances in which the tax has become uncollectible because there are no assets from which it can be paid. We do not believe the term "insolvencies" is used in any limited, technical sense, as meaning either bankruptcy or accounting insolvency. The term "removals" would seem to apply in those instances, more likely to occur in connection with personal property taxes, in which the taxpayer may have the ability to pay but due to his absence from the jurisdiction or because he cannot be located, the tax cannot practically be collected.

Referring to the particular situations raised in this letter, we do not believe that any fixed rules can be determined as to when an allowance should be made to the collector. The determination would seem to be somewhat analogous to those situations in which a private business man writes off a bad debt. The analogy limps, however, since the peculiar status of the public tax collector must be considered, in-

cluding the fact that a public and not a private claim is involved, the right of holding a tax sale, the lien of real property taxes, the priorities afforded taxes under the Bankruptcy Law, the express exclusion from discharge of tax claims under the Bankruptcy Law, and the fact that the collector's attorney is usually on an annual salary and not on contingent fee.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

RECORDATION TAX — CLERKS OF COURT — QUEEN ANNE'S COUNTY—RESOLUTION OF COUNTY COMMISSIONERS INCREASING RATE NOT EFFECTIVE WHEN PASSED PRIOR TO EFFECTIVE DATE OF ENABLING ACT OF LEGISLATURE.

June 22, 1961.

Mr. T. Sorden Pippin, Clerk,
Circuit Court for Queen Anne's County.

We have reviewed your letters of June 8 and June 15 in regard to the increase of State recordation tax in Queen Anne's County. You have informed us that on May 29, 1961, the County Commissioners of Queen Anne's County passed a resolution purporting to put into effect an increase in the recordation tax within the limits of the County, under authority granted by Chapter 796, Acts of 1961 (House Bill 879). That Act of the Legislature, however, did not go into effect, by its very terms, until June 1, 1961, two days after the passage of the resolution by the County Commissioners.

Since the County Commissioners filed a copy of the resolution with your office immediately upon its passage, you have informed us that you put the increased rate into effect as of June 1, 1961. However, the validity of the increased rate has been questioned on the ground, among others, that no valid resolution exists effectuating the statute, since the resolution of the County Commissioners was passed before the effective date of the Act.

We feel that the above objection is proper, and that the resolution of the County Commissioners and the increased rate put into effect by your office, are invalid. Chapter 796 of the Acts of 1961 is not by its terms self-operative, but depends on the County Commissioners in putting the new rate into effect. The County Commissioners, on the other hand, have no authority by resolution, or otherwise, to put new rates into effect, except such authority as given them by the Legislature in Chapter 796. The counties of this State do not have any inherent rights or powers and derive what-

ever powers they possess from the Legislature. See, e.g., *Tasker v. Garrett County,* 89 Md. 150; *Barnett v. Charles County,* 206 Md. 478. Moreover, powers granted by the Legislature to the County Commissioners must be strictly construed for they confer a special and limited jurisdiction. *Barnett v. Charles County, supra.* Accordingly, since Chapter 796 had not yet gone into effect on May 29, the County Commissioners had no authority or power to pass a resolution increasing the rate of recordation tax within the limits of the County. Such resolution was absolutely void and was not cured by the subsequent effectuation of Chapter 796 on June 1.

Although we have not yet been asked the specific question, it is well to suggest at this time that the County Commissioners take immediate steps to cure this situation, if it is still their intention to put into effect the new rate of taxation. This should be done through an immediate resolution, establishing the new rate schedule, and by a companion resolution making this rate schedule retroactive to June 1. Such companion resolution would be for the purpose of validating the taxes already collected under the new schedule and would apparently not be offensive by reason of its retroactive effect according to the opinion of the Court of Appeals of Maryland in *Diamond Match Company v. State Tax Commission,* 175 Md. 234. We suggest that this be done by two resolutions, rather than by a single resolution, so that if the retroactive resolution should be, for any reason, defective, it would not impair the validity of the prospective resolution setting up the new schedule of taxes.

You have also requested our instructions as to the disposition of the increased tax collected by your office between June 1 and the date of this opinion. Of course, if the County Commissioners should pass a retroactive resolution, you would dispose of the increased tax in the same manner as you would any other tax, in accordance with Section 278 of Article 81 of the Annotated Code of Maryland.

If the County Commissioners do not immediately enact

such resolution, you should nevertheless proceed as you would in the case of any other tax collected in accordance with Section 278 of Article 81 of the Annotated Code. The remedy of anyone who has paid the increased tax, if such tax is not immediately validated by a new resolution of the County Commissioners, is an action for refund of the taxes paid, in accordance with Sections 213 through 219 of Article 81 of the Annotated Code. See, e.g., *State Tax Commission v. Potomac Electric Power Company,* 182 Md. 111.

Your letter of June 15 also sets forth in numbered paragraphs 2 through 5, certain objections based upon the constitutionality of Chapter 796, and the authority of the Legislature to delegate to the County Commissioners the authority to impose taxes of this nature by resolution. These objections can be disposed of at this point by our advising you that this Act is presumed to be constitutional, as are all acts of the Legislature, unless and until a court of appropriate jurisdiction holds otherwise. It is our opinion that Chapter 796 is constitutional and is within the authority of the Legislature.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Assistant Attorney General.*

TAXATION — INHERITANCE TAXATION — EXEMPTION FROM COLLATERAL INHERITANCE TAX FOR CHARITABLE CORPORATION PERFORMING SUBSTANTIAL PART OF ITS ACTIVITIES IN THIS STATE OR IN THE DISTRICT OF COLUMBIA— WHAT CONSTITUTES "SUBSTANTIAL".

June 29, 1961.

Mr. Leroy C. Shaughnessy,
Register of Wills
for Baltimore City.

You have asked our opinion as to whether a substantial bequest to the National Society for the Prevention of Blindness, Inc., in an estate being administered in the Orphans' Court for Baltimore City, qualifies for the exemption from payment of collateral inheritance tax under Article 81, Section 150, Annotated Code of Maryland (1960 Supplement). Your request is accompanied by affidavit on behalf of the Society, together with lengthy exhibit relating to its activities as of and after 1946.

The above indicated section of the Code provides, among other things, as follows:

> ". . . And provided further that nothing in this section shall apply to property passing, in trust or otherwise, to or for the use of a corporation, trust or community chest, fund, or foundation, created or organized under the laws of the United States or any state or territory or possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, a substantial part or all of the activities and work of which are carried on in the State of Maryland or in the District of Columbia, and no part of the net earnings of which inures to the benefit of any private shareholder or individual . . ."

As you know, at 30 Opinions of the Attorney General 234 (1945), at the request of the Register of Wills for Baltimore City, we considered this question, but at that time, as is our practice, and being of the opinion that the question was primarily one of fact, we advised that the same was to be decided by the Register of Wills in the light of all the information before him.

Since that opinion was rendered, the law has been amended so as to broaden the scope of inquiry into "activities and work" which are carried on in the "State of Maryland or the District of Columbia."

The basic question to be decided, then, as pointed out in our earlier opinion, and which we find just as applicable now, might well be phrased thus: "Do the activities and work of the Society which are carried on in the State of Maryland, or in the District of Columbia, constitute a 'substantial part' of its activities, or does its work and activities identify it, in a meaningful way, with the State of Maryland or the District of Columbia?"

Ordinarily, "substantial" means "material", as distinguished from "immaterial" or "trifling"; it means of "real worth and importance; of considerable value; valuable". 30 Opinions of the Attorney General 234, 236; *Tax Commission of Ohio v. American Humane Education Society*, 181 N.E. 557.

While the detailed documents forwarded to us do not indicate precisely what proportion of the Society's work and activities are turned to efforts made in Maryland, or the District of Columbia, they highlight numerous, consistent and continuous operations, since 1946, in the jurisdictions involved, in the following areas of activity:

Field trips by various staff members;

Consultations in education;

Nurse consultation;

Medical social work consultation;

Consultation in statistics;

Consultation by correspondence;

Providing publications and education materials;

Seminars, conferences, addresses by Staff Director and associates in the above spheres of activity, as well as in related research problems.

In addition, the Society made available specified grants to Georgetown University, and Johns Hopkins Hospital for research in Retrolental Fibrophasia, during the years 1954, 1955 and 1956.

Consequently, on the basis of the information submitted to you, and by you to us, we are of the view that you would be justified in holding that at this time a substantial part of the Society's activities are carried on in Maryland or in the District of Columbia. While the question is a factual one and is to be decided by you in light of the circumstances and data before you, you would appear to be warranted in deciding in favor of granting an exemption to the Society in connection with the bequest under consideration.

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Assistant Attorney General.*

RECORDATION TAX—LEASE OF PERSONAL PROPERTY ON A MONTH-TO-MONTH BASIS.

February 1, 1961.

Mr. W. Henry Gsell, Clerk,
Circuit Court for Kent County.

We have your recent inquiry as to whether or not a certain rental agreement is subject to recordation tax, and, if so, what is the proper place in which to record the rental agreement. The agreement covers twenty dairy cattle which are leased to a farmer on a month-to-month basis at a monthly rental of $6.00 per cow. There is no term specified in the agreement, and it is simply in effect from month-to-month until written notice of termination is given by either party at least thirty days prior to the tenth day of any month. The rental payments are paid on the tenth of each month.

In our opinion, the agreement is subject to recordation tax, and since it is impossible to determine any annual average rental for the cattle, as the agreement does not have any specific term and may actually end very shortly, we feel that the recordation tax in this instance should be based upon the assessed value of the cattle covered by the rental agreement. See Article 81, Section 277 (g), Annotated Code of Maryland (1957 Ed.).

Although a technical argument might be made that Section 277 (g) applies only to leases for a term of years, and what we are dealing with here is only a rental from month-to-month, we also feel that the purpose of enacting the second sentence of Section 277 (g), relating to the determination of the basis for recordation tax on assessed value where the average annual rental cannot be determined, was to cover situations such as that here presented and enable us to arrive at a means of determining the recordation tax. We therefore advise you that you should compute the recordation tax on this agreement based on the assessed value of the cattle covered by the agreement, which infor-

mation should be available in the assessment records. See 33 Opinions of the Attorney General 371. If the cattle have not been assessed in your county, since the lessor may have reported them in another county, you should require proof of this assessed value in whatever form satisfactory to you.

You also inquire as to the place of recording this agreement. Although we do not feel that it is your basic responsibility to determine for persons offering instruments for recordation the appropriate place to record them, in situations such as the present, where there is no specific place of recordation set out for this type of agreement, it is our opinion that in order to secure for the lessor the protection he desires, the logical place for recording this instrument would be in the conditional sales contract book. What the lessor in all probability is intending to protect himself against by the recording of this instrument would be claims of outside creditors of the lessees that might be asserted against these cattle.

Although a true lease generally need not be recorded to secure this protection, some of the Maryland cases have construed what purported to be leases of personal property as conditional sales contracts, and since these "lease-contracts" were not recorded, the lessor lost his interest in the goods against the claims of a creditor of the lessee. See *Beckwith Machinery Co. v. Matthews,* 190 Md. 182. In addition, we feel the transaction is more comparable to a conditional sales contract than to a chattel mortgage, as the lessee in the instant case does not have any interest in the property to convey to the lessor, such as he would under a chattel mortgage.

We therefore advise you that you should record the lease agreement in the conditional sales contract book.

THOMAS B. FINAN, *Attorney General.*

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

TAXATION — TRAILERS — WASHINGTON COUNTY — SUBJECT TRAILER TAXABLE UNDER LOCAL LAW (CHAPTER 556, LAWS OF 1959) AND NOT AS IMPROVEMENT TO REALTY.

June 30, 1961.

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

You have referred to us a problem concerning the assessment of trailers in Washington County. The Supervisor of Assessments of that county has assessed in the same manner as if it were an improvement forming part of the realty, a house trailer which is situated on a lot owned by the father of the trailer owner. The house trailer is connected for both water and sewerage. The wheels are attached to the trailer but it is also propped up with concrete blocks in order to keep it level. The taxpayer has objected to this method of assessment and asserts that the trailer should be assessed in accordance with Section 689 of the Code of Public Local Laws of Washington County (1957 Edition) as said section was enacted by Chapter 556 of the Acts of 1959. The section provides as follows:

> "The County tax rate for any and all house trailers used as residences owned or maintained in Washington County shall be two dollars per month. All other house trailers shall pay a county tax of one dollar per month. This tax may be paid by the month or by the year in advance. If the tax is paid by the year in advance, refunds shall be made only in increments of a six-month period."

The question is further complicated by the fact that Article 81, Section 9, subsection 32, of the Code (1960 Supp.) provides:

> "The following shall be exempt from assessment and from State, county and city taxation in this

> State, each and all of which exemptions shall be strictly construed: . . . (32) Motor vehicles Classes A to J, inclusive."

Trailers are included in motor vehicles, classes A to J. The subsection provides further that it shall not be construed to exempt house trailers, designed primarily for human habitation, from the assessment of the local property tax in certain enumerated counties. Washington County is not one of the counties enumerated.

In 43 Opinions of the Attorney General 358 (1958) the Attorney General had occasion to rule on a somewhat related problem. The question there presented was whether trailers used for human habitation and with sewerage, water and electrical connections, which were located in one of the counties excluded from the operation of the exemption in Article 81, Section 9 (32), were exempt from taxation under the provisions of the Civil Relief Act, Title 50, USCA Section 574. The Civil Relief Act provides, *inter alia,* that personal property located in a state because its owner is present in that state in compliance with military orders shall not be deemed to be located or to have a situs in such state for purposes of taxation. It was there ruled that the trailers owned by nonresident military personnel were personal property and were exempt from taxation. It was further ruled that the provisions of Article 81, Section 9 (32) of the Code, were not an attempt to classify trailers as realty. It would therefore seem that the Supervisor of Assessments of Washington County should not have proceeded to assess the subject trailer as an improvement to land.

We do not believe it is necessary at the present time to determine whether, and to what extent, personal property which is not owned by a commercial or manufacturing business is subject to assessment for county and/or city taxes in Washington County, inasmuch as the Legislature by the aforesaid Chapter 556 of the Acts of 1959 has expressly declared the manner in which trailers are to be taxed. While it is true that Washington County is not by

the express terms of Article 81, Section 9 (32) of the Code, excluded from the operation of the exemption for trailers therein set forth, we believe the provisions of Section 689 of the Code of Public Local Laws of Washington County (Chapter 556, Acts of 1959) are inconsistent with the provisions of Article 81, Section 9 (32) of the Code (1960 Supp.). We are further of the opinion that this is a proper instance for the application of the rule of interpretation set forth in Article 1, Section 13 of the Code (1957 Edition), and that the Public Local Law prevails over the provisions of the Public General Law to the extent of the inconsistency between the two.

For these reasons it is our opinion that the Supervisor of Assessments of Washington County should proceed to assess the trailer involved in this matter in accordance with the provisions of Section 689 of the Code of Public Local Laws of Washington County (1957 Edition), as the same were enacted by Chapter 556 of the Acts of 1959. We express no opinion on the validity of Chapter 556 of the Acts of 1959, but predicate the foregoing opinion on the strong presumption of the constitutionality of that Act.

Furthermore, this opinion should be considered as limited solely to a ruling that the connection of a trailer for sewerage, water and electricity does not constitute the trailer an improvement to realty under the present statutes. We fully recognize the increasing tax problems presented by trailers and express no opinion as to whether, under certain circumstances, a trailer can cease to be personalty and become part of the realty or whether, under such circumstances, the exemption for classes of motor vehicles would be applicable.

THOMAS B. FINAN, *Attorney General.*

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

TAXATION—PROPERTY ASSESSMENTS—WHEN MAY BE ALTERED AFTER DATE OF FINALITY BY LOCAL FINAL ASSESSING AUTHORITY—DUTY OF SUPERVISOR TO APPEAL.

February 23, 1961.

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

You have requested our opinion on a number of matters arising under the assessment laws of Maryland, on behalf of one of the County Supervisors of Assessments. He is the Supervisor for one of the four counties which, together with Baltimore City, are not covered by the provisions of Section 67 of Article 81 of the Annotated Code.

The first question he asks is what type of decreases the County Commissioners of his county can make in assessments after the date of finality. Since the county in question is not one of those enumerated in the second sentence of Section 67, the County Commissioners may make decreases in assessments after the date of finality, based on their judgment as to the valuation of property, or in the application of exemption laws, only under two procedures, both of which must be initiated before the date of finality. One procedure is by appeal to the Board, under which the demand for the hearing of the assessment appeal must be made prior to the date of finality. The other procedure is that in which the County Commissioners, "at any time before the said date of finality" on their own motion, may "hold a hearing and review any assessment on property assessed locally". Both procedures are provided for under Article 81, Section 255 of the Annotated Code.

The next question asked by the Supervisor is what action, if any, he is required to take in the event the County Commissioners order a decrease after the date of finality. Section 234 of Article 81 of the Annotated Code, provides that the Supervisors of Assessments "are charged with the duty to appeal to the Maryland Tax Court from any and all as-

sessments or rulings which such Supervisors shall consider improper when made by the several Boards of County Commissioners in the counties . . .". It is our opinion that under this language a Supervisor has the duty to appeal any assessment reduction which might be made without any legal authority by a Board of County Commissioners. An example would be a case in which an appeal to the final assessing authority of the county has not been taken prior to the date of finality. Another illustration of an assessment or ruling which could clearly be considered as "improper" by a Supervisor would be a reduction in an assessment which, while made in the lawful exercise of the jurisdiction of the final assessing authority, is made in an essentially arbitrary and capricious manner, without supporting evidence, and which reduces the assessment below the range in which there may be reasonable differences of opinion as to the valuation of the property for assessment purposes. Needless to say, our illustrations are not intended to set forth all of the possible examples of an "improper" ruling. In the final analysis the determination of whether to appeal is one which must be made by the local Supervisor, in the exercise of his judgment, as specific cases may arise.

The third aspect of your request seeks a clarification of the language of the first sentence of Section 67 of Article 81. We have recently had occasion to interpret this section in an opinion furnished to the City Solicitor of Baltimore City. 46 Opinions of the Attorney General 195.

THOMAS B. FINAN, *Attorney General.*

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

TAXATION — REAL PROPERTY — POSSESSORY INTEREST OF "FIXED BASE OPERATOR" AT FRIENDSHIP AIRPORT NOT TAXABLE UNDER CHAPTER 884, LAWS OF 1961.

August 8, 1961.

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

You have referred to us the question of whether a portion of the south terminal area at Friendship International Airport, which has been leased by the Mayor and City Council of Baltimore to a private aviation company for a period of 15 years, is subject to assessment and taxation for the year 1961. The lease recites that the City desires to provide a base in the south terminal area for light planes and that it desires to lease the south terminal area "to an experienced and reliable fixed base operator, in order to promote general aviation activity for light airplanes in that area and especially to provide a base for those light airplanes to be displaced from Harbor Field . . .". The activities of the private aviation company tend to fall into two general categories. The first of these is the inside storage of aircraft and the furnishing of outside tie-down service together with the sale of aviation fuel and lubricants. Secondly, it is our understanding that the private aviation company is a dealer for the sale of a particular manufacturer's aircraft. The lease permits the repair of aircraft, particularly in connection with the operation of the dealership, but the lease does not preclude the making of emergency repairs to other aircraft. The lessee is also permitted to operate a ground school for flight students and for aircraft mechanics, and to furnish special flight services. The lessee pays the City a fixed monthly rent, a fixed price per gallon on fuel and oil sold, and a percentage of fees on the special flight services. The lessee agreed to erect a hangar, shop, office building and ramp in the aggregate cost of not less than $100,000, which we understand has been done. The improvements become the property of the City, subject to the lease.

We believe the question is controlled by Chapter 884 of the Acts of 1961 which added a new subsection (8) to Section 8 of Article 81 of Code (1957 Edition). The new subsection provides in part as follows:

> "(8) *Leaseholds and other limited interests in real or personal property*—No leasehold or other limited interest in real or tangible personal property shall be subject to taxation except the following which shall be subject to taxation in the same amount and to the same extent as though the person in possession or the user thereof were the owner of such property.
>
> * * *
>
> "(e) The interest or privilege of any lessee, bailee, pledgee, agent, or other person in possession of or using any real or personal property which is owned by the federal or State governments, and which is leased, loaned, or otherwise made available to any person, firm, corporation, association, or other legal entity, with the privilege to use or possess such property in connection with a business conducted for profit, except where the use is by way of a concession for occupancy of a public airport, park, market, fairground, or similar property, which is available to the use of the general public, shall be subject to taxation . . ."

The first problem presented is whether Chapter 884 imposes the tax on limited interests in property owned by the counties or municipal corporations of Maryland. It is our opinion that the Act is applicable to such interests. The Act does not state that the tax is imposed on property owned by the United States or by the State of Maryland. Rather, the imposition is upon property "owned by the federal or state governments". We believe that by the use of this language it was the legislative intent to cover the entire field of publicly-owned property. As we read the statute, the intention would appear to be to tax the possessory interests in all publicly-owned property by a reference

to the two sources of power or two sovereignties under our federal system, so that property owned by agencies or instrumentalities of the federal government, and property owned by agencies or instrumentalities or subdivisions of the state government, are included.

It has frequently been held that the use of the term "state" in a Constitution or statute includes the counties and municipalities of the state. This is because such organizations are instruments of the state created to carry out its will. They derive their power from the sovereignty of the state and exist only for the convenient administration of the government in the state. See *State ex. rel. Ferris Industrial School v. Levy Court of Newcastle County,* 17 Del. 597, 43 A. 522 (1899); *In Re Morrison,* 43 S.D. 42, 177 N.W. 806 (1920); *Sitton v. Burnett,* 216 Ark. 574, 226 S.W. 2d 544 (1950).

We are reinforced in this interpretation by the provision of sub-subsection (e) of Article 81, Section 8(8), as enacted by aforesaid Chapter 884, which states that the tax shall not apply "to port facilities owned by the federal or state governments (or any agencies or instrumentality thereof) or by any political subdivision of the State of Maryland". It would seem clear that the reference to property "owned by the federal or state governments" must have been intended by the General Assembly to include property owned by agencies, instrumentalities and political subdivisions since there would otherwise be no purpose in the very explicit exclusion concerning port facilities immediately above quoted. It is a cardinal rule of construction that no part of a statute should be read as surplusage.

While we are of the opinion that Chapter 884 imposes the tax on possessory interests in property owned by a municipal corporation of this State, the subject possessory interest is not subject to assessment and taxation for purposes of municipal and county taxation. Chapter 884 expressly excludes from its operation, for purposes of municipal and county taxation, possessory interests in Anne Arundel County, the situs of the subject property.

The remaining question is whether the subject interest is liable to taxation for state purposes in view of the exclusion of possessory interests "where the use is by way of a concession for occupancy of a public airport, park, market, fairground or similar property, which is available to the use of the general public . . .". It is our opinion that the activities of the subject aviation company fall within this exclusion. The work of a fixed base operator at an airport, including the dispensing of fuel and lubricants and the furnishing of "garage" facilities, would seem to be an integral part of the operation of a functioning airport. These services are available to the use of the general public in the sense that all small aircraft using Friendship International Airport have the fixed base operator services of the subject company available to them if the aircraft do not exceed the maximum weight limitations at the south terminal. We do not believe that the fact that the subject company (lessee) also operates an airplane dealership on the leased property mitigates against the exclusion. When the entire exclusion, which includes concessions at markets and fairgrounds, is considered, it would seem that sales businesses are contemplated. The most prominent example of a business conducted for profit, using a market by way of a concession, is that of the stall operator. It would seem that the intention of the General Assembly under Chapter 884 was to exclude such possessory interests from the imposition of the tax. Likewise, if it be assumed that there is a publicly-owned fairground in this State, it would seem that a concession to a farm implement dealer at which sales of his equipment are made would likewise be within the exclusion. When viewed in this light, it is our opinion that a concession at a public airport which includes the business of selling airplanes is a type of a concession which is within the statutory exclusion. While the concession would by its nature be limited only to those members of the public interested in buying airplanes, we believe it is a concession available to the use of the general public to the same extent that a ferris wheel concession at a fairground is available to the general public,

although only members of the public interested in riding ferris wheels would make use of it.

For these reasons it is our opinion that the possessory interest of the subject aviation company at Friendship International Airport is not subject to assessment and taxation for the year 1961.

THOMAS B. FINAN, *Attorney General.*

LAWRENCE F. RODOWSKY, *Assistant Attorney General.*

RECORDATION TAX — CLERKS OF COURT — ASSIGNMENT OF ACCOUNTS RECEIVABLE—DOCUMENTARY STAMPS NOT REQUIRED—MAY BE RECORDED BUT NOT REQUIRED TO BE.

August 16, 1961.

Mr. Walter J. Rasmussen,
Clerk of the Circuit Court
of Baltimore County.

In your letter of August 3, you inquired as to the requirement of Maryland State Documentary Stamps on a certain instrument offered to you for recording, designated as "Assignment of Accounts Receivable." You have pointed out that the instrument secures a debt of $100,000 and a reading of that instrument indicates that its purpose is to assign, as security for a certain loan transaction, the interest of the assignor in all accounts receivable presently due and owing, or which may, during the continuance of the security, become due and owing to the assignor.

It is our opinion that no Maryland State Documentary Stamps are required for the recordation of this instrument. Section 277, Article 81, of the Annotated Code of Maryland, imposes a tax upon every instrument of writing conveying title to real or personal property, or creating liens or encumbrances upon real or personal property offered for record and recorded in this State. In 32 Opinions of the Attorney General 419, this office rendered its opinion that an agreement offered for record, the effect of which was to assign certain real estate commissions out of rents payable the lessee on a certain lease, was not subject to recordation tax on the basis that Section 277 of Article 81 only subjects to tax contracts or agreements which convey title to or create a lien or encumbrance upon real or *tangible* personal property. This opinion is bolstered by the decision of the Court of Appeals of Maryland in 1909 under the recording provisions set forth in Section 54 of Article 17 of the Annotated Code of Maryland (1904 Edition), in the case of *Lambert v. Morgan,* 110 Md. 1, 27. In that case, the Court

of Appeals held that an assignment of a fund of money was not within the purview of then existing recordation statutes. Although those statutes have been from time to time amended since the date of the above decision, the material portions thereof relating to the question herein have not been altered.

This brings up, however, the further question of whether or not you are required to record the instrument under the provisions of Section 50 of Article 17 of the Annotated Code of Maryland.

The above cited case indicates that an instrument such as the one here in question is not required to be recorded, and consistency demands that since Section 277 of Article 81 has been interpreted to impose a recordation tax only upon those instruments conveying title to, or creating a lien or encumbrance upon, real or *tangible* personal property, Section 50 of Article 17 should likewise be interpreted as applying only to those instruments affecting title to or any interest in land or *tangible* personal property. With reference to the instrument in question, it should be pointed out that Section 1 of Article 8 of the Annotated Code of Maryland specifically provides for effectuation of assignments of accounts receivable without recordation and obviates the necessity for notice thereof, except to the debtor on the accounts. See *Maryland Cooperative Milk Producers v. Bell,* 206 Md. 168. Accordingly, the instrument here in question falls into that group of instruments which you are not required to, but which you may, receive for recordation. See 40 Opinions of the Attorney General 128, 134, and citations therein. In the exercise of this discretion, we might suggest that you give due consideration to the following well-established principles of recording law:

> "In the majority of American jurisdictions the recording statutes have been liberally construed to effect their purpose * * *." 45 Am. Jur., Sec. 35. "The courts should not be technical where the instrument in question is complex and difficult to classify. And the rights of the parties under the

recording act should not depend upon the ability of the recorder properly to determine the character of the recorded instrument." 45 Am. Jur., *supra*, 69.

THOMAS B. FINAN, *Attorney General.*

JAMES P. GARLAND, *Asst. Attorney General.*

TAXATION—INHERITANCE TAX—RECORD TITLE OF REAL ESTATE GOVERNS INHERITANCE TAX LIABILITY INSOFAR AS REGISTER OF WILLS IS CONCERNED—COURT OF COMPETENT JURISDICTION MAY CORRECT ERRORS OF RECORD TITLE.

August 21, 1961.

Mrs. Rosalie G. Clark,
Register of Wills for
St. Mary's County.

Your letter of August 3 presents us with the following fact situation:

On June 27, 1961, the Last Will and Testament of Vernon Hardin was probated in the Orphans' Court of St. Mary's County. In the will, the deceased left everything he possessed to his wife. The will was dated December 29, 1958. You also state that a certain paper, titled "Declaration", written on January 24, 1959, had been filed with your office, wherein it is stated that everything the decedent owned is held as tenants by the entireties. The decedent and a certain woman lived in Florida for approximately two years as common law man and wife, so this woman states, and the latter has filed several affidavits to that effect. Since January, 1942, these parties have lived at Lexington Park, Maryland, as man and wife. On many occasions, the decedent told lawyers and justices of the peace and friends that this woman was not his wife, yet he made this will and stated this "Declaration" to the effect that she was his wife. The same day this will was probated and this woman was appointed Executrix, the latter deeded away approximately two-thirds of his estate. Her lawyers contend there is no estate, as the property held by the parties was held as tenants by the entireties.

You stated that you have claims on file against the estate and you desire to know whether the court would be correct in dismissing the case on the filing of the affidavits, or

should the court request testimony in person as to ownership of the property, as same involves quite a vast difference in the taxes because of the possibility that the same represents a joint tenancy, rather than a tenancy by the entireties.

You further wish to know what happens to the creditors, of which there are quite a few. You state also that the decedent borrowed money and operated his business as an individual, not jointly with the party he terms his wife in the will.

Numerous prior opinions of this office have dealt with this general question. At 28 Opinions of the Attorney General 300, 301, the decedent had acquired title by deed from his surviving brother, who claimed, following the death of the decedent, that the actual ownership of the property was in him, the brother, and that the decedent held title only as undisclosed trustee with no beneficial interest. To substantiate this, the brother showed an unrecorded agreement which stated in substance that the decedent was to hold the record title but the beneficial interest was to remain in the surviving brother. At that time, we advised the Register of Wills that he was "not at liberty to look beyond the record title", and that it seems clear "that the brother who claims ownership must go to court to substantiate his claim."

In 27 Opinions of the Attorney General 362, we advised the Register of Wills that in our opinion, his "obligation to collect the tax . . . is fixed by the record title." See also 41 Opinions of the Attorney General 368; 32 Opinions of the Attorney General 472; 13 Opinions of the Attorney General 273.

For these reasons, it is our view that you may not look behind the record title in this case. If the real property which his "wife" claims as surviving tenant by the entirety lists the decedent and this woman as such tenants, it would be up, perhaps, to the largest creditor of the estate of the decedent to come in and contest the propriety of the "wife" in claiming and deeding away the same.

For these reasons, it seems clear that no inheritance tax is due you at this time, or at least until it is determined by a court of competent jurisdiction that the property involved was held by the decedent as joint tenant with a woman not his wife.

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Asst. Attorney General.*

INCOME TAX—WAGES OF TEACHER EMPLOYED BY COUNTY SCHOOL BOARD SUBJECT TO STATE INCOME TAX LIEN.

December 4, 1961.

Mr. Frank W. Forestell,
Income Tax Division,
Comptroller of the Treasury.

You have asked our opinion as to whether the Comptroller of the Treasury may assert a lien for income tax due against the wages of a delinquent taxpayer, when such taxpayer is a teacher employed in one of the public schools of one of the counties of Maryland. Under Article 81, Section 322 (5) of the Annotated Code of Maryland (1961 Supp.), it is provided that the lien of the State for income tax due shall extend to and cover all salary, wages, etc. due or coming due to the delinquent taxpayer. The Comptroller of the Treasury is directed to give notice of such lien "to any employer of any delinquent taxpayer" and after the receiving of such notice, the employer shall not pay to the delinquent taxpayer-employee any salary, wages, etc. in excess of $15.00 per week until the Comptroller notifies the employer that the tax lien has been satisfied or released. Article 81, Section 279 (q) of the Annotated Code of Maryland (1957 Ed.), a portion of the section containing the definitions relating to the income tax act, defines employer as "any person, firm or corporation including . . . the State of Maryland and any county, municipal corporation or political subdivision or instrumentality of this state, employing . . . individuals for hire, remuneration, or compensation of any kind."

It is true that as a general principle the courts of this State have held that funds in the hands of state or municipal officers are not subject to attachment. *Baltimore v. Root,* 8 Md. 95; *Hughes v. Svboda,* 168 Md. 440. See also our opinion in 12 Opinions of the Attorney General 41. The reasoning of these cases, however, turns on the theory espoused by the courts that although the normal attachment

laws of this State are very broad, the courts could not "believe that they were ever intended to authorize attachments to be laid upon funds in the hands of state or municipal officers as such, and thereby impose upon them and the public service such annoyances, inconveniences and interruptions as are described. . . ." *Hughes v. Svboda, supra,* at 442. In our opinion, however, we feel the Legislature has made its intention clear in regard to the income tax lien for salary or wages by its defining the word "employer" to include the State and any county, municipal corporation, political subdivision or instrumentality of this State. In effect, the Legislature has declared that the desirable policy of collecting State income tax revenue will override the policy of not burdening State and municipal officials with the duty of answering attachments or honoring liens.

We therefore advise you that the salary of a public school teacher in the employ of one of the county school systems is subject to the lien for income tax as set out in Article 81, Section 322 (5). It should be noted that the only exemption from this lien is $15.00 per week, as compared with the normal exemption for wages of $100 due or owing any employee at any time. See Article 9, Section 31, of the Annotated Code of Maryland (1957 Ed.) and Article 81, Section 322 (5), *supra.*

THOMAS B. FINAN, *Attorney General.*

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

TAXATION — INHERITANCE TAX — BRANDEIS UNIVERSITY, WALTHAM, MASSACHUSETTS—LEGACY TO SUCH INSTITUTION NOT EXEMPT FROM INHERITANCE TAXATION AS "SUBSTANTIAL PART" OF ITS "ACTIVITIES" NOT CARRIED ON IN THE STATE OF MARYLAND OR IN THE DISTRICT OF COLUMBIA. BURDEN ON APPLICANT TO ESTABLISH ENTITLEMENT TO EXEMPTION.

December 13, 1961.

Mr. Leroy C. Shaughnessy,
Register of Wills for Baltimore City.

Re: Estate of Frieda S. Seff

Your recent letter asks our opinion as to whether a $20,000 legacy to Brandeis University, located in Waltham, Massachusetts, in the above case, qualifies for the exemption from payment of collateral inheritance tax under Article 81, Section 150, Annotated Code of Maryland (1961 Supp.). Together with your request, you have attached certain detailed information made available by the University and, you will recall, we requested additional data which was provided to us.

The pertinent provisions of the above referred to section of the Code provide, *inter alia*, as follows:

> ". . . And provided further that nothing in this section shall apply to property passing, in trust or otherwise, to or for the use of a corporation, trust or community chest, fund, or foundation, created or organized under the law of the United States or any state or territory or possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, a substantial part or all of the activities and work of which are carried on in the State of Maryland or in the District of Columbia, and no

> part of the net earnings of which inures to the benefit of any private shareholder or individual. . ."

Brandeis University has currently enrolled in its College of Arts and Sciences twenty-two students who are residents of Maryland, and financial assistance in the form of scholarships, loans and student employment has been extended for the current year to these students, qualified on the basis of need and merit, to a total amount of $1,405.00. In the Graduate School of the University, there are three Maryland students currently enrolled, and the total financial assistance awarded these three graduate students in the form of tuition, scholarships and fellowships and teaching assistantships, amounts to $7,970 for the current year.

In addition, the National Women's Committee of Brandeis University has over fourteen hundred active members in its Baltimore Chapter, and one thousand in the Washington, D. C. Chapter. The Committee is an integral part, we are told, of Brandeis University; it is not a separate legal entity. The Committee, with chapters throughout the United States and a total membership of over seventy-two thousand, conducts adult education activities under the auspices of the University faculty. It has its own budget within the total University financial structure. Its income from membership fees covers its expenses of operation as well as maintaining the cost of the University Library. The administrative costs spent in Maryland and in the District of Columbia in maintaining the chapters of the Committee in Baltimore and Washington amount to about $1800 per year. The cost of the Study Group Program in these chapters and of lectures by visiting members of the faculty comes to about $600 a year.

The National Women's Committee of the University holds several meetings during the year, at which lectures are delivered by outside speakers, and the University describes this type of activity as a program of adult education.

Apparently the total expenditures of Brandeis University in Maryland, and in the District of Columbia during the

past year amounted to some $5,800, and constitutes a very small proportion of the University's total annual operating budget of over $7,000,000. This latter observation is not a conclusion reached by this office, but is a direct statement by C. Ruggles Smith, Esq., University Counsel, in his letter to us of December 1, 1961.

In a recent opinion of this office at 42 Opinions of the Attorney General 402, 404, 405, we advised that in matters concerning taxation of a bequest to an educational institution, or to a charitable organization, the ultimate factual determination must be made by you, as collector of inheritance taxes for the State of Maryland. We advised at that time that we review the facts submitted to us by you in these various situations in order to enable you to reach your decision. In the quoted opinions, we referred to an earlier letter of April 26, 1956, to you by David Kauffman, Esq., Assistant Attorney General, wherein he indicated that a bequest to the University of Richmond would be exempt where the University had conducted a school of Christian Education in the State of Maryland and that, excluding the Maryland students enrolled in the University's classes conducted in Richmond, the number of students enrolled in Maryland constituted 3% of the student body. Although the University spent only 2.5% of its budget in Maryland, Mr. Kauffman stated that the budget amount spent was not "insubstantial or immaterial."

We also direct your attention to an opinion of this office in 46 Opinions of the Attorney General 202 to you, wherein we stated:

> "The basic question to be decided, then, as pointed out in our earlier opinion, and which we find just as applicable now, might well be phrased thus: 'Do the activities and work of the society which are carried on in the State of Maryland or in the District of Columbia, constitute a "substantial part" of its activities, or do its work and activities identify it, in a meaningful way, with the State of Maryland or the District of Columbia?' ".

We went on:

> "Ordinarily, 'substantial' means 'material', as distinguished from 'immaterial' or 'trifling'; it means 'of real worth and importance; of considerable value; valuable'."

30 Opinions of the Attorney General 234-236; *Tax Commission of Ohio v. American Humane Education Society,* 181 N.E. 557.

On the basis of the above cited authority, we find it most unlikely that a "substantial part . . . of the activities" of Brandeis University are carried on in the State of Maryland or in the District of Columbia. Applying the flexible standard in these matters, as we find it expressed in the cases and in prior opinions of this office, we cannot say that the University clearly qualifies for the exemption, under the particular circumstances and facts made available to us in your request for an opinion. However, in all cases the burden is upon the applicant for the exemption to establish clearly that it is entitled to the exemption and if there is any doubt in your mind, then you should deny such request therefor. 42 Opinions of the Attorney General 402, 405. 46 Opinions of the Attorney General 202.

We have pointed out, in a great number of situations wherein the question arose as to the taxability of described bequests, that the findings of facts and decisions thereon must "in each case be made by you as collector of inheritance taxes."

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Assistant Attorney General.*

TAXATION—INHERITANCE TAX—PROCEEDS OF OUT-OF-STATE REAL ESTATE NOT ORDINARILY SUBJECT TO TAX—BEQUEST PAYABLE OUT OF SUCH PROCEEDS TAXABLE AS OBTAINED THROUGH MARYLAND ADMINISTRATION—TAXES PAID OTHER STATES NOT DEDUCTIBLE.

December 29, 1961.

Mr. Carlton V. West,
Register of Wills
for Caroline County.

Re: Estate of Emily G. Lapham, deceased.

Your recent letter sets forth the following facts, upon which you seek our opinion:

The above named decedent died in Caroline County in 1960, owning a parcel of land in Virginia in fee simple. She also owned a parcel of land in Caroline County for life, "with power to sell, mortgage, lease, and otherwise dispose of the same, including to so dispose of the same by Last Will and Testament, and in such way or manner that the purchaser, mortgagee, lessee or other shall not be liable or compelled to see to the application of the purchase money or consideration therefor; and upon the death of the said Emily G. Bailey without exercising said power, then the remainder to the children of the said Emily G. Bailey, their heirs, per stirpes and not per capita, and their assigns, free and clear of said trust in fee simple forever." The decedent died in Maryland, testate, without exercising any of the powers, and bequeathed to her stepson, a resident of Virginia, $5000 in cash and provided that "in the event I should not have $5000 in cash at the time of my demise, I direct my executor to sell and convert into cash a sufficient amount of my property to make this bequest." The remainder was devised and bequeathed to the testatrix's children, absolutely. Mrs. Lapham did not have $5000 in cash. The property in Virginia appeared to be the only part suitable for sale, her personalty being indiscriminate, and the executor took out ancillary proceedings in Virginia and sold

that land, paying the inheritance taxes there on the whole of the land and paying the pecuniary legacy without reference to the possibility of Maryland inheritance taxes.

You have inquired whether, the Virginia inheritance taxes having been paid there, must the residue be brought to Maryland for division, or may it be divided there; whether the residue is taxable here, and the legacy having been paid in Virginia from the sale proceeds as a condition of transfer, if it is again taxable here.

At 31 Opinions of the Attorney General 225, 226, in answer to the question whether real estate located in Pennsylvania and owned by the decedent, a resident of Maryland at the time of her death, is taxable, we stated:

> "The answer . . . will be found in 25 Opinions of the Attorney General, 599, which is directly on point and states in part: 'No inheritance tax is payable to the State of Maryland on the proceeds from the sale of real estate located in Pennsylvania * * *'."

And in *State v. Fusting,* 134 Md. 349, 354, 106 A. 690, the court stated:

> ". . . the real estate of Mrs. Stowman situated in Arkansas was not made subject to the collateral inheritance tax by the direction to sell contained in her will, and, being real estate owned by her at the time of her death and situated in a foreign jurisdiction, neither it nor the money realized from its sale is taxable under the laws of this State . . ."

See also 3 M.L.R. 329 and 25 Opinions of the Attorney General 599, 600.

Thus, in answer to your questions 1 and 2, if the $5000 bequest provided for in the decedent's will were not involved, it seems clear that the money realized from sale of the real estate situated in Virginia is not taxable under

the inheritance tax laws of this State. In line with our conclusion regarding question 3, certainly none of such money in excess of $5000, is so taxable.

In regard to the bequest, we quote from Article 81, Section 151 of the Annotated Code of Maryland (1957 Edition):

> "The taxes imposed by Sections 149 and 150 of this subtitle shall apply to all tangible or intangible property, real or personal, passing either by will or under the intestate laws of this State . . ."

The Court of Appeals, in *Safe Deposit and Trust Company v. State*, 143 Md. 644, 648, 649, 123 A. 50, has stated:

> "It is with the estate as it passes to the beneficiary, and not merely with the estate as it passes from the person who dies 'seized and possessed thereto,' that the collateral inheritance tax law is concerned. The expressed purpose of the law is that any property or money passing from a decedent to one not related within the limits prescribed 'shall be subject' to the tax, and that it shall be paid by the executor or administrator at the rate of five per cent, of 'every hundred dollars he may hold for distribution' among the persons entitled. This payment is directed to be made by the executor or administrator 'before he pays any legacy, or distributes the shares of any estate liable to the tax imposed' by the statute. When the legacy or distributive share consists of property other than money or real estate, the tax is payable 'on the appraised value thereof as filed in the office of the register of wills.' Separate provision is made by the Code for the valuation of real estate as to which the tax may be chargeable. In the case of real estate, directly devised to, or inherited by, a collateral relative of the decedent, there would be no income funds to which the tax might apply, because the estate vests immediately in the heir or devisee. The title of a legatee or distributee

> is obtained through administration, during the period of which the amount for distribution may be increased by receipts or income.
>
> "In this case there is money held for distribution to collaterals as part of a personal estate which is liable to collateral inheritance taxation. As the tax is 'on the transmission' of the estate, and is 'a premium for the enjoyment of the benefit thereby secured' *(Fisher v. State,* and *State v. Dalrymple, supra),* it should be held to affect equally the current money and the appraised assets thus transmitted and acquired."

Consequently, since title to the bequest passing to the decedent's stepson is "obtained through administration", it seems clear that the Legislature intended the sum of $5000 to be taxable under the provisions of the Annotated Code, Article 81, Section 151, *supra.* In this case, the bequest is distributed as part of the decedent's personal estate, which is liable to inheritance taxation. *Safe Deposit and Trust Company v. State, supra.* Virginia inheritance or transfer taxes paid on the proceeds of the sale of the Virginia real property may not be deducted from the Maryland estate, thus diminishing that portion of the distribution which is subject to the Maryland inheritance tax. 25 Opinions of the Attorney General 599, 600, *supra.*

THOMAS B. FINAN, *Attorney General.*

ROBERT S. BOURBON, *Asst. Attorney General.*

TAXATION—PERSONAL PROPERTY—EXEMPTION FOR BOATS—NOT APPLICABLE TO STOCK IN TRADE OF BOAT MANUFACTURER.

December 18, 1961.

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

You have requested our opinion on a claim for exemption from ordinary taxation. The taxpayer is a corporation engaged in the manufacture and sale of boats of 100 feet or less in length. It has in the past reported the finished craft owned by it as part of its inventory of finished goods. The taxpayer now contends that it is entitled to exemption because of the provisions of the Code (1957 Edition), Article 81, Section 9, subsection (39) which provides:

> "The following shall be exempt from assessment and from State, county and city taxation in this State, each and all of which exemptions shall be strictly construed.
>
> (39) *Certain small boats.*—Every boat, vessel and watercraft of any description which is one hundred (100) feet or less in over-all length."

Subsection 39 appears somewhat unusual since the provision is phrased in terms of the type of property to be exempted and does not in terms refer to any element in the qualification for exemption which relates to the ownership of the property or to the use to which it is put. However, we believe that a comparison to other subsections of Section 9, which also phrase the exemption only in terms of the type of property, indicates that the subject exemption is not intended to cover boats which are the inventory or stock in trade of one engaged in a commercial or manufacturing business.

Subsection 32 provides for the exemption of "Motor vehicles, Classes A to J, inclusive". By a parity of reason-

ing with the instant taxpayer's contention, the effect of the language of subsection 32 would be that the stock in trade of all of the automobile dealers in this State would be exempt from taxation. Such is not, of course, the fact, since automobile dealers are assessed annually on their stock in trade. It would also seem clear that this practice is in accordance with the legislative intent since Article 81, Section 15 (a) of the Code (1961 Supp.) makes a special provision for used cars taken in trade in computing the dealer's taxable inventory.

A similar exemption, phrased only in terms of the type of property itself, is also set forth in Section 9, subsection (12), which provides exemption for "Wearing apparel of any description, except diamonds and other costly jewelry not habitually worn on the person". This provision was added to the list of exemptions by Chapter 120 of the Acts of 1896 and codified as part of Section 4 of Article 81 of the Code (1904). Under the instant taxpayer's contention, the provisions of subsection (12) would have the effect of exempting the inventories of all of the clothing manufacturers and clothing dealers in the State. Yet for sixty-five years the wearing apparel exemption has not been so construed, and wearing apparel, which constitutes stock in trade, has not been exempted under subsection (12).

The instant exemption relating to boats, set forth in subsection (39), was added by Chapter 30 of the Acts of 1954. Since that time your Department has administratively interpreted the section as having no application to boats which are stock in trade or inventories of finished goods. Your Department's interpretation is therefore in accordance with the long-standing application of the similarly phrased exemptions above set forth.

Moreover, Section 9, relating to exemptions, is a section which is before the General Assembly at almost every session. Sixteen subsections have been added to the section since the enactment of the exemption as to boats, without any change in the boat exemption. These subsequent amendments would appear to lend great weight to the contempo-

raneous administrative construction by your Department. *Kimball-Tyler v. Balto. City,* 214 Md. 86, 133 A. 2d 433 (1957).

It is further noteworthy that the boats owned by the instant taxpayer comprise the inventory of finished goods owned by a manufacturer. The policy of the General Assembly concerning the exemption from taxation of manufactured products is set forth in subsection (24) of Section 9. Under this subsection the determination of exemption, *vel non,* is made by local resolution or ordinance. Thus, the instant taxpayer's contention would result in an interpretation contrary to the clear policy enunciated in subsection (24). See 38 Opinions of the Attorney General 279 (1953).

In view of the foregoing, it is our opinion that the claim of the instant taxpayer to exemption is doubtful at best, and that the claimed exemption must therefore be denied. *Clarke v. Union Trust Co. of D. C.,* 192 Md. 127, 63 A. 2d 635 (1949).

THOMAS B. FINAN, *Attorney General.*

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

UNSATISFIED CLAIM AND JUDGMENT FUND

INTERPRETATION OF SUBSECTION (c) OF ARTICLE 66½, SECTION 174 OF THE ANNOTATED CODE OF MARYLAND (1957 ED. AS AMENDED)—DRIVING PRIVILEGES NOT RESTORED UNTIL FUND IS REIMBURSED IN FULL.

October 10, 1961.

Mr. John H. Calhoun, Manager,
Unsatisfied Claim and Judgment Fund Board.

We wish to acknowledge receipt of your letter of September 29, 1961, in which you enclosed copies of letters received by the Unsatisfied Claim and Judgment Fund Board from several individuals who are in default in making installment payments specified in a settlement or court order, and who had their driving privileges suspended by the Commissioner of Motor Vehicles as a result thereof, in accordance with the provisions of the Unsatisfied Claim and Judgment Fund law.

You specifically wish to know whether the phrase "until the amount of his indebtedness to the Fund has been repaid in full" as contained in subsection (c) of Article 66½, Section 174, means all of the indebtedness remaining unpaid under a settlement or court order or, on the other hand, means only the unpaid installments which are in default.

For your convenience, Article 66½, Section 174, is quoted in its entirety:

> "174. *Registration, etc., not restored until fund is reimbursed.*
>
> (a) Where the license or driving privileges of any person, or the registration of a motor vehicle registered in his name, have been suspended or revoked under the Motor Vehicle Financial Responsibility Law of this State, and the Treasurer has paid from the fund any amount in settlement of a claim or towards satisfaction of a judgment

against that person, the suspension or revocation shall not be removed, nor the license, privileges, or registration restored, nor shall any new license or privileges be issued or granted to, or registration be permitted to be made by, that person until he has—

"(1) Repaid in full to the Treasurer the amount so paid by him, together with interest thereon at four per centum (4%) per annum from the date of such payment, or has undertaken in writing, in the manner provided in section 161, to repay to the Treasurer the sum to be paid under a settlement, or has obtained a court order permitting payment of the *amount of his indebtedness to the fund* to be made in installments; and

"(2) Satisfied all requirements of said Motor Vehicle Financial Responsibility Law in respect of giving proof of ability to respond in damages for future accidents.

"(b) The court in which such judgment was rendered may, upon ten days' notice to the Board, make an order permitting payment of the amount of such person's indebtedness to the fund to be made in installments, and in such case such person's driver's license, or his driving privileges, or registration certificates, if the same have been suspended or revoked, or have expired, may be restored or renewed.

"(c) In the event of any default in making any installment payment specified in a settlement or court order the Commissioner shall, upon notice of such default, suspend such person's driver's license, or driving privileges or registration certificates *until the amount of his indebtedness to the fund has been repaid in full.*

> "(d) A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this subtitle." (Emphasis supplied).

Reference is made to paragraph (1) of subsection (a) of the above quoted section. It should be noted that this paragraph also contains a phrase similar to the phrase under discussion.

It becomes apparent after reading paragraph (1) of subsection (a) that the meaning of the phrase, "amount of his indebtedness to the fund", as contained in such paragraph, can only be defined so as to mean all of the indebtedness remaining unpaid under a settlement or court order and not the unpaid installments which are in default since the phrase "to be made in installments" follows this phrase and includes the word "installments".

It would not be logical to have two similar phrases in the same section meaning two entirely different things. *Nositur a sociis.* See Corbin on Contracts, Vol. 3, *Interpretation,* page 203.

We therefore advise that in our opinion the subject phrase as contained in subsection (c) of Article 66½, Section 174, can only be interpreted to mean all of the indebtedness remaining unpaid under a settlement or court order, and not the unpaid installments which are in default.

THOMAS B. FINAN, *Attorney General.*

GERARD WM. WITTSTADT, *Assistant Attorney General.*

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