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COMPLIMENTS OF

THOMAS B. FINAN

ATTORNEY GENERAL

2-3-8-8

ANNUAL REPORT
AND
OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND

1963

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 Carville 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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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'Connor	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
⁹ Thomas B. Finan	1962

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

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

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

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

⁵Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

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

⁸Appointed January 13, 1961, to serve unexpired term of former Attorney General.

⁹Elected at election of November, 1962.

STATE LAW DEPARTMENT

Thomas B. Finan.....	Attorney General
¹ Joseph S. Kaufman.....	Deputy Attorney General
² Robert C. Murphy.....	Deputy Attorney General
Robert S. Bourbon.....	Assistant Attorney General
Robert F. Sweeney.....	Assistant Attorney General
Loring E. Hawes.....	Assistant Attorney General
Jacques E. Leeds.....	Assistant Attorney General
³ Franklin Goldstein.....	Assistant Attorney General
⁴ Mathias J. DeVito.....	Assistant Attorney General
⁵ James P. Garland.....	Assistant Attorney General
⁶ R. Randolph Victor.....	Assistant Attorney General
⁷ Robert L. Karwacki.....	Assistant Attorney General
⁸ Harrison M. Robertson.....	Special Assistant Attorney General for the Depart- ment of Assessments and Taxation
⁹ Stuart H. Rome.....	Special Assistant Attorney General for the Depart- ment of Assessments and Taxation
Russell R. Reno, Jr.....	Special Assistant Attorney General for the Comptrol- ler of the Treasury
¹⁰ ¹¹ Robert S. Bourbon.....	Special Assistant Attorney General for the University of Maryland
¹² Gerard W. Wittstadt.....	Special Assistant Attorney General for the Unsatisfied Claim and Judgment Fund
¹³ Fred Oken.....	Special Assistant Attorney General for Subversive Activities Control
¹⁴ Donald H. Noren.....	Special Attorney for Sub- versive Activities Control
Joseph D. Buscher.....	Special Assistant Attorney General for the State Roads Commission
Eli Baer.....	Special Assistant Attorney General for the Depart- ment of Motor Vehicles
Louis E. Schmidt.....	Special Assistant Attorney General for the Depart- ment of Health
Edward R. Jeunette.....	Special Attorney for the De- partment of Mental Hygiene
J. Howard Holzer.....	Special Attorney for the State Accident Fund
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
¹⁵ Albert A. Levin.....	Special Attorney for the Second Injury Fund
¹⁶ Ernest N. Cory, Jr.....	Special Assistant Attorney General in charge of Crime Investigation
¹⁷ ¹⁸ Decatur H. Miller.....	Securities Commissioner Assistant Securities Commissioner
¹⁹ Frederick O'Fiesh.....	Commissioner
²⁰ J. Max Millstone.....	Special Attorney for Depart- ment of Public Improvements
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. Hattie M. Dryden.....	Stenographer, Law and Legislative
Mrs. Marjorie A. Chesser.....	Stenographer, Law and Legislative
Mrs. Ida P. Beyer.....	Stenographer, Law and Legislative
Miss Adele Kemper.....	Secretary II
Miss Julia A. Hilditch.....	Secretary II
Miss Frances M. Schroeter.....	Secretary I

¹Resigned January 1, 1963

²Appointed Deputy January 2, 1963

³Appointed March 1, 1963

⁴Appointed July 1, 1963

⁵Resigned June 4, 1963

⁶Appointed January 8, 1963

⁷Appointed July 15, 1963

⁸Resigned February 5, 1963

⁹Appointed February 6, 1963

¹⁰Appointed University of Maryland January 9, 1964

¹¹Resigned December 31, 1963

¹²Resigned December 31, 1963

¹³Appointed July 10, 1963

¹⁴Appointed October 16, 1963

¹⁵Appointed September 11, 1963

¹⁶Resigned February 19, 1963

¹⁷Appointed June 11, 1962

¹⁸Resigned December 31, 1963

¹⁹Appointed October 16, 1963

²⁰Appointed July 1, 1963

Offices: 1200 One Charles Center
Baltimore, Maryland 21201

Annual Report For 1963

January 1, 1964

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

DEAR GOVERNOR TAWES:

I am herewith submitting to you a report of the proceedings and activities of the State Law Department during the period beginning January 1, 1963, and ending December 31, 1963. This is pursuant to the provisions of Section 10 of Article 32A of the Annotated Code of Maryland (1957 Ed.).

The number of cases continues to increase, making a resume of each individual case impractical. I am, however, indicating below the various courts and the number of cases in each in which the Department participated. Some have been finally completed, others are in the process of trial and some are still pending.

SUPREME COURT OF THE UNITED
STATES 7 cases

UNITED STATES COURT OF AP-
PEALS FOR THE FOURTH
CIRCUIT 9 cases

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARY-
LAND 82 cases

COURT OF APPEALS OF MARYLAND:

Civil Appeals 21 cases
Criminal Appeals 141 cases
Applications for Leave to Appeal—
Post Conviction and Defective De-
linquent Cases 160 cases

Total Cases Court of Appeals... 322 cases

Maryland Tax Court Cases..... 189 cases
Cases in Lower Courts..... 73 cases

In addition to the above, the Department appeared as counsel in numerous contested cases before the administrative or departmental tribunals of the State Government.

All bonds submitted to the Department by public officials required by law to be bonded were approved as to form and legal sufficiency before acceptance by the State. All leases, contracts, contract bonds, deeds, agreements and easements submitted to the Department of Public Improvements and/or the Department of Budget and Procurement were examined by this Department for 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 required to be approved by us as to legality before being filed with the State departments indicated by statute.

The General Assembly convened on January 2, 1963, and adjourned on April 1, 1963. The Annapolis office, during this session, was in charge of Mr. Ronald L. Schreiber, although I was in daily attendance, together with one or more of my regular staff, to advise and consult with members of the General Assembly and the departments and officials of the State Government having an interest in proposed legislation.

In April of 1963, I attended the meeting of the Southern Regional Conference of Attorneys General held at Charleston, South Carolina, together with Assistant Attorneys General Robert F. Sweeney, Robert S. Bourbon and Gerard William Wittstadt. In June of that year, I attended the 57th Annual Meeting of the National Association of Attorneys General in Seattle, Washington. Deputy Attorney General Robert C. Murphy and Special Assistant Attorney General Joseph D. Buscher accompanied me.

A detailed Financial Statement of the State Law Department for the fiscal year beginning July 1, 1962 and ending June 30, 1963, is included herewith.

The following changes in the personnel of the Department occurred during the year:

On January 1, 1963, Deputy Attorney General Joseph S. Kaufman resigned to resume the private practice of law,

and on January 2, 1963, I appointed Mr. Robert C. Murphy as Deputy Attorney General. On January 1, 1963, I appointed Mr. R. Randolph Victor as Assistant Attorney General. On February 5, 1963, Mr. Harrison M. Robertson, Special Assistant Attorney General for the Department of Assessments and Taxation, resigned to return to private practice, and on February 2, 1963, I appointed Mr. Stuart H. Rome as Special Assistant Attorney General to replace Mr. Robertson. On January 9, 1963, I appointed Mr. Robert S. Bourbon as Special Assistant Attorney General for the University of Maryland to replace Mr. Murphy. On July 10, 1963, I appointed Mr. Fred Oken as Special Assistant Attorney General for Subversive Activities Control, and on October 9, 1963, I appointed Mr. Donald H. Noren as Special Attorney I for this same Department. On September 11, 1963, I appointed Mr. Albert A. Levin as Special Attorney for the Second Injury Fund. On October 16, 1963, I appointed Mr. Frederick O'Fiesh as Assistant Securities Commissioner. On February 29, 1963, Mr. Ernest N. Cory, Jr., Special Assistant Attorney General in charge of Crime Investigation, resigned to resume the private practice of law. On July 1, 1963, I appointed Mr. J. Max Millstone as Special Attorney II for the Department of Public Improvements. On December 31, 1963, Mr. Decatur H. Miller, Securities Commissioner, Mr. Gerard W. Wittstadt, Special Assistant Attorney General for the Unsatisfied Claim and Judgment Fund, and Mr. Robert S. Bourbon, Special Assistant Attorney General for the University of Maryland, all resigned to return to private practice.

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

With kindest personal regards, I remain

Sincerely yours,

THOMAS B. FINAN,
Attorney General.

FINANCIAL STATEMENT OF THE STATE LAW DEPARTMENT
FOR THE FISCAL YEAR BEGINNING JULY 1, 1962
AND ENDING JUNE 30, 1963

Appropriations and Budget Credits:

Program .01.....	\$230,155.00
Program .02.....	12,988.00
Program .03.....	1,000.00
Program .04.....	38,423.80
	\$282,566.80

Program .01

Legal Counsel and Advice:

Appropriation	\$229,955.00
Appearance Fees	220.80
Budget Credits	200.00
	\$230,375.80

Appearance Fees turned into State Treasury..... 220.80

Net Appropriation Plus Budget Credits.....\$230,155.00

Salaries:

Attorney General	\$ 15,000.00
Deputy Attorney General	12,000.00
Assistant Attorney General (6)	62,000.00
Special Attorney III	1,368.00
Administrative Assistant—State Law Department	8,514.00
Stenographer, Law and Legislative (5)	20,570.72

Secretary II (2)	9,104.00	
Additional Clerical Assistance.....	500.00	
Salaries	\$129,056.72	
Expenses (Exclusive of Salaries) :		
Technical and Special Fees.....	\$ 35,624.12	
Communication	10,626.87	
Travel	5,345.91	
Motor Vehicle Operation and Maintenance	1,909.32	
Contractual Services	8,794.75	
Supplies and Materials	2,877.06	
Equipment—Additional	11,501.89	
Fixed Charges	24,139.70	
Expenses (Exclusive of Salaries)	\$100,819.62	
Salaries and Expenses	\$229,876.34	
Reverted to State Treasury	278.66	
Net Appropriation and Budget Credits.....	\$230,155.00	

Program .02

Subversive Activities Control:		
Net Appropriation	\$ 12,988.00	
Salaries:		
Special Investigator	\$ 1,660.29	
Stenographer, Law and Legislative	4,258.67	
Salaries	\$ 5,918.96	

Expenses (Exclusive of Salaries) :

Communication	\$ 100.00
Travel	98.55
Contractual Services	4,609.23
Supplies and Materials	91.08
Equipment - Additional	2,099.26

Expenses (Exclusive
of Salaries)\$ 6,998.12

Salaries and Expenses.....\$ 12,917.08

Reverted to State Treasury..... 70.92

Net Appropriation\$ 12,988.00

Program .03

Sundry Claims Board:

Net Appropriation\$ 1,000.00

Expenses:

Contractual Services\$ 967.70

Expenses\$ 967.70

Reverted to State Treasury..... 32.30

Net Appropriation\$ 1,000.00

Program .04

Appropriation\$ 38,400.00

Budget Credit 23.80

Net Appropriation and Budget Credit.....\$ 38,423.80

Salaries:

Securities Commissioner\$ 10,000.00

Assistant Securities
Commissioner 7,500.00

Secretary III	4,070.17	
Clerk-Typist I	1,462.00	
Salaries	\$ 23,032.17	
Expenses (Exclusive of Salaries) :		
Technical and Special Fees.....	\$ 190.00	
Communication	1,600.61	
Travel	353.13	
Contractual Services	1,312.43	
Supplies and Materials.....	3,509.34	
Equipment - Additional.....	5,849.90	
Fixed Charges	2,472.69	
Expenses (Exclusive of Salaries)	\$ 15,288.10	
Salaries and Expenses	\$ 38,320.27	
Reverted to State Treasury	103.53	
Net Appropriation and Budget Credit.....	\$ 38,423.80	
Total Net Appropriations and Budget Credits:		
Program .01.....	\$230,155.00	
Program .02.....	12,988.00	
Program .03.....	1,000.00	
Program .04.....	38,423.80	
		\$282,566.80
Total Expenditures:		
Program .01.....	\$229,876.34	
Program .02.....	12,917.08	
Program .03.....	967.70	
Program .04.....	38,320.27	
		\$282,081.39
Total Reversion to State Treasury.....	\$ 485.41	

OFFICIAL OPINIONS
of the
ATTORNEY GENERAL of MARYLAND

ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGES—DEFINITION OF TERM “VALUE” IN SECTION 110 OF ARTICLE 2B PROHIBITING THE FURNISHING OF SIGNS IN EXCESS OF \$5.00 VALUE.

June 28, 1963.

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

You have requested our opinion as to the meaning of the term “value” as it is used within the provisions of Section 110 of Article 2B of the Maryland Code.

Section 110, insofar as here pertinent, reads as follows:

“ . . . it shall . . . be unlawful for any person to furnish any sign, display, or other form of advertisement of any value in excess of five dollars (\$5.00), . . . ”

You specifically ask what factors should be taken into account in determining the “value” of such signs, displays, or other forms of advertisement.

In legal parlance the term “value” has consistently been considered as referring to market value. See, for example, the definition of the term “value” found at page 1721 of Black’s Law Dictionary (4th Edition) which is defined as relating to an object’s “ . . . worth consisting in the power of purchasing other objects, called ‘value in exchange.’ ” Black then goes on to discuss Market Value as follows:

“Fair value of property as between one who wants to purchase it and another who desires to sell it. *Lincoln Joint Stock Land Bank v. Board of Review of Sioux City*, 227 Iowa 1136, 290 N.W. 94, 95; *People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, Sup.*, 26 N.Y.S. 2d 232, 236. What willing purchaser will give for property under fair market conditions. *People v. F. H. Smith Co.*, 230 App. Div. 268, 243 N.Y.S. 446, 451. Not what the owner could realize at a forced sale, but the price

he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make a sale of like property. *Wade v. Rathbun*, 23 Cal. App. 2d Supp. 758, 67 P. 2d 765, 766."

Thus, the item "value" or "market value" is equaled with the price which a willing purchaser will pay to a willing seller for an object in an arm's length business transaction where the seller is not obligated to sell and the purchaser is not obligated to buy.

This concept of value has consistently been applied by the Maryland courts. See, for example, 8 M.L.E., *Damages* 123; 9 M.L.E., *Eminent Domain*, Section 41.

In determining what is the fair market value of an item of property, it would be relevant to take into consideration the price for which similar items of property have been sold for in the past. Of course, it goes without saying that the price which the particular item in question has brought in arm's length transactions is also highly relevant (such sales, however, must be carefully scrutinized to ascertain if, in fact, the transaction is really at arm's length rather than one wherein the purchaser, because of business or other relationships with the seller, is able to obtain a lower price than others or where the seller, because of over-supply or some other reason peculiar to him, is, in effect, forced to sell). In situations wherein arm's length sales are not present, it would be pertinent to inquire into the fair market value of the various component parts which make up the item and then, after adding a reasonable figure for know-how, overhead, and profit, arrive at a figure which would represent a reasonable market price.

In ascertaining these fair market values, it may well be wise to consult with persons in the advertising or manufacturing business having expert knowledge of the various factors described above.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

AUDITOR, STATE

CLERKS OF COURT—DISPOSITION OF CONTEMPT FINES IN
LAW, EQUITY AND CRIMINAL COURTS.

March 21, 1963.

Mr. Leo J. Parr, State Auditor

We have been advised that there has recently been some confusion among the Clerks of the courts in this State with respect to the proper disposition to be made of fines imposed for contempt of court. In order to clarify this situation we thought it would be advisable for this office to issue a formal opinion on this subject.

Article 38, Section 6 of the Annotated Code of Maryland, as amended by Chapter 160 of the Laws of 1959, specifically provides that all fines paid to the Clerk of the court for the purgation of contempt of a court of equity shall be paid to the county or Baltimore City, as the case may be, where the offense occurred. With respect to the disposition of contempt fines which may have been imposed by the law courts or by the criminal courts of this State, they are covered by Section 1 of Article 26 of the Annotated Code of Maryland (1957 Edition). This section provides as follows:

“The judges of the several courts of law and of equity may make such rules and orders from time to time for the well-governing and regulating their respective courts and the officers and suitors thereof and under such fines and forfeitures as they shall think fit, all of which fines shall go to the State.”

In an opinion of this office dated December 17, 1947, and reported at 32 Opinions of the Attorney General 174, it was held that contempt fines imposed by law and criminal courts were encompassed by the scope of the statute and that fines from these sources should be paid to the Treasurer of the State of Maryland. In that opinion we also held that fines for the purgation for contempt of courts of equity

were likewise encompassed within Section 1 of Article 26. However, as noted above, since the date of that opinion Section 6 of Article 38 of the Code has been amended so that these fines are now to be disposed of in the manner indicated above.

In summary, therefore, fines for contempt of an equity court are payable to the city or county wherein the offense occurred whereas fines imposed for contempt of a law court or criminal court are payable to the Treasurer of the State of Maryland.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

BANKS AND BANKING

BANK COMMISSIONER—FOREIGN BANK HOLDING CORPORATION NOT PROHIBITED FROM DOING BUSINESS IN MARYLAND BY ARTICLE 11, SECTION 31A.

July 17, 1963

*Mr. Herbert R. O'Connor, Jr.,
Bank Commissioner.*

In your letter of July 11, 1963 you inquired whether a foreign bank holding corporation is prohibited from doing business in Maryland by Chapter 580, Laws of Maryland, 1963. This statute added Section 31A to Article 11 of the Maryland Code. This section provides as follows:

“No foreign banking corporation, except a national banking association having its main office in this State, shall maintain any office within the State to solicit deposits or to conduct a general banking, a savings banking or a banking and trust business.”

The particular foreign corporation referred to in your letter controls, through stock ownership, three banks chartered by the State of Maryland. Holding corporations organized for a lawful purpose are not prohibited from doing business in Maryland. *Warren v. Fitzgerald*, 189 Md. 476, 491. The general corporation law, applicable to corporations other than municipal corporations and banks, grants corporations the power to acquire, own, hold, vote, sell or otherwise dispose of or deal in the shares of stock of other corporations of this State or foreign corporations. Article 23, Section 9(a) (7). There is no statute in Maryland relating to bank holding corporations as a class.

It is our opinion that a bank holding corporation is not a banking corporation as contemplated in the statute in question. The holding company neither solicits the deposits nor conducts a general banking business. Its activities in Maryland are limited to the activities normally conducted by

a share holder of a bank. Section 63, Article 11 defines "banking institution", as used in the banking law, as: "incorporated banks, savings institutions and trust companies."

The banks located in Maryland controlled by the foreign holding corporation have their principal offices in Maryland, where solicitation of deposits and the conduction of banking business takes place. It would seem that the intention of this statute is to require banking institutions regulated by the Banking Commission of Maryland to maintain their main office within this jurisdiction so that the Commissioner could at any time inspect the books and records of the bank. This statute would appear to be aimed at preventing a bank from having its main office in another jurisdiction and establishing a branch in this State.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

BANK COMMISSIONER — INDUSTRIAL FINANCE ACT — DEFAULT CHARGES—APPLICATION OF PAYMENTS—WHERE LOAN CONTRACT FAILS TO PROVIDE FOR APPLICATION OF PAYMENTS TO EARLIEST UNPAID INSTALLMENT DUE ON DELINQUENT ACCOUNT, DEFAULT CHARGE MAY NOT BE ASSESSED ON SUCCESSIVE MONTHLY INSTALLMENT PAYMENTS MADE WHEN DUE.

July 25, 1963.

*Herbert R. O'Connor, Jr., Esq.,
Bank Commissioner.*

You have requested that we resolve apparent inconsistencies between two prior opinions of this office regarding the collection of delinquency charges by lenders under Section 196(A)(3) of the Maryland Industrial Finance Law, Article 11, Annotated Code of Maryland (1957 Edition). The factual situation giving rise to your inquiry is as follows.

A borrower obtains a loan of \$1,500 or less from a company licensed under the Maryland Industrial Finance Law and agrees to repay the loan in 12 equal monthly installments. The borrower fails to make the first monthly installment payment when due, but thereafter makes all payments in the agreed amount at the designated time. The lender in this instance credited each payment to the preceding month and exacted delinquency charges for each payment. Consequently, the entire loan was paid off in a period of 13 months in equal monthly installments beginning on the second month and 12 default charges were collected, presumably pursuant to Section 196(A)(3) of the Industrial Finance Law. The loan contract does *not* contain a provision to the effect that each payment shall be applied to installments due in the order of their maturity.

In an opinion dated September 6, 1950, the Attorney General ruled that, in the absence of an agreement between the borrower and the lender to the contrary, the lender could apply each payment received to the previous unpaid

balance, thereby placing the borrower in default. Consequently, the lender could exact a delinquency charge for each successive installment until the loan was repaid. In a subsequent opinion dated March 8, 1960, this office advised the Bank Commissioner that, under similar facts, only one delinquency charge could be received by the lender; that is, a penalty for the initial default.

Section 196(A) (3) provides that the licensee under the Industrial Finance Law may collect from the borrower a delinquent charge of five cents for each default continuing for five or more days in the payment of \$1.00, or a fraction thereof, at the time any periodical installment is made; provided, however, that such delinquent charge shall not be imposed more than once for the same default. As is recognized in the opinion of this office of September 6, 1950, (35 Opinions of the Attorney General 210), whether a penalty may be exacted for successive defaults due to the borrower's missing his initial payment depends upon whether each of the borrower's subsequent payments shall be applied to the installment due when such payment is made. In that opinion it was conceded that the parties might agree that, even after default in a single payment, subsequent payments may be treated as "payment in full of the installments due for subsequent months". It was further stated that under standard accounting practice a payment is to be applied to the oldest item on the account, in the absence of an agreement to the contrary. The opinion of this office of March 8, 1960, reasoned that since the Industrial Finance Law should be construed most favorably to the borrower as a remedial statute, the borrower should only be charged once for the initial default. Although we agree with the principles set forth in both of these opinions, we are constrained to approve the result of the latter where the loan agreement is silent as to the application of payments.

It is the general rule that a debtor may make application of his payment and such application of the payment need not be expressly directed at the time by the party paying

money, but his intention may be inferred from the circumstances of the particular case. *Mitchell v. Dall*, 2 H&G 159, 4 G&J 361. Clearly, the contract between the parties, the amount and time of payment are circumstances to be considered in determining whether the borrower intended application of the payment to the particular installment due at the time it was paid. See *Cavanagh v. Marble*, 68 Atl. 853, 80 Conn. 389.

Consider first the case where the borrower makes a partial payment at the time his first payment is due on an industrial loan. Where he makes subsequent payments on the due dates in the exact amounts agreed upon in the contract, there can be little question that such payments were intended to be applied to the installments due. See *Restatement of Contracts*, Volume 2, Section 387, particularly Illustration 4 on page 733. The illustration in the *Restatement* states that where A owes B two debts respectively of \$193 and \$221, and A pays B \$193, "the coincidence of the amount of this payment and that of one of the debts is sufficient evidence, in the absence of facts indicating a contrary intention, to indicate a direction to have the payment applied to the smaller debt". The *Restatement* further states, in accordance with the rule in the Maryland case of *Mitchell v. Dall*, *supra*, that

"It is not essential that the debtor's intent shall be manifested in express words. Here, as elsewhere, in the law of contracts, a manifestation of intent deduced from acts or from the circumstances of the case is as effective as if expressed in words." *Restatement, supra*, page 731.

We see no reason why the same principle may not govern where the debtor omits an entire payment, but makes subsequent payments in full on the subsequent due dates. The amount paid and payment on the installment due date specified in the schedule of payments are circumstances from which the borrower's intent may be deduced. The whole purpose of scheduling payments is to prevent the haphazard application of credits in varying amounts such

as occurs in a retail account or other typical general running account.

We are not unmindful of the general rule that where divers debts are due on an open or general running account, and the debtor does not appropriate his payments thereon, the creditor may make such an appropriation; and where the creditor makes no such appropriation, the law will apply the payment to the earliest items of the account; *German Lutheran Church v. Heise*, 44 Md. 453, 471; *Carozza v. Brannan*, 186 Md. 123; *Dickey v. Permanent Land Company of Baltimore*, 63 Md. 170; *Mullan Co. v. International Corp.*, 220 Md. 248. In all of these cases the account in question was an open or running account, such as that existing between a supplier and a contractor, where items of varying price are charged against the account and payments are made in dissimilar amounts. It is our opinion that where the contract between the parties calls for payments in a specified amount on a specified date, the application of payments is not necessarily governed by the rules relating to open or running accounts as set forth in these cases.

We see no difficulty, therefore, in finding that the borrower making a full installment payment on the monthly due date specified in his schedule of payments furnished by the lender, whether he has defaulted in whole or in part in the payment of a previous installment, intends the application of his installment payment under an industrial loan contract to be applied to the month in which payment is made. As is stated above, the circumstances of the transaction, including the fact that the parties agree to regular monthly payments in a specified amount, bear out this conclusion. We do not express an opinion as to the designation of a delinquent or a partial payment made in any one month. Unless the loan contract itself, therefore, specifically states that regular monthly payments received will be first applied to any deficiency in the balance due at the time the payment is made, then it may be presumed that such payment was intended by the borrower to apply to the month when paid.

Attorneys for various industrial finance companies at a recent conference advised us that the prevailing practice is for the loan note to contain a provision that each payment shall be applied to installments due in the order of their maturity and to late charges. If such is the case, there can be no question that a delinquency charge may be exacted at the time of each payment where the borrower is one month delinquent in his payments.

THOMAS B. FINAN, *Attorney General.*

LORING E. HAWES, *Asst. Attorney General.*

BANKS AND BANKING—CHARGES FOR EXAMINATION OF
INDUSTRIAL FINANCE LICENSEES INCLUDE INDIRECT
COSTS—"ACTUAL COST" DEFINED.

December 2, 1963.

Mr. John D. Hospelhorn,
Deputy Bank Commissioner.

You have requested our opinion as to whether Section 188, Article 11, Annotated Code of Maryland (1957 Edition), requires the Bank Commissioner to include, charge and collect as a part of the "actual cost of examination" of industrial finance company licensees, such items as social security contributions, retirement contributions, annual leave and sick leave deductions from total hours worked, and other departmental overhead costs as presently determined. The State Auditor has urged computing and billing for such additional costs of examination by applying a percentage to the hourly rates presently in effect.

Although no Maryland cases shed light on the proper construction of the term "actual cost," cases in other jurisdictions support the conclusion that "actual cost" includes overhead and other expenses incidental to the performance of the task at hand. In *Fillmore v. Johnson*, 221 Mass. 406, 109 N. E. 153, the actual cost of finishing paper was held to include such costs as heat, light, rent, office expenses, superintendence, repairs, depreciation and other incidentals. Cf. *Bulawayo v. Waterworks Co., Ltd.*, (1908) A. C. 241, 247.

"The term 'cost' or 'actual cost' is not a technical one having at all times the same meaning. It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used." *Boston Molasses Co. v. Molasses Distributors' Corp.*, 274 Mass. 589, 175 N. E. 150, 152.

Overhead expenses may be included, unless specifically excluded. *Ibid.* See also *State v. N. W. Poultry & Egg Co.*, 281 N. W. 753, 755 (Minn.).

It is our opinion that the term "actual cost of examination" in Section 188, Article 11, includes indirect as well as direct costs to the Commissioner for conducting the required examinations of industrial finance companies; and that the computation and collection thereof as suggested by the State Auditor is legally correct. Travel expenses, social security contributions, leave deductions from total hours worked, typing, supervision and other overhead expenses may, therefore, be charged according to the accounting procedures suggested by the State Auditor.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

BONDS, PAYMENT AND PERFORMANCE

DEPARTMENT OF PUBLIC IMPROVEMENTS—PAYMENT AND PERFORMANCE BONDS—WHEN REQUIRED UNDER PROVISIONS OF SECTION 11 OF ARTICLE 90 OF MARYLAND CODE.

February 15, 1963.

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

We have your recent letter in which you inquire as to whether the Payment and Performance Bonds required by Chapter 10 of the Acts of 1959 are applicable to building or construction contracts entered into by other than State agencies, but in which there is financial participation or contribution by State appropriation. Specifically, you refer, by way of example, to construction work recently undertaken by Washington College, a private educational institution in Maryland, toward which work the State contributed the sum of approximately \$286,419.00 pursuant to the provisions of the General Construction Loan Act of 1959.

Chapter 10 of the Acts of 1959, codified as Section 11 of Article 90 of the Annotated Code of Maryland (1962 Supplement), makes mandatory provision for the execution by contractors, of Payment and Performance Bonds in connection with any contract exceeding \$5,000.00 in amount "for construction, alteration, or repair of any public building or public work or improvement of the State of Maryland, or of any county, city, municipal corporation, town, board of education or other political subdivision, public authority or public instrumentality, * * *."

By its precise terms, Section 11 is applicable only to public projects or works, whether of the State of Maryland or other governmental unit or instrumentality, as therein enumerated. The State's participation in the construction work at Washington College was solely financial and constituted essentially a gift of State funds to an institution serving public ends within this State. That such may con-

stitutionally be done is no longer open to question. *Frostburg v. Jenkins*, 215 Md. 9; *Johns Hopkins University v. Williams*, 199 Md. 382; *Melvin v. Anne Arundel County*, 199 Md. 402. The fact that the State contributed financially toward such a private building project obviously does not convert it into a public one, so as to require compliance with the provisions of Section 11.

It is, however, our further view that since the State does participate financially in these private projects it would be most appropriate for your department, on behalf of the State, to insist that the private corporation receiving State funds secure adequate Payment and Performance Bonds from contractors, since a contractor's failure either to adequately perform the project, or to pay all laborers, suppliers and material men, could well eventually result in either a total or partial loss of the State's gift to the private corporation. As aforesaid, however, Section 11 places no such legal requirement upon your department.

You also inquire as to whether your department is obligated to require the execution of Payment and Performance Bonds under Section 11 in favor of the State as Obligees when the State contributes financially toward the construction of Junior and Community Colleges by the various political subdivisions of the State. As heretofore indicated such political subdivisions are themselves required by Section 11 to obtain the requisite Payment and Performance Bonds on such projects. This is a statutory requirement imposed upon the political subdivisions and there is no legal obligation upon your department to superintend compliance therewith by the political subdivision. It is nevertheless our further view that although your department has no legal obligation to require that such political subdivision do, in fact, comply with Section 11, it would not be inappropriate if your department on behalf of the State, would assure itself that the requisite Bonds were obtained by the political subdivision before the State's money is dedicated to the project.

In conclusion, therefore, we point out that in neither case referred to could the State of Maryland become Obligee on such Bonds under Section 11, since it has no proprietary ownership of the projects under construction, notwithstanding that it has contributed financially thereto. It is because of this financial contribution by the State, however, that it would be most appropriate for your department to insist that requisite Payment and Performance Bonds be executed by contractors so as to fully protect the State's contributions to these projects.

THOMAS B. FINAN, *Attorney General*.

ROBERT C. MURPHY, *Deputy Attorney General*.

BUDGET BILL

BUDGET—LIMITATIONS ON EXPENDITURES FOR SALARY OF
DIRECTOR OF COMMISSION ON AGING—PROPERLY IM-
POSED IN BUDGET BILL.

April 30, 1963.

*Honorable Margaret C. Schweinhaut, Chairman,
State of Maryland Commission
on the Aging.*

You have requested our opinion as to whether or not it is appropriate and in accordance with the Constitution for the General Assembly, in the Budget Bill (House Bill 174), to have amended the item "Commission on the Aging General Fund Appropriation—\$37,500.00" by striking the sum of \$37,500.00, and inserting in lieu thereof \$25,000.00 and adding the following limitation:

"From the above general fund appropriation in the amount of \$25,000 no more than the sum of \$7,500 shall be provided from any source for the annual salary of the executive director of the commission."

You have suggested that the insertion of the limiting language may be unconstitutional in that Section 52(6) of Article III of the Constitution of Maryland provides, among other things:

"* * * the General Assembly * * * may not alter the [Budget] Bill except to strike out or reduce items therein, * * *"

You have called our attention to an Opinion of the Attorney General dated August 9, 1955, 40 Opinions of the Attorney General 288, in which we state that the power of the General Assembly is limited to reducing or eliminating budget items. In that opinion, however, the question before us was whether or not the General Assembly has the power to include in the budget items not already contained therein upon receipt of the budget from the Governor. Our citation of the limits upon the General Assembly's power was in

illustration of our answer that it could not include items not included by the Governor. The problem which you pose is a different one and involves the perplexing question, whether and to what extent the General Assembly may legislate in the Budget Bill? The answer to that question is not subject to precise formulation and each problem which arises thereunder must be decided on its own merits. However, the best exposition of the General Assembly's power in this regard is contained in 37 Opinions of the Attorney General 139, an opinion rendered by Attorney General Hall Hammond in 1952. Because it bears repeating, we set forth the following quotation from the opinion:

"The Legislature may not, under the guise of incorporating in the Budget Bill language purporting to have the effect of law, make that language become a law. No law can be passed in Maryland except by both Houses of the General Assembly and the signature of the Governor, or the overriding of his veto if he disapproves the proposed law. The function and effect of the Budget Bill as a law is restricted by its purposes, and the mechanics set up by Section 52 of Article III carry out those purposes. That function and effect is to appropriate money, not to legislate generally. This is not to say that a provision in the budget, such as is found on page 219 of the Acts of 1952,

'To the State Department of Health for the control of Epidemic and Pestilential Diseases, to be spent under the direction of the Governor,'

cannot be included, since the qualification and limitation are directly related to the spending of the sum appropriated. Note also, for example, the provision found on page 224 of the Acts of 1952:

'* * * no passenger motor vehicle to be used by a State officer or employee, other than an elected official, shall be pur-

chased with funds appropriated by this act, the net cost of which inclusive of trade-in allowance, shall exceed \$2,200.'

This last limitation on the use of money would seem to be a reasonable function of budget making. What I am saying is that the Legislature, in enacting the Budget Bill, can attach such provisions as it pleases—not obviously capricious, nor illegal nor unconstitutional—to the appropriation or expenditure of public moneys. The Legislature may decrease or eliminate an expenditure proposed by the Governor and in the performance of this power, could, it seems to me, cut down by condition or limitation on the use of the facility for which money was appropriated."

We are in accord with this reasoning. We cannot so restrict the budgetary authority of the General Assembly as to allow it to strike out or reduce items in the budget without recognizing the subsidiary authority which naturally flows from that power, to condition or limit the use of the money appropriated, or the use of the facility for which the money is appropriated. In either case, of course, the limitation must not violate other provisions of the Constitution nor may it be capricious.

In view of the above we are of the opinion that the General Assembly's act in limiting the general fund appropriation for the Commission on the Aging by stipulating that no more than \$7,500 therefrom shall be provided for the annual salary of the Executive Director, is not violative of Section 52(6) of Article III of the Constitution.

You have also suggested that since the Executive Director's salary scale was established by the State Employees' Standard Salary Board on October 8, 1959, and since funds therefor were included in the next subsequent State Budget that salary scale could not be changed in a succeeding budget without the General Assembly's first having repealed the authority of the Standard Salary Board to fix salary scales. Your suggestion is based on Section 27 of

Article 64A of the Annotated Code of Maryland (1962 Supplement) which fixes the powers and duties of the Standard Salary Board.

We are of the opinion, however, that the approval in one budget of the salary scale established by the Standard Salary Board does not bind the General Assembly for all time to appropriate money in accordance with that salary scale in future budgets. It is appropriate to note that Section 52(4) of Article III of the Constitution of Maryland requires that the Governor in submitting his budget to the General Assembly must make provision therein “* * * (e) for the salaries payable by the State and under the Constitution and laws of the State * * *”. On the other hand subsection (6) of the same section of Article III states that the General Assembly, after submission of the budget by the Governor “* * * shall not amend the Budget Bill so as to affect * * * the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; * * *”

It is clear therefore that although the Governor must include in his budget both salaries required by the Constitution and by law, the General Assembly is only precluded from amending those items dealing with salaries required by the Constitution. By necessary implication the General Assembly has the authority to amend salaries required by previous laws of the General Assembly and has the authority to do so in the Budget Bill. *A fortiori*, the General Assembly has the authority in the budget to amend salaries and salary scales which have become effective not by its own legislative act but by force of law as is the case with salary scales fixed by the Standard Salary Board. Clear indication that this is so is given in Section 13 of Article 15A of the Annotated Code of Maryland, which states:

“§ 13. Change in salaries.

Whenever in any budget bill an increase or decrease is made in any salaries fixed by any act of the General Assembly, heretofore enacted, the passage of such budget bill shall operate as an

amendment to such act to the extent of such increase or decrease, within the limits permitted by the Constitution of Maryland."

This authority of the General Assembly is to be distinguished from the situation which was involved in the late former Attorney General O'Connor's opinion to the late Governor Nice reported at 20 Opinions of the Attorney General 201, wherein the Governor in submitting his budget improperly omitted salaries for certain positions thereby nullifying an act of the Legislature which had established those salaries. The applicable reasoning is that set forth in an opinion of the late former Attorney General O'Connor to the former State Budget Director, reported in 22 Opinions of the Attorney General 201, wherein it was stated:

"It might be contended that where a statute definitely fixes a salary, that the method of modifying that salary by an appropriation of a different amount in the budget, is objectionable. Furthermore, it would seem to be better practice to submit for the action of the Legislature, in such instances, an amendment to the pre-existing law which would re-enact the statute to bring it into harmony with the budgetary provisions. But while obviously the preferable method of amending general laws is by specific amendment of the law in question, rather than through the medium of the budget, it must be remembered that the Legislature has specifically provided that the budget is to be accepted as a repeal and re-enactment of pre-existing statutes, where any inconsistency exists."

For the foregoing reasons we are of the opinion that there is no constitutional infirmity in the action of the General Assembly in question.

THOMAS B. FINAN, *Attorney General*.

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

BUILDING, SAVINGS AND LOAN ASSOCIATIONS

RELOCATION OF PRINCIPAL OFFICE—NECESSITY OF BOARD APPROVAL.

February 28, 1963.

*Mr. Harry B. Wolf, Jr.,
Director, Department of Building,
Savings, and Loan Associations.*

You have requested our opinion as to whether or not the Act regulating savings and loan associations, Sections 144 to 161 of Article 23 of the Annotated Code of Maryland (1957 Edition) and Sections 161A to 161KK of Article 23 of the Annotated Code of Maryland (1962 Supplement) require the approval of the Director prior to the relocation by an association of its principal office as distinguished from its branch offices.

Section 161V of Article 23 provides that no association, as defined therein, shall establish, maintain or relocate any branch office without applying for and securing the prior approval of the Director under the procedure therein set forth. In light of the provisions of Section 161M of Article 23, providing certain stringent prerequisites to the incorporation and establishment of a new savings and loan association, it would appear that the General Assembly must have intended that the relocation of a principal office be treated in the same manner as the location or relocation of a branch office. The same considerations as to the promotion of the public interest, convenience, and advantage in the area of the proposed relocation would apply equally to the relocation of a principal office as well as to the establishment of branch offices.

However, the Act makes no specific mention of the relocation of a principal office and in Section 161V is quite definite in specifying branch offices. Under the usually accepted definition of branch office, one must consider that term to be limited to offices other than the principal office of a cor-

poration. See Words and Phrases, Permanent Edition, Volume 5. Under this set of circumstances, we cannot supply language evidently omitted by the General Assembly in order to accomplish what the General Assembly most probably intended but did not accomplish. See *Dundalk Liquor Company v. Tawes*, 197 Md. 446.

On the other hand, Section 161-O of Article 23 requires that any amendment to the charter of an association, pursuant to Sections 10 through 13 of Article 23, is subject to the procedures set forth in Section 161M(e) of that Article referring to the filing of Articles of Incorporation, with certain exceptions. That subsection requires the prior approval of the Board of Building, Savings, and Loan Commissioners prior to such amendment's becoming effective.

Although a change of principal office for the purpose of corporate records may be accomplished by a resolution of the Board of Directors of a corporation, filed for record with the State Department of Assessments and Taxation, such change of principal office is also one of the charter amendments authorized in Section 10 of Article 23. These methods are in the alternative and it is apparent that either may be sufficient to accomplish a change of principal office depending upon the circumstances of the corporation in question. See *O'Toole Tire Company, et al. v. Gaither, Inc.*, 216 Md. 54, 59 (1957).

It follows, therefore, that an amendment to the charter of an association changing its principal office can become valid only after prior approval of the Board as provided in Sections 161M(e) and 161-O of Article 23. Although it would be possible under some circumstances to change the principal office of a corporation for the purposes of the record keeping provisions of the State Department of Assessments and Taxation without an amendment to the corporate charter, by a simple resolution filed for record with that Department pursuant to Section 8 of Article 23, the location of the principal place of business of a savings and loan association is an integral part of its operations. It

would seem that such location or relocation would require a charter amendment.

Section 161M(e) requires, for newly proposed associations, a public hearing to determine whether the business of the association will be honestly and efficiently conducted and whether the public interest, convenience, and advantage will be promoted by allowing the proposed association to engage in business. By reason of the further provisions of Section 161(M)(e) it may be concluded that such interest, convenience, and advantage and such honest and efficient operation refer to the conduct of the business at the location set forth in the proposed charter of the association. It would be a complete subversion of the law if an association, after having received authorization to operate at a location at which the Board had determined it would be efficiently operated in promotion of the public interest, convenience, and advantage, could, without any approval of the Board, relocate at some other place wherein it might not be conducted efficiently for the promotion of the public interest, convenience, and advantage. Since the principal office of a savings and loan association is more than a mere designation of a mailing address for record purposes but is actually an integral part of the functioning of the association, we conclude that an association which changed its location without amending its corporate charter would be operating in violation of that charter. We further conclude, therefore, that in order validly to change its principal office for operational purposes an association must amend its charter and such amendment is subject to the provisions of Section 161M(e).

THOMAS B. FINAN, *Attorney General*.

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

BUILDING, SAVINGS AND LOAN ASSOCIATIONS—REQUIREMENT
TO ASSESS STOCK TO MAKE GOOD A DEFICIENCY—STAT-
UTORY CONSTRUCTION—USE OF THE WORD “SHALL” IS
MANDATORY.

April 9, 1963.

*Mr. Harry B. Wolf, Jr., Director,
Department of Building, Savings
and Loan Associations.*

You have requested our opinion as to the proper interpretation of Section 161P (g) (2) of Article 23 of the Annotated Code of Maryland (1962 Supplement). The specific language which is in issue is as follows:

“* * * The directors of every association upon which a request to make good a deficiency is made, *shall* levy an assessment upon the guaranty stock to repair the deficiency. * * *” (Emphasis supplied.)

We believe that the use of the word “shall” in the context of Section 161P makes the requirement to levy an assessment mandatory.

“The word ‘shall’ is generally and ordinarily construed as being mandatory and it is to be presumed that the Legislature intended that words be given their ordinary and natural meaning unless there is something in the statute which discloses that it intended otherwise. It is a rule of statutory construction that when a statute is framed in terms of command and there is no indication that it is to receive a permissive interpretation, it shall be construed as being mandatory. Crawford, *Statutory Construction*, Section 262.” (42 Opinions of the Attorney General, 303).

Therefore, the proposal by an association to secure a guaranty deposit, rather than to assess the guaranty stock does not comply with the law.

THOMAS B. FINAN, *Attorney General.*

FRANKLIN GOLDSTEIN, *Asst. Attorney General.*

BUILDING AND LOAN ASSOCIATIONS—INVESTMENTS—BUILD-
ING AND LOAN ASSOCIATION MAY NOT HAVE A FREE
SHARE ACCOUNT IN ANOTHER BUILDING AND LOAN
ASSOCIATION.

June 12, 1963.

*Mr. Harry B. Wolf, Jr., Director,
Department of Building, Savings
and Loan Associations.*

You have requested our opinion as to whether or not a savings and loan association may have a free share account in another savings and loan association.

The authorized investments of savings and loan associations are set forth in Article 23 of the Annotated Code of Maryland (1962 Cumulative Supplement), Section 150 and Section 161Z. Article 23, Section 150 specifically states that savings and loan associations:

“are hereby prohibited from investing in any other manner than in . . .”

The section then proceeds to list the authorized investments.

Article 23, Section 161Z states:

“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:”

The section then proceeds to list certain additional authorized investments.

Sub-paragraph 8 thereunder, is as follows:

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

There is no provision in either Article 23, Section 150 or Section 161Z, authorizing investments in other savings and loan associations whether insured or uninsured or in banks

which are not insured by the Federal Deposit Insurance Corporation. Article 49A of the Annotated Code of Maryland (1957 Edition), as most recently amended by Senate Bill 251 (Chapter 363), as passed by the 1963 session of the Legislature, generally covers investments for fiduciary and public monies. Section 1 of Article 49A, as most recently amended, authorizes investments in free share accounts of savings and loan associations where the withdrawal and repurchase value is insured by the Federal Savings and Loan Insurance Corporation and by the Maryland Savings-Share Insurance Corporation for certain fiduciaries and other holders of public monies. One class of holders of public monies included in the terms of Article 49A, Section 1, is savings and loan associations.

You have inquired whether or not Article 49A of the Annotated Code of Maryland adds additional authorized investments for savings and loan associations over and above the authorized investments set forth in Article 23, Section 150 and Section 161Z. It is a general rule of statutory construction that where there is a conflict between a specific statute relating to a specific subject and a general statute which includes the specific subject, the specific statute should prevail even if it was passed prior to the general statute unless it appears that the Legislature intended to make the general statute controlling. See Crawford, *Statutory Construction*, Section 230; Sutherland, *Statutory Construction*, Section 5204 (Third Edition, 1943).

Section 161A through Section 161LL of Article 23 is a comprehensive law specifically regulating the savings and loan business in the State of Maryland. These sections supplement Article 23, Section 144 through Section 161 with regard to savings and loan associations.

It is our opinion that since savings and loan associations are so comprehensively and completely regulated under the above sections of Article 23, any provision in a general law which purports to apply to savings and loan associations but is inconsistent with the provisions in Article 23, Section 144 through Section 161LL would not apply to savings and

loan associations, unless the Legislature makes it clear that it intends to make the general act controlling. We believe that if Section 1 of Article 49A is to include savings and loan associations, it is in conflict with Article 23, Section 150 and Section 161Z. Section 150 specifically provides that savings and loan associations are prohibited from investing in investments not authorized in Section 150. Section 161Z, which enlarges the permissible investments under Section 150, specifically allows investments in banks insured by the Federal Deposit Insurance Corporation but does not authorize investments in insured or uninsured savings and loan associations or in banks which are not insured.

Where the Legislature has intended that a general act was to be controlling, it has provided that it should be applicable:

“Notwithstanding any rule at common law or any provision of any general or special law.”

Article 23, Section 424, Annotated Code of Maryland (1962 Supplement).

No such provision was included in Article 49A, Section 1.

It is, therefore, our opinion that a savings and loan association may not have a free share account in another savings and loan association.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

BUILDING AND LOAN ASSOCIATIONS—SAVINGS AND LOAN ASSOCIATIONS—DEVELOPMENT CREDIT CORPORATION—INVESTMENTS—STATE CHARTERED SAVINGS AND LOAN ASSOCIATIONS MAY INVEST IN STOCK OF THE DEVELOPMENT CREDIT CORPORATION.

August 6, 1963.

*Mr. Harry B. Wolf, Jr., Esq.,
Director, Department of Building,
Savings and Loan Associations.*

You have inquired whether State Chartered Savings and Loan Associations are authorized to invest in stock of the Development Credit Corporation of Maryland. More specifically, you ask whether such investment would be authorized as an investment for a State Chartered Savings and Loan Association even though such an investment is not listed as an authorized investment in Section 150 or Section 161Z of Article 23 of the Annotated Code of Maryland.

It is a general rule of statutory construction that where a general statute is in conflict with a specific statute, the specific statute must prevail unless it appears that the Legislature intended to make the general statute controlling. Where there is evidence of a legislative intent to make the general statute controlling, the legislative intent will be controlling even if the general statute was enacted prior to the enactment of the specific statute. See Crawford, *Statutory Construction*, Section 230.

The laws relating to the Development Credit Corporation were enacted as Chapter 822 of the Laws of 1959 and are now Sections 412 through 429 of Article 23 of the Annotated Code of Maryland. At the time of the enactment of Article 23, Sections 412 through 429, investments of Savings and Loan Associations were limited to the investments authorized under Article 23, Section 150. Article 23, Section 422, is a general provision allowing all domestic corporations to invest in the Development Credit Corporation. Normally Article 23, Section 150, as a specific statute, would have

precluded a Savings and Loan Association from investing in stock of the Development Credit Corporation of Maryland, notwithstanding Article 23, Section 422, a general statute. However, it is our opinion that the Legislature specifically intended that Article 23, Section 422, should control since the Legislature stated that it should apply:

“Notwithstanding any rule at common law or any provision of any general *or special law*.”
(Emphasis supplied.)

Subsequent to the enactment of Article 23, Section 422, the Legislature in 1961 enacted a specific law governing Savings and Loan Associations now contained in Article 23, Section 161A through Section 161LL of the Annotated Code of Maryland. Section 161Z adds to the investments authorized by Article 23, Section 150, additional authorized investments for Savings and Loan Associations and does not include investments in the stock of the Development Credit Corporation of Maryland. In addition, Article 23, Section 150, was amended by Chapter 131 of the Laws of 1962 of the State of Maryland and did not include as an authorized investment an investment in the stock of the Development Credit Corporation of Maryland. However, as we have indicated above, where the Legislature indicates that it intends that the general statute control, the general statute must control. Since the Legislature had already expressed its intention in 1959 that Article 23, Section 422, should control and should add an additional permissible investment to those provided by Article 23, Section 150, it was not necessary for the Legislature to again express its intent when it added to or amended Article 23, Section 150.

An additional evidence of the legislative intent is the fact that Article 23, Sections 419 and 422, was also amended in the 1962 session of the Legislature by Chapter 107 of the Laws of 1962 of the State of Maryland. The actual change in the law removed Savings and Loan Associations from the definition of the term “financial institutions” so that a Savings and Loan Association could purchase stock of the Development Credit Corporation without the require-

ment of lending money to the Development Credit Corporation of Maryland. This amendment on such a specific point indicates that the Legislature had originally intended and still intended that stock of the Development Credit Corporation of Maryland was an authorized investment for Savings and Loan Associations.

It is, therefore, our opinion that Savings and Loan Associations incorporated under the laws of the State of Maryland are authorized to invest in stock of the Development Credit Corporation of Maryland.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

CIVIL DEFENSE

POLITICAL SUBDIVISIONS OF STATE AUTHORIZED TO ORGANIZE
AND ESTABLISH OWN ORGANIZATION FOR CIVIL DE-
FENSE—BALTIMORE CITY—APPROVAL OF ORGANIZA-
TIONAL STRUCTURE BY STATE CIVIL DEFENSE AGENCY.

December 6, 1963.

General Rinaldo Van Brunt,
Director, Civil Defense Agency.

We have your letter of November 12, 1963, wherein you requested our opinion concerning the legality of Baltimore City's proposal to organize its civil defense organization under its Board of Fire Commissioners.

Specifically, you have asked whether such a plan would be in compliance with the provisions of the Maryland Civil Defense Act.

Section 7(a) of Article 16A of the Annotated Code of Maryland (1957 Edition), applicable to the question presented, states in part:

“Each political subdivision of this State is hereby authorized and directed to establish a local organization for civil defense in accordance with the State civil defense plan and program and to participate in federal programs for civil defense. . . .”

It is clear from this section that each political subdivision of the State may organize and establish its own organization for civil defense. The only express organizational requirements in the present law are that each organization must have its own director, and that each organization must have such staff, personnel and program as may be required by the State organization, except in instances where the political subdivision comprises a population in excess of 750,000 and maintains a full time staff and personnel to carry on the State plan and program.

It is thus clear that each political subdivision of this State is comparatively free to establish an organizational structure, a plan for operation, and a method of administration, as long as the same are within the framework of the State plan and program. Once the plans for a local organization are formulated, Section 7(a) would require that they be submitted to the State Director for review and approval.

The position of the State agency is advisory in character. It must advise each political subdivision whether its plan is in conformity with the requirements of the overall State civil defense plan, and also whether its structure and plans for operation and administration for carrying out the purposes of civil defense are sufficient to meet the federal requirements in order to obtain assistance from the government.

Therefore, we are of the opinion that under the present law, Baltimore City may legally change the structure of its civil defense organization. However, whether such a change will comply with the law cannot be determined until a definite plan is submitted to your agency for review in compliance with the aforementioned Section 7(a) of Article 16A.

THOMAS B. FINAN, *Attorney General*.

R. RANDOLPH VICTOR, *Asst. Attorney General*.

CIVIL RIGHTS

PUBLIC GENERAL LAWS—EXEMPTION OF PARTICULAR COUNTIES THEREFROM—SUBMISSION OF PUBLIC GENERAL LAW TO REFERENDUM IN PARTICULAR COUNTIES INCLUDED WITHIN PUBLIC GENERAL LAW—CONSTITUTIONALITY OF.

March 1, 1963.

*Honorable Edward O. Weant, Jr.,
Senator, Carroll County.*

You have asked whether or not it is possible to submit the contents of House Bills 149 and 150 to the voters of Carroll County for a referendum to determine whether said County should be included in the provisions of these bills. The contents of House Bills 149 and 150 relate generally to the prohibition of discrimination in places of public accommodation in Maryland. Certain Counties are specifically exempted from the provisions of the bills, and the bills provide for administration by the Commission on Inter-racial Problems and Relations.

It is clear that if these bills are to be considered as a public local law, then the submission of the same to a referendum for Carroll County is proper and legal. However, if the bills are to be considered as Public General Laws, an attempt to submit them for referendum in Carroll County would be invalid. (20 M.L.E. 484).

The Court of Appeals of Maryland was faced with a similar problem in the case of *Levering v. Supervisors of Election*, 137 Md. 281 wherein the General Public Laws of Maryland relating to Sunday activities were amended to allow the exhibition of Motion Pictures on Sunday in Baltimore City. This proposed change was submitted solely to the voters of Baltimore City on referendum, and the Court of Appeals held that this referendum provision was an invalid delegation of the Legislative power since the proposed Act was an amendment of the Public General Laws. The Court said at page 288 that it was improper for the . . .

"Legislature in the exercise of its law-making function to delegate that power to the people. Such a result is reached from the very form and framework of our theory and system of government, under which the Legislature is a representative body for the purpose of making laws, and it discharges its duty in a representative, delegated capacity, and is without power to delegate either to a portion or class of the community the exercise of the very power for which it was selected by the people."

House Bills 149 and 150 are to be enforced by the Committee on Interracial Problems and Relations which is a State Agency, and the language of the bills is clearly intended to make them Public General Laws. It is my opinion that House Bills 149 and 150 are in the nature of Public General Laws and cannot be submitted to the voters of Carroll County for a referendum.

I might add further that it is my opinion that the placing of these bills on referendum in Carroll County would not invalidate their effectiveness in those other counties which are included in the terms of the Acts. However, I feel that it is necessary to include a severability clause in both House Bill 149 and House Bill 150 to clearly indicate the Legislative intent. I call your attention to the case of *Baltimore v. A. S. Abell Co.*, 218 Md. 273 where the Court of Appeals said at page 290 . . .

"In the absence of a severability clause, a presumption is raised that the Legislature intends the act to be effective as an entirety. If there be a saving clause, an opposite presumption of separability is raised."

THOMAS B. FINAN, *Attorney General.*

CIVIL RIGHTS—MUNICIPALITIES—POLICE POWERS—MAYOR
AND COMMISSIONERS OF THE CITY OF CAMBRIDGE
AUTHORIZED BY BROAD CHARTER PROVISIONS TO ENACT
PUBLIC ACCOMMODATIONS LAW FOR CITY OF CAM-
BRIDGE—NO CONFLICT WITH STATE-WIDE TRESPASS
LAW.

June 19, 1963.

*The Mayor and Commissioners,
City of Cambridge.*

You have, with the concurrence of the City Attorney, requested my opinion as to your authority to enact a public accommodations law in and for the City of Cambridge, similar in substance to that recently enacted by the General Assembly of Maryland at its 1963 session (Chapter 227, Laws of 1963). For the reasons expressed below it is my opinion that the Mayor and the Commissioners of the City of Cambridge possess the requisite authority to enact such legislation.

It is well settled law that the Federal Constitution does not forbid a state or municipality in the exercise of its police powers from enacting legislation prohibiting racial discrimination in privately owned facilities serving a public need. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28; *District of Columbia v. Thompson*, 346 U. S. 100; *Marshall v. Kansas City*, 355 S.W. 2d 877 (Mo.). As long ago as 1889, in *Rhone v. Loomis*, 77 N.W. 31 (Minn.) it was broadly declared that the legislature of a state may enact a civil rights statute "as to all kinds of business, of a public or quasi public character, conducted for the accommodation, refreshment, amusement, or instruction of the public, and which the state has the right to regulate under its police power, so that all classes of citizens may enjoy the benefit thereof without unjust discrimination." That such is a true statement of law today is supported by the great weight of authority. See cases collected in a Note, 49 A.L.R. 505. The principle has most recently been recognized and vigorously applied by the Supreme Court of the United

States in *District of Columbia v. Thompson, supra*, involving racial discrimination in restaurant facilities in the District of Columbia.

Pursuant to this recognized area of state and municipal police regulation, a substantial number of states and municipalities have enacted such legislation. See statutes cited in Greenberg, *Race Relations and American Law* (1959) 375-399; and Emerson and Helfeld, *Political and Civil Rights in the United States* (2nd Ed.) 1413. Nothing in the Maryland Constitution prohibits such legislation as is well evidenced by enactment of the Maryland Public Accommodations Law, Chapter 227 of the Laws of 1963, aforesaid. See also the Montgomery County Equal Accommodations Law, Ordinance 4-120, effective January 16, 1962.

That the Mayor and Commissioners of Cambridge are vested with broad and comprehensive police powers is clear from a review of the provisions of the City Charter, and was so recognized by the Maryland Court of Appeals in the case of *Engle v. City Commissioners of Cambridge*, 180 Md. 82. Specifically, by Section 63 of Article 10, Public Local Laws of Maryland (1930 Edition) (City Charter of Cambridge, Section 63 et seq.), it is provided:

“* * * to pass and enact all by-laws and ordinances not contrary to law, for the good government of the town of Cambridge, or that may be necessary and proper to promote and preserve the health of the town and the people thereof, and to protect and safeguard the town generally and every section and part of it, and to protect and safeguard the property belonging to the town as a corporate body and the property of the residents thereof and also to protect and safeguard persons who are not residents and the property of such non-residents while they or their property are within said town; * * *”

* * * *

“* * * and by ordinance, to require any and all things to be done which will promote the welfare,

good government and prosperity of the people of the town, and to forbid whatever that will oppress or injure them in their persons or property; * * *

I have been advised that the City of Cambridge will shortly adopt a new Charter which will be in conformity with Article 23B of the Maryland Code (The Model Municipal Corporations Charter Act). Section 22 of the Model Charter setting forth the municipal corporation's powers is equally as broad as Section 63 of the present City Charter.

Although grants of powers to municipalities are ordinarily strictly construed, (see *Mayor and Council of Mount Airy v. Sappington*, 195 Md. 259) where, as in the Charter of the City of Cambridge, a comprehensive police power has been clearly delegated to the Mayor and Commissioners they may enact a public accommodations law in pursuance thereof, unless, of course, such a law would conflict with a public general law. Such a conflict is prohibited by Section 6 of Article XI-E of the Constitution of Maryland. The only public general law which might remotely be considered as in any fashion conflicting with an equal accommodations ordinance would be Section 577 of Article 27 of the Maryland Code (the criminal trespass statute). This statute in pertinent part, provides as follows:

"Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor, * * * provided, further, that nothing in this section shall be construed to include within its provisions the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right of ownership of said land, it being the intention of this section only to prohibit any wanton trespass upon the private land of others. * * *"

The fact that a public accommodations ordinance is reconcilable with the State Trespass Law, Section 577, Article 27, is readily apparent when we realize that a patron in a place of public accommodation may very well gain admission and be served pursuant to the rights given to him under a public accommodations ordinance and yet subsequently, because of a variety of non-conformist actions displeasing to the proprietor, become obnoxious to the proprietor, and accordingly be requested by the proprietor to leave the premises within a reasonable time, or else be adjudged guilty of a trespass pursuant to Section 577 of Article 27, for failing to so do.

I am not unmindful of the *nisi prius* opinion of the Superior Court of Baltimore City in *Karson's Inn, Inc. v. Mayor and City Council of Baltimore* (Jan. 30, 1963, Daily Record February 4, 1963) wherein the court found that the Baltimore City public accommodations ordinance (Ordinance No. 1249) was in conflict with the State Trespass Law (Section 577, Article 27) and hence invalid because it breached the restrictions contained in Section 3 of Article XI-A of the Constitution of the State of Maryland, giving Baltimore City home rule, and providing that in the case of any conflict between a local law and any public general law, the latter should prevail.

I hasten to state that as regards the *Karson's Inn* case, *supra*, it should be noted that since the decision in that case the General Assembly of Maryland has passed a public accommodations law which embraces Baltimore City and has also amended the state-wide trespass law to accommodate the Baltimore City equal accommodations ordinance, apparently doing this in anticipation that the state-wide accommodations law might fail of passage. Accordingly, the *Karson's Inn* case is necessarily of limited significance, and, in view of the authorities herein cited, is at variance with the doctrinaire of statutory construction long applied in the appellate decisions of this State.

I submit that no one has seriously contended that the General Assembly of Maryland in passing Senate Bill 149

and Senate Bill 150, the same being Chapters 227 and 228 of the Laws of the General Assembly, 1963 intended to repeal Article 27, Section 577 of the Annotated Code of Maryland (1957 Edition); yet, if carried to its logical conclusion such would be the effect of the decision in *Karson's Inn, Inc. supra*, because it is a rule of statutory construction that if two public general laws are in conflict, the one last passed prevails and repeals the former by implication. See: *Auto, Accep. Corp. v. Universal Corp.*, 216 Md. 344; *Ulman v. State*, 137 Md. 642 and numerous cases cited in Volume 20 M.L.E., *Statutes*, Section 54, footnote 28 at 409. In reviewing the cases cited in the above sentence it can be stated as a canon of statutory construction that unless two statutes are manifestly repugnant or irreconcilably inconsistent, they must be reconciled. See: 16 M.L.E. *Municipal Corporations*, Section 182.

I also refer to the language used by the Court of Appeals in *Bell v. State*, 227 Md. 302 at page 305 which is pregnant with the idea that citizens may, at a future date, have their rights under the trespass law circumscribed:

"On principle, we think the right to speak freely and to make public protest does not import a right to invade or remain upon the property of private citizens, *so long as private citizens retain the right to choose their guests or customers.*"
(Emphasis supplied)

Again we emphasize that if the two laws, whether both public general laws, or one a public general law and the other a public local law, can be reconciled or harmonized, an interpretation permitting such reconciliation must prevail. It is an established rule of construction that repeals by implication are not favored. See: *Kelly v. Consol. Gas Elec. Power Co.*, 153 Md. 523, as *pari materia*; *Appelstein v. Baltimore*, 156 Md. 40 and *Kirkwood v. Provident Savings Bank*, 205 Md. 48.

To illustrate our point that the trespass statute would still be functional after the passage of a public accommodations ordinance, we cite as an example the situation

wherein the proprietor of a restaurant might insist, as a rule of his establishment, that no man would be served unless he wore a coat and tie. Under such a rule, if a patron sought service in his shirtsleeves, the proprietor could lawfully refuse to serve him and in the event the patron insisted on remaining in the dining area of the premises, the proprietor could have him arrested under the state trespass statute if he refused to leave after reasonable warning.

Again, in the Cambridge situation, the local ordinance would not be in conflict with the public general law (Article 27, Section 577) but would merely, in the area of public accommodations, circumscribe certain rights of the property owner or the one in possession in the enjoyment of his property and would leave the substance of the trespass statute inviolate.¹

THOMAS B. FINAN, *Attorney General*.

(1) NOTE: The foregoing opinion must be read in conjunction with *Bell v. State*, 236 Md. 356, decided October 22, 1964, wherein it was held that the passage of the State Public Accommodations Law brought about a "fundamental change" in the State Trespass Act; that in those situations specified by the Public Accommodations Law, that Law and the Trespass Act "cannot stand together and both be executed, and to that extent, the two are repugnant and in irreconcilable conflict".

CIVIL RIGHTS—INTERRACIAL COMMISSION—DISCRIMINATION
IN PUBLIC ACCOMMODATIONS—INTERPRETATION OF ACT
—EXEMPT PREMISES.

June 25, 1963.

*The Honorable John Thomas Parran, Jr.,
State Senator from Charles County.*

You have requested our interpretation of Chapter 227 of the Acts of 1963, (the so-called Public Accommodations Law) in three particulars, viz.:-

1. Where a section of a restaurant or tavern is used exclusively as a bar, is the entire establishment exempted from the Act?
2. If, under the above hypothesis, the bar is in a separate room, does this exempt the entire establishment from the Act?
3. If the establishment has a bar and also serves food elsewhere on the premises, is it necessary that the bar area be partitioned off from the rest of the establishment to be exempt from the Act?

In its pertinent portions, the Act in question provides:

"It is unlawful for an owner or operator of a place of public accommodation or an agent or employee of said owner or operator, because of the race, creed, color, or national origin of any person, to refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation. For the purpose of this subtitle, a place of public accommodation means any hotel, restaurant, inn, motel or an establishment commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving food, or both, for a consideration, and which is open to the general public; *except that premises or portions of premises primarily de-*

voted to the sale of alcoholic beverages and generally described as bars, taverns, or cocktail lounges are not places of public accommodation for the purposes of this subtitle. * **

Upon examination of the underlined exemption provision, it is immediately apparent that situations may arise where portions of the single establishment might be subject to the non-discriminatory clause of the Act, while in other areas of the same establishment, discrimination might lawfully be practiced. The Act specifically states that "*premises or portions of premises*" shall not be considered as "places of public accommodation" within the meaning of its non-discriminatory provision if *two* conditions are met: (1) the premises or any portion thereof, to be exempted, must be "primarily devoted to the sale of alcoholic beverages;" and (2) the premises or any portion thereof, to be exempted, also must be "generally described as bars, taverns, or cocktail lounges."

What constitutes a "portion" of any premises is not altogether free of doubt. However, as used in the statute the term "portions" appears, upon consideration, to be more synonymous with "areas" than with "rooms." The first accepted definition of "portion" given in Funk & Wagnall New Dictionary of the English Language (1927) is: "a part of a whole, whether separated from it or not." Of course, had the General Assembly wished to distinguish between *bar areas* and *bar rooms*, it could have done so quite readily; this it did not do. Any distinctions between partitioned and non-partitioned bar areas are only of architectural and not of functional substance, and the intended purpose of this legislation offers no basis upon which to make such distinctions. A bar is not any more a bar merely because it is separated by a partition from those dining at nearby tables. And, as a matter of practical application, the existence or non-existence of a clearly defined line between bar areas and dining areas probably would present no difficulties.

Troublesome, also, is the matter of when any premises or a portion thereof is "*primarily devoted to the sale of*

alcoholic beverages." There is a tendency, perhaps, to reduce this verbal expression to a mathematical formula. For instance, one might be inclined to state that an establishment or a portion thereof is primarily devoted to the sale of intoxicants when 50% or more of its total gross receipts are derived from such sales, or when gross receipts from the sale of such beverages are greater than the receipts from the sales of any other categories of items (e.g., food or tobacco), or when the number of sales of intoxicants exceeds the number of all other sales, and so on. However, the General Assembly did not choose to legislate in this manner, and the very language in the Act decries the application of any particular mathematical formulation—however satisfying it may be to one's desire for precision and clarity. By sensible paraphraseology and by fusing the two exemption requirements, it might fairly be said that an establishment or a part thereof is primarily devoted to the sale of intoxicants when such sales constitute so great a part of the total business that the establishment or the part thereof might fairly be called a bar, tavern or cocktail lounge. "Primarily", as it is used in its present context, has been judicially defined as meaning, "preeminently", "chiefly", "mainly", "principally", "essentially", or "fundamentally". See *Application of I. Lewis Cigar Mfg. Co.*, 205 F. 2d 204 (1953); *People ex rel Breuning v. Berry*, 304 P. 2d 818 (Calif., 1956); *Friedman Textile Co. v. Northland Shopping Center, Inc.*, 321 S.W. 2d 9 (Mo., 1959).

When the exemption proviso is read in the light of these definitions, it should become apparent that an enterprise or portion thereof is not necessarily exempt merely because the proceeds from the sales of intoxicants comprise more than 50% of the total gross receipts, for this one economic fact does not invariably lead to the conclusion that such an enterprise or portion thereof is preeminently, fundamentally, or essentially devoted to the sales of such beverages. Of course, gross receipts are significant but so, also, might be cost data, capital expenditures, net income, the number of sales, and the number of employees engaged in different activities. Whether or not an enterprise is pri-

marily *devoted* to the sale of intoxicants should be determined by more than sales receipts alone.

The second requirement, that exempted establishments must be "generally described as bars, taverns or cocktail lounges", is relatively clear and simply calls for the application of the three descriptive words, as they are customarily used and understood, to a given set of factual circumstances.

In the light of the foregoing discussion, we think that the answers to the questions you raise are fairly clear:

First, merely because a section of a restaurant or tavern is used exclusively as a bar, does not necessarily exempt the entire establishment from the application of the public accommodations law.

Second, merely because a separate room of a restaurant or tavern is used exclusively as a bar, likewise does not necessarily exempt the entire establishment from the application of the public accommodations law.

Finally, for a bar area, in an establishment where food is served elsewhere on the premises, to be exempt from the law, it is not necessary that this bar area be partitioned off from the rest of the establishment.

THOMAS B. FINAN, *Attorney General*.

STUART H. ROME, *Asst. Attorney General*.

CIVIL RIGHTS—EQUAL ACCOMMODATIONS—STATE LAW AND
BALTIMORE CITY ORDINANCE BOTH OPERATIVE WITHIN
BALTIMORE CITY—STATE LAW DOES NOT PREEMPT THE
FIELD—BOTH STATE AND CITY COMMISSION MUST
EACH MAKE SERVICES AVAILABLE.

August 5, 1963.

*Mr. Parran J. Mitchell, Executive Secretary,
Maryland Commission on Interracial
Problems and Relations*

This will acknowledge receipt of your recent letter in which you inquire, in several particulars, as to the scope of Chapters 227 and 228 of the Laws of Maryland of 1963, (the so-called Maryland Equal or Public Accommodations Law), as the same may be applicable within Baltimore City. More specifically, you point out that Baltimore City has a similar type of Equal Accommodations Law (Ordinance No. 1249, approved June 8, 1962) whereunder the Equal Opportunity Commission of Baltimore City is charged with the function of hearing complaints of alleged violations thereof. You note that the State law (which is applicable to Baltimore City) and the City ordinance both relate to the establishment of equal accommodations for all races and you are concerned with the possible overlapping jurisdiction of the agencies charged with the enforcement of their respective laws. You ask our opinion as to the relative status of these two laws within Baltimore City. In particular, you ask whether or not the State law has preempted the field, thereby rendering the City ordinance nugatory insofar as it relates to those aspects of equal accommodations within Baltimore City covered by the State law.

You are, of course, aware that Judge Harlan of the Supreme Bench of Baltimore City in the case of *Karson's Inn, Inc. v. Mayor and City Council of Baltimore* (decided January 30, 1963, and reported in the Daily Record of February 4, 1963), held the City ordinance to be unconstitutional on the ground that it was in conflict with the State Trespass Law (Section 577 of Article 27 of the Annotated

Code of Maryland, 1957 Edition). A subsequent amendment to the trespass law has, apparently, removed this difficulty (see Chapter 453 of the Laws of 1963) and we understand that the City Solicitor of Baltimore City has advised the Equal Opportunity Commission that the City ordinance has been revived, effective June 1, 1963. Accordingly, this opinion is based on the assumption that the City ordinance is in full force and effect.

An analysis of Chapters 227 and 228 of the Laws of 1963 (the State law) and Ordinance No. 1249 and the related Sections 8 through 17 of Article 14A of the Baltimore City Code, as amended, discloses that both the State and City laws, in almost identical language, make it unlawful for an owner or operator of a place of public accommodation, or an agent or employee thereof, because of race, color, creed, or national origin, to refuse, withhold, or deny to any person the facilities of a place of public accommodation. Although the definition of a "place of public accommodation" contained within each law is substantially similar, under the State law certain restaurants are included within the definition, whereas they might be exempt from coverage under the City ordinance if more than 50% of their daily receipts are from the sale of alcoholic beverages. The City ordinance also exempts from its coverage boarding or rooming houses as well as lunch counters or refreshment stands maintained in certain places of recreation whereas the State law does not contain any such express exemption. Also of importance is the fact that the City Equal Opportunity Commission is also assigned certain duties with respect to the equal employment of all persons, whereas no such duties are assigned to the Maryland Commission on Interracial Problems and Relations.

A comparison of the enforcement mechanisms of the State and City laws discloses that the same are substantially similar, although the State law contains a provision not appearing in the City ordinance permitting a respondent to bypass the administrative mechanisms and go directly to court. Generally speaking, both laws contemplate that their respective agencies will first attempt to

persuade the violator to conform to the law and only upon his failure to do so is the aid of a court secured. Both laws as a last resort contain provisions for the seeking of an order from a court, requiring that the alleged violator comply with the agency's order. The State law makes it a misdemeanor to file a malicious complaint, whereas the City ordinance contains no similar provision.

Any determination of the relative positions of a State and a local ordinance, both of which deal with the same or substantially the same subject matter, must be analyzed in the context of the constitutional and statutory provisions relating to the problem. Under the provisions of Section 3 of Article XI-A of the Maryland Constitution (the so-called Home Rule Article), the City Council of the City of Baltimore, after the adoption of a Charter, is given full power to enact local legislation pursuant to the police powers extended to it, provided, however, that in case of any conflict between the local legislation and any public general law, the public general law shall control. This constitutional admonition is likewise contained in Section 6 of the Baltimore City Charter granting to the City the right to exercise all power, commonly known as the police power, to the same extent as the State could exercise such power "subject to the provisions of said (State) Constitution and public general laws." These limitations upon the power of the City to enact a local law ordinance included within its police power are clear and unmistakable. If a City ordinance "conflicts" with the Constitution of the State of Maryland or a public general law, then the City ordinance is invalid.

The question of what constitutes a "conflict" between an item of local legislation and a public general law enacted by a State Legislature has been the subject of many judicial opinions, both of this State and elsewhere. As stated in 37 Am. Jur., *Municipal Corporations*, ¶166, entitled "Regulating or Forbidding Matters Regulated or Forbidden by State Statutes":

". . . No generalization may be stated as to the results obtained in the authorities dealing with

this problem. . . . As some of the authorities have specifically pointed out, this field of the law is pervaded with conflicts of authority . . .”

That the above is indeed accurate is illustrated by the numerous cases discussed in the various annotations appearing in 147 A.L.R. 522 (Conflict between statutes and local regulations as to automobiles), 22 A.L.R. 2d 774 (Regulation by public authorities of motor courts or motels), 138 A.L.R. 1492 (Ordinance—conflict with statute—usury), 168 A.L.R. 1188, 1216 (State and municipal control of mining), 45 A.L.R. 2d 1397 (Regulation of junk dealers), and 53 A.L.R. 2d 1438 (Regulation of jewelry auctions), all of which deal with problems of conflicting and concurrent state and local laws.

The State of California appears to be in the forefront of those jurisdictions holding that State regulation in a given field of activity constitutes a pre-emption of that field to the exclusion of any local regulation. An excellent discussion of this philosophy and approach is found in the case of *Abbott v. Los Angeles*, 349 P. 2d 974 (Cal. Supreme Ct. 1960) and the cases cited therein, where the California Supreme Court held invalid an ordinance of the City of Los Angeles requiring persons previously convicted of a crime to register with designated officials. The rationale of the Court's decision was that since the State Legislature had enacted a law requiring the registration of certain specified types of criminals the field had been pre-empted and local legislation would not be permitted. It is interesting to note that the Los Angeles City Ordinance was somewhat broader than the State law in that it required the registration of virtually all persons previously convicted of a crime whereas the State law, in most respects, limited registration to those convicted of a sex offense. Section 11 of Article XI of the California Constitution authorized cities, such as Los Angeles, to “. . . make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.” The California court determined that such a conflict would exist

where a City ordinance imposed an additional jurisdictional requirement although the statute involved was essentially parallel to the provisions of a statewide law. In a previous opinion, it had been held that this constitutional provision prohibited a City from punishing the same act denounced by a State law. (See *In re Mingo*, 214 P. 850 and *Ex Parte Daniels*, 192 P. 442.) As noted in *Pipoly v. Benson*, 125 P. 2d 485, “. . . The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground . . .”

An analysis of the Maryland cases indicates that our courts have not accorded the same definition to the term “conflict” as have the courts of states such as California. For example, the State of Maryland, unlike California, has specifically permitted a local ordinance to punish the same act denounced by State law. In *Rossberg v. State*, 111 Md. 394, the court upheld a Baltimore City ordinance making it a crime to possess, sell, or give away cocaine and kindred substances, and provided a maximum fine therefor of \$500 and a jail sentence of not less than six months. The State law did not make possession a crime and the maximum fine for the first offense was only \$50 and the maximum jail sentence six months. In upholding a conviction under the City ordinance, despite the contention of the defendant that the State statute pre-empted the field, the court in effect declared that whether or not a local ordinance conflicted with a State law was to be determined by applying the test of whether the ordinance permitted acts or occupations which the State law prohibited, or prohibited acts which the State law permitted. This test of whether or not a conflict exists has been repeated with approval on a number of subsequent occasions. See *Levering v. Park Commissioner*, 134 Md. 48, and *Mayor and City Council v. Stuyvesant Ins. Co.*, 226 Md. 379, wherein the court, at page 388, stated as follows:

“The test is precisely stated in *Rossberg v. State*, *supra*, at page 416, decided in 1909, several

years before the Home Rule Amendment and the Baltimore City Charter adopted pursuant thereto, in which it was said that 'ordinances which assume directly or indirectly to permit acts or occupations which the State statutes prohibit, or to prohibit acts permitted by statute or Constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void.'

In addition to the *Rossberg* case there are a number of other cases where Baltimore City has been permitted to act in a field which has been the subject of State legislation. In *Kidd v. Chissell*, 146 Md. 169, the court recognized the validity of a City ordinance giving fire engines the right of way at intersections despite the existence of a State law providing that the vehicle to the right of an intersection would have the right of way. See also *State v. Brown*, 142 Md. 27, dealing with traffic ordinances and cases therein cited. Likewise, in *Billig v. State*, 157 Md. 185, the City ordinance severely circumscribing the powers of auctioneers to make sales of jewelry was upheld despite the existence of a State statute providing for the licensing of auctioneers, and further providing that licensed auctioneers "may make sales of every description." See also *Baltimore v. Bloecher and Schaaf*, 149 Md. 648, upholding a Baltimore City ordinance relating to slaughter houses even though this regulatory power was likewise vested in the State Board of Health. Compare cases cited *supra* with *Ackerman v. Sapperstein*, 191 Md. 301 wherein the prohibition against parallel local legislation was spelled out in the public general law.

In addition to the cases noted above, which indicate a judicial tendency to permit City ordinances and State laws to exist side by side even though relating to the same subject matter in the absence of a direct conflict between the two, i.e., where one prohibits but another permits, there are a number of other factors relating to the passage of the State equal accommodations bill which can fairly be regarded as a legislative recognition that the statewide law

was not intended to pre-empt the field. The very fact that eleven counties within the State are exempt from the provisions of the statewide law is indicative of a present legislative determination not to treat matters of this nature with exact uniformity, as between all counties. Thus, the rationale for a finding that the State has preempted this field, i.e., that the subject matter under regulation is one calling for a comprehensive program of uniform state control, is not to be found in the State Public Accommodations Law.

Additionally, there is another factor which can be taken as a further indication that the State Legislature did not intend that the State Public Accommodations Law preempt the field and be regarded as superseding the City ordinance. The State Public Accommodations Law was passed by the General Assembly on March 11, 1963. Several weeks later on April 17, 1963, the General Assembly passed House Bill 391 (now codified as Chapter 453 of the Acts of 1963) which amended the statewide Trespass Law to provide as follows:

“ . . . nothing contained herein shall preclude . . .
Baltimore from enacting (equal accommodations)
legislation . . . ”

The statewide Public Accommodations Law was signed into law by Governor Tawes on March 29, 1963, and the amendment to the Trespass Law was signed by him on April 17, 1963.

The chronology of these legislative enactments, with the amendment to the Trespass Law occurring subsequent to the enactment of the Public Accommodations Law, can fairly be regarded as evidencing a legislative intent that the statewide Act not supersede any City ordinance dealing with the same problem. Had the Legislature intended the State law to preempt the field then there would have been no reason for it to later amend the trespass act.

In summary, therefore, it is our opinion that, insofar as the City of Baltimore is concerned, both the State Public

Accommodations Law and the City Ordinance are operative therein.

We might also mention that since the preparation of this opinion, but before posting it to you, the City Solicitor of Baltimore, in an opinion letter dated July 16, 1963, and addressed to the Executive Secretary of the Baltimore Equal Opportunity Commission, has reached the same conclusion as we have with respect to the question discussed in this letter. The opinion of the City Solicitor also deals with the question of whether the Equal Opportunity Commission and the Maryland Commission on Interracial Problems and Relations can enter into an agreement whereby the City Commission would handle all complaints within Baltimore City wherein it has jurisdiction. The conclusion of the City Solicitor is to the effect that no such agreement is permissible and that both the State and City Commissions must each make their services available within the City of Baltimore, not only with respect to situations covered by one law and not the other, but also with respect to situations covered by both laws. Although you have not asked this office for a ruling on this latter point, we realize that you would be interested in knowing that we concur in the conclusion of the City Solicitor on this issue.

THOMAS B. FINAN, *Attorney General.*

RUSSELL R. RENO, JR., *Asst. Attorney General.*

CIVIL RIGHTS—INTERRACIAL COMMISSION—CANNOT PARTICIPATE WITH LOCAL COMMISSIONS IN ARBITRATION AND SETTLEMENT OF DISPUTES.

September 4, 1963.

*William C. Rogers, Sr., Esq., Chairman,
Maryland Commission on Interracial
Problems and Relations.*

We have received your letter of August 16, 1963, relating to the question of to what extent, if at all, your Commission may cooperate with the Interracial Commission of Howard County in investigating and arbitrating interracial problems in that County.

Your file indicates that Lewis Straughn Nippard, Counsel to the County Commissioners of Howard County, wrote to you on August 13, 1963, stating that an interracial commission had been established in Howard County and that the Commission would like to informally arbitrate any complaint submitted to them voluntarily in Howard County, with the definite understanding that this would not preclude the complainant from thereafter filing a formal complaint with your Commission if he is dissatisfied with the informal arbitration.

We find no prohibition in the law against the Howard County Interracial Commission doing whatever it can, on a voluntary basis, to arbitrate these matters before your Commission becomes formally involved. Nor do we find any prohibition against your Commission or its staff rendering advice to or exchanging general information with the local group. We do not think, however, that your Commission can in any way advise or encourage complainants, who come to you in the first instance, to take their grievance to the Howard County Interracial Commission for arbitration before filing a formal complaint with your Commission. Sections 11, 12 and 13 of Article 49B of the Maryland Code place upon your body the duty to consider the complaint of any person claiming to be aggrieved by an alleged discrimination, and the referral of such a complaint by you to

a local commission before considering it would seem to be an abrogation of these responsibilities.

It has been suggested, as an alternative, that the local Interracial Commission be employed to assist your staff in the investigation and arbitration of a complaint after it has been instituted with you. It is our opinion that this procedure is specifically prohibited by Subsection (d) of Section 12 of Article 49B of the Maryland Code, which provides:

“(d) Neither the Commission nor its staff shall disclose what has transpired during the course of any investigation, nor shall any publicity be given to any negotiations or to the fact that a complaint has been filed.”

Consultation with the Howard County Interracial Commission, after a complaint has been filed and while it is in the investigation and arbitration stage, would certainly run counter to this provision.

While the local Interracial Commission can certainly serve a useful purpose in settling interracial problems in Howard County on an informal and voluntary basis, we do not believe the law permits your Commission to participate in the local group's activities other than, as indicated above, to render advice or exchange general information.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

CIVIL RIGHTS—INTERRACIAL COMMISSION—TRESPASS LAW
MAY BE UTILIZED WHERE PUBLIC ACCOMMODATION
LAW APPLIES IN CASES OTHER THAN EXCLUSION FOR
RACE, COLOR, CREED OR NATIONAL ORIGIN.

November 15, 1963.

*Mr. Parran J. Mitchell, Executive Secretary,
Maryland Commission on Interracial
Problems and Relations.*

We have received your letter of November 12, 1963, inquiring into the status of the trespass law in those counties to which the state public accommodations law applies.

As we pointed out in our letter to you of September 4, 1963, the trespass law (Section 577 of Article 27 of the Maryland Code) cannot be employed in counties where the public accommodations law is effective in order to enforce the exclusion of persons from places of public accommodation on account of race, color, creed or national origin. This does not mean, however that the trespass law may not be utilized by the owner of a place of public accommodation in order to exclude persons from the premises on some other legitimate basis, such as disorderly conduct, drunkenness, improper attire for the particular establishment and the like. We emphasize, however, that the basis of the exclusion can be in no way predicated upon the patron's race, color, creed or national origin.

A magistrate would be correct in issuing a warrant, and the police in making an arrest, for trespass if the ground stated therefor is other than the patron's race, color, creed or national origin. There will always exist, of course, the possibility that a magistrate will be persuaded to issue a warrant, or the police persuaded to make an arrest, on a purported legitimate ground where the exclusion in reality is predicated upon race, color, creed or national origin. If the owner of a place of public accommodation secures an arrest or warrant on an improper ground in order to enforce a discriminatory policy, and the case is subse-

quently dismissed for that reason, the patron may have recourse against the said owner both in a proceeding before your commission and, under the proper circumstances, in the civil courts. In addition, the owner would be subject to criminal prosecution for making false statements to the police or the magistrate under Sections 150 and 151 of Article 27 of the Maryland Code (1957 Edition).

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

COMMERCIAL CODE

UNIFORM COMMERCIAL CODE—FINANCING STATEMENTS—
ALTHOUGH ACT DOES NOT BECOME EFFECTIVE UNTIL
FEBRUARY 1, 1964, CLERKS OF COURTS ARE AUTHORIZED
TO RECEIVE FINANCING STATEMENTS PRIOR THERETO,
WITH THE UNDERSTANDING THAT SUCH STATEMENTS
SHALL NOT BE DEEMED DOCKETED OR FILED UNTIL
FEBRUARY 1, 1964.

December 23, 1963.

*Mr. James F. Carney, Clerk,
Superior Court of Baltimore City.*

You have inquired whether, under the provisions of the Uniform Commercial Code (Article 95B, Annotated Code of Maryland, 1963 Supp.), Clerks of Courts of the Circuit Courts in the Counties, and of the Superior Court of Baltimore City, are authorized to receive the "financing statements" contemplated by sub-title 9, Part 4 of the Act, prior to the effective date thereof (February 1, 1964), with the understanding that such statements shall not be deemed docketed or filed until 9:00 A. M. on February 1, 1964.

As you know, Section 9-403 of the Act provides that presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer, constitutes filing under the Act. Sub-paragraph 4 of this Section sets forth the duties of the Clerk on presentation to his office of such statements, viz.:

" . . . he shall mark it with an identifying file number and with the date and hour of filing and give a receipt therefor and he shall record same in the financing records for public inspection. In addition the filing officer shall index such a financing or continuation statement alphabetically according to the name of the debtor and shall note in such index the name of the secured party, the identifying file number, the liber and folio

number of the record reference of such financing or continuation statement, and the note of filing. It shall not be necessary to index such statement according to the name of the secured party. The index shall also contain sufficient space for the noting therein of an amendment, assignment, termination or release relating thereto, and with respect to any amendment of a financing statement or a continuation statement the fact of such amendment shall be noted in the index of the statement being amended with the record reference of such amendment. After recording such statement, or amendment, the original shall be delivered or mailed to the secured party or his agent whose name and address for purposes of delivery shall be indicated on the statement or amendment. With respect to a financing or continuation statement or any amendment thereof, relating to fixtures, same shall be indexed and recorded among the land records as a mortgage effecting an interest in land."

It is my view that nothing in the Act prohibits Clerks of Court, should they deem it advisable, from receiving such financing statements prior to the effective date of the Act, (February 1, 1964), so long as they are not spread on the Clerks' records as bearing a date earlier than the said effective date of the Act. Similarly, it is my view that all receipts for fees received prior to February 1, 1964, by the various Clerks of Court pursuant to the provisions of the Act should, for record purposes be dated and considered as received on February 1, 1964.

It is my further view that each Clerk deeming it advisable to receive financing statements prior to February 1, 1964, should, by all appropriate means, including announcement in local legal newspapers or other news media, make it known to the public that the financing statements will be so received, on the terms and conditions as herein provided, it being, of course, the basic purpose of allowing

such advance filing to avoid a deluge of such statements being filed on the effective date of the Act.

I would further suggest, in connection with the notification to be given to the public, as aforesaid, that a particular date in advance of February 1, 1964, be agreed upon between the Clerks of the various Courts, so that there may be some measure of uniformity in the various jurisdictions as to when the Clerks will commence receiving the financing statements. In this connection you have suggested to me the date of January 15, 1964, as an appropriate commencement date. It is probable that this date would commend itself to the other Clerks agreeing to advance filing.

For your information, I am forwarding a copy of this letter to each of the Clerks of the Circuit Courts in the respective Counties.

THOMAS B. FINAN, *Attorney General*.

CONSTITUTIONAL LAW

CONDEMNATION—PUBLIC UTILITIES—RELOCATION OF UTILITIES FACILITIES—ACT AUTHORIZING PAYMENT CONSTITUTIONAL.

May 2, 1963.

*Honorable J. Millard Tawes,
Governor of Maryland.*

Re: House Bill No. 491 (Chapter 853, Acts of 1963)

After having reviewed the above bill, I have grave doubts as to its constitutionality. However, for certain legal and practical reasons more fully set out at the conclusion of this letter, I am compelled to refrain from advising you that the bill is so clearly unconstitutional that it should not be signed into law.

The following analysis indicates the bases for my doubts as to the constitutionality of the bill.

The act attempts to secure for publicly-owned utilities the benefits of Section 111 of the Federal-Aid Highway Act of 1956 by assuring that whenever in the construction, reconstruction, or improvement of any highway on the "National System of Interstate and Defense Highways" it is necessary to relocate, realign, raise, lower, rebuild, or remove any publicly-owned utility facilities, the entire cost thereof less salvage value of the old facility and any increased value of the new facility (usually referred to as "nonbetterment cost") shall be paid by the State Roads Commission. The aforementioned provision of the Federal-Aid Highway Act of 1956 provides in pertinent part as follows:

"Sec. 111. Relocation of Utility Facilities.

"(a) Availability of Federal Funds for Reimbursement to States.—Subject to the conditions contained in this section, whenever a State shall pay for the cost of relocation of utility facilities

necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project: *Provided*, That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.

“(b) Utility Defined.—For the purposes of this section, the term ‘utility’ shall include publicly, privately, and cooperatively owned utilities.

“(c) Cost of Relocation Defined.—For the purposes of this section, the term ‘cost of relocation’ shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.”

Since the enactment of the Federal Act in 1956, numerous states have enacted legislation to enable utilities to take advantage of the Federal reimbursement provision. In many cases such state legislation has been the subject of litigation on constitutional objections, such as the expenditure of public money for private purposes. See, e.g., *Opinion of Justices*, 132 A. 2d 440 (Me. 1957); *Minneapolis Gas Co. v. Zimmerman*, 91 N.W. 2d 642 (Minn. 1958); *Opinion of Justices*, 132 A. 2d 613 (N. H. 1957); *Northwestern Bell Tel. Co. v. Wentz*, 103 N.W. 2d 245 (N. D. 1960); *Department of Highways v. Pennsylvania Public Utilities Commission*, 136 A. 2d 473 (Pa. 1957); *State v. Austin*, 331 S.W. 2d 737 (Tex. 1960); *State v. Idaho Power Co.*, 346 P. 2d 596 (Idaho, 1959); *State Highway Commission v. Southern Union Gas Co.*, 332 P. 2d 1007 (N. M. 1958); *State v. Southern Bell Tel. Co.*, 319 S.W. 2d 90 (Tenn. 1958). In view of the prohibitions of Section 34 of

Article III of the Constitution of Maryland and in view of the persuasive force of some of the above opinions, it is possible that an Act of the General Assembly requiring payment of relocation costs to all utilities, public and private, might be unconstitutional as applied to certain utilities. See *Welch v. Coglin*, 126 Md. 1. However, it is not necessary for me to reach any conclusion on that issue at this time since there are more fundamental objections which must be considered.

It is quite probable that the purpose of House Bill No. 491 was to secure for publicly-owned utilities the benefits which might possibly be extended to private utilities under the provisions of the Federal-Aid Highway Act of 1956. This purpose, however, proceeds on the assumption that under existing law or practice provision is made for payment by the State of the costs of relocation, etc., of privately-owned utility facilities so as to secure for such privately-owned utilities the benefit of the Federal Act. Such is not the case. Although private property most certainly cannot be taken for public use without just compensation, it is clear that under the common law, and in the absence of statute, the State need not pay the cost of relocation of such facilities occasioned by the construction, maintenance, or improvement of public highways. See, e.g., *Southern Bell Telephone Company v. Commonwealth*, 266 S.W. 2d 308 (Ky. 1954); *State v. Lavender*, 365 P. 2d 652 (N. M. 1961).

There is no statute or practice in Maryland which requires that the State pay the entire amount of nonbetterment costs of the removal, relocation, etc., of utility facilities occasioned by the construction, maintenance, or improvement of public highways.

Senate Bill No. 8 (now Chapter 52, Acts of 1963), which repeals and re-enacts Article 33A of the Annotated Code of Maryland and which has been approved by me, makes provision in Section 12 of the re-enacted Article 33A for the payment of the costs of moving personal property when real property or a chattel real

has been acquired by condemnation or purchase. This section contains the further provision that the amount of such payment is not limited when, under federal law or regulations, it may be paid wholly or in part out of federal funds. However, by reason of the restriction of this provision to condemnation cases and to "personal property," we cannot say that it provides for the payment to private utilities of the nonbetterment cost attributable to relocation, realignment, etc., of privately-owned utility facilities. Furthermore, Section 12 of the re-enacted Article 33A does not apply to the procedures available to the State Roads Commission under the provisions of Sections 50 through 63 and Section 74 of Article 89B of the Annotated Code of Maryland whereby the Commission may, in certain instances, require the relocation, realignment, etc., of certain private utility facilities without condemnation and without paying the *entire* cost thereof.

In view of this it is apparent that House Bill No. 491, if signed into law, would give to publicly-owned utilities (described in the bill as utilities "owned or operated by a county, municipality, commission, board, district, or agency created under the laws of the State of Maryland") certain substantial rights, privileges, and benefits not afforded to privately-owned utilities in similar or identical situations. It does not appear that such distinction between privately-owned and publicly-owned utilities can be made in conformity with Section 33 of Article III of the Constitution of Maryland or in accordance with Article 23 of the Maryland Declaration of Rights, or with the equal protection of laws clause of the Fourteenth Amendment to the Constitution of the United States. In order to support such distinction under the aforementioned constitutional provisions, it must appear that it has been made as the result of a reasonable classification which must include all who naturally and logically belong to the class. *State v. Potomac Valley Coal Co.*, 116 Md. 380; *Railway Express Agency v. People of State of New York*, 336 U. S. 106, 69 S. Ct. 463. I find it difficult at this time to conceive of any logical or natural classification which can be made which would

include publicly-owned utilities and exclude privately-owned utilities when the purpose of the classification is to secure certain benefits and to repay certain costs common to both types of utility company.

In *Littleton v. Hagerstown*, 150 Md. 163, the Court of Appeals held that municipalities supplying public utilities are to be considered just as are other public service corporations in relation to the Public Service Commission Law, and that an Act of the General Assembly exempting a municipally-owned-and-operated utility from the requirements of the Public Service Commission Law constituted an arbitrary and unreasonable classification in violation of Section 33 of Article III of the Maryland Constitution. I consider the reasoning of the court in that case applicable to the bill in question. In *State v. Lavender*, 365 P. 2d 652 (N. M. 1961) the Supreme Court of New Mexico held unconstitutional a statute of that state which provided for payment by the state of certain relocation costs of municipally-owned utility facilities to a greater extent than to privately-owned utilities. The reasoning of the court in that case is also persuasive here.

Each of the aforementioned cases supports the proposition that publicly-owned utilities are proprietary rather than governmental, and are to be considered as part of the same class which includes privately-owned facilities engaged in similar functions. The classification, therefore, which limits payment of the entire amount of relocation, realignment, etc., costs to public utilities would seem unreasonable and arbitrary.

However, as Your Excellency is aware, the climate of judicial opinion in regard to the law relating to public utilities is undergoing modification in recent times especially in view of the substantial grants of federal money to the several states in aid of projects which seriously affect such utilities. It is to be borne in mind that the federal money which is available under Section III of the Federal-Aid Highway Act of 1956 is money which has been paid in the form of taxes by the citizens of all fifty states.

The distribution of this money and its benefits to the taxpayers, however, is limited to the citizens of those states whose laws require the payment of utility relocation costs. Substantial benefits might be seen to accrue to the taxpayers of Maryland and its political subdivisions and municipalities (who directly or indirectly support publicly-owned public utilities) by making such federal money available to publicly-owned utilities thereby reducing their cost of operation. The state under the proposed Act, of course, would be required to pay to such publicly-owned utilities at least 10% of the cost of such relocation and to that extent would be favoring such utilities over privately-owned public utilities in the distribution of State funds. Nevertheless, by reason of the substantial benefit thereby accruing to the public at large, it is not beyond the realm of possibility that the Maryland Court of Appeals and, indeed, the Supreme Court of the United States, in the present fluid status of the applicable law, might, upon consideration of the problem, hold that the proposed law, if enacted, is constitutional.

I do not believe that, under these circumstances, and in view of the importance of the proposed law, I should foreclose the possibility of a favorable court ruling by advising Your Excellency that the proposed law is so clearly unconstitutional as to be a nullity. It is quite probable that if Your Excellency deems it wise to sign House Bill No. 491 into law, litigation will be commenced immediately to determine its constitutionality. It would not appear that any expenditure of State money under the law in question would occur prior to the conclusion of such litigation and indeed I would be of the opinion that the pendency of such litigation would be sufficient to forestall any such payment under that law.

Therefore, it is my conclusion that if Your Excellency is otherwise disposed to sign the bill the constitutional objections set forth above should not be considered a bar to such action.

THOMAS B. FINAN, *Attorney General*.

CONSTITUTIONAL LAW—BILL IS VALID IF PROPERLY SIGNED
UPON PRESENTATION TO GOVERNOR EVEN THOUGH PRE-
SENTATION DOES NOT OCCUR UNTIL AFTER JUNE 1,
FOLLOWING LEGISLATIVE SESSION.

June 3, 1963.

Hon. J. Millard Tawes,
Governor of Maryland.

A question has arisen in relation to House Bill 938, enacted by the 1963 session of the General Assembly. The bill provides, *inter alia*, for an additional Assistant State's Attorney for Montgomery County and, as originally introduced, was passed by the House. In the Senate, two amendments were made, striking out a provision for increase in the minimum salary of all Assistants, and this was concurred in by the House.

However, upon return from the printer to him of the enrolled version of the bill, the Clerk of the House forwarded to you a copy thereof in which the number of assistants had inadvertently been changed by printer's error from "six" to "five". This change clearly had not been provided for by any amendment, as an examination of both the House and Senate Journals confirms. In this form the bill was presented to you and you signed it on April 30, 1963. It was then assigned Chapter No. 717.

At 38 Opinions of the Attorney General 147, we considered a situation which stands on all fours with the present one. There we said:

"We have no doubt that the version presented to you and signed is a complete nullity, since it never received approval by both the Senate and the House. In fact, Senate Bill No. 413, as actually enacted, has never been presented to you. We are satisfied that if the appropriate steps are taken by the proper officials to present the correct version to you, and you promptly sign it, then it will become a valid subsisting law. The fact that

a much greater delay than is usual will have occurred between enactment by the House and Senate and signature by you will not, in our opinion, render the Act invalid. In *Robey v. Broersma*, 181 Md. 325, the Court of Appeals pointed out that there is 'no constitutional or statutory limit to the time, after passage, within which a bill must be presented to the Governor.' The Court indicated that it is a practical question and must be answered by the particular circumstances attending each case. In that case, an Act provided that it should take effect on May 1. However, it was not presented to the Governor until after that date, and was signed by him only on May 14. The Court held the Act not to be a nullity although presented to the Governor only after the date on which the Legislature intended it should take effect. It was held that the effective date was May 14, the date of signature.

"It is true that in 21 Opinions of the Attorney General, 274 and 277, this office ruled that an Act to become operative must be signed before June 1 following the legislative session. However, in those opinions we were concerned with a situation in which the bill had been presented to the Governor sometime before the first of June. Where no presentation is made before the first of June, an Act is valid if promptly signed by the Governor upon presentation, even though the date of signature is after June 1. As pointed out by the Court of Appeals in *Robey v. Broersma*, *supra*, a contrary conclusion would lead to the undesirable possibility that the Secretary of the Senate or the Chief Clerk of the House of Delegates could prevent the going into effect of an Act by withholding its presentation from the Governor until after the arrival of the date designated by the Legislature for it to go into effect. The rule stated in 21 Opinions of the Attorney General, 274 and 277 derived from the

language of Section 31 of Article III of the Constitution, which provides:

'No law passed by the General Assembly shall take effect until the first day of June next after the session at which it may be passed, unless it be otherwise expressly declared therein.'

"The reasoning of the Court of Appeals is equally applicable to a situation where the Legislature has specifically designated a particular date for the Act to become effective, and where, in the absence of such provision, June 1 is read into the Act as the result of the constitutional directive. In either event, it would be most undesirable for the secretarial officials of the Legislature to have a power amounting substantially to one of veto. As the Court of Appeals stated in *Robey v. Broersma*, 'It would be a dangerous innovation and it should not now be introduced into our legislative system'."

We have already suggested to Dr. Carl Everstine, Director of the Department of Legislative Reference, that he make arrangements with the printer to reprint House Bill 938 so that the word "six" will appear in italics, amending the bill, properly, from the present Code provision allowing "five" assistants. The effect, then, of the bill would be to increase the number of Assistant State's Attorneys in Montgomery County from five to six, as the Legislature intended. In this form the bill may be signed by you and the same will take effect from the date of your signing. See *Robey v. Broersma*, 181 Md. 325, 29 A 2d 827.

THOMAS B. FINAN, *Attorney General*.

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

CONSTITUTIONAL LAW—SEPARATION OF POWERS—NO RIGHT
IN GOVERNOR TO ACT BY "EXECUTIVE ORDER," IN AB-
SENCE OF LEGISLATION, TO ELIMINATE DISCRIMINATION
IN STATE-LICENSED BUSINESS OR PROFESSION.

July 2, 1963.

*Honorable J. Millard Tawes,
Governor of Maryland.*

You have requested this office to advise you as to the constitutional propriety of an Executive Order by you eliminating discrimination because of race, religion, color, creed, or national origin in any State-licensed business or profession.

Specifically, you call to our attention the provisions of Executive Order 63-485, dated June 26, 1963, by the Honorable Bert Combs, Governor of Kentucky, to wit:

"Whereas, the denial of equal opportunity in and access to places of public accommodations because of race, color, creed or national origin, is unfair, unjust and inconsistent with the public policy of the Commonwealth of Kentucky as manifested in its Constitution and the Constitution of the United States; and

"Whereas, the executive branch of the government in executing the laws of the Commonwealth of Kentucky and the United States which prohibit discrimination based on race, religion, creed, color or national origin, is charged with an obligation and duty to assure that those laws are fairly administered and that benefits thereunder are made available to all Kentucky citizens without regard to race, religion, color, creed or national origin;

"Now Therefore, by virtue of the authority vested in me as Governor of the Commonwealth of Kentucky by the Constitution and Laws of the Commonwealth of Kentucky, it is ordered as follows:

"Section 1. All departments and agencies in the executive branch of state government, insofar as their functions relate to supervising or licensing persons or organizations (doing business or practicing a profession) in this state, shall take all lawful action necessary and appropriate to prevent at all times discrimination because of race, color, creed or national origin.

"Section 2. All such executive departments and agencies shall take such other appropriate action permitted by law, including revising the rules and regulations, if required, to promote the abandonment of discriminatory practices by all permittees or licensees under their jurisdiction.

"Section 3. Each executive department and agency subject to this order is directed to submit to me within sixty (60) days from this date a report outlining all current programs administered by it which are affected by this order.

"Section 4. The chief administrative officer of each executive department or agency of state government administering programs affected by this order is directed to proceed with all deliberate speed toward a program of full compliance with the purposes and intents of this Executive Order. This responsibility is non-delegable."

You ask whether such an order would meet minimum tests of permissibility under the Constitution and Laws of Maryland and of the United States.

Such an order might be taken by the Courts as an attempt by the Chief Executive to exercise, and intrude into the area of, powers not granted to him under the Constitution and Statutes of Maryland, and we have the gravest doubts as to its constitutionality.

Stated differently, we would be more concerned with the application of such an order in a given case than with its

bare promulgation in the form set forth hereinbefore. In one case, its application could be clearly proper, and the action of the Executive in that connection required; in another, it could be patently invalid.

Under Article II, Section 1 of the Constitution of Maryland, the Executive power is vested in the Governor. Under Section 9 of that Article, he is enjoined to "take care that the laws are faithfully executed." See *Miles v. Bradford*, 22 Md. 170 (1864).

Clearly, were the order promulgated by the Executive, under the broadest interpretation it could be extended only, we think, to include primarily those agencies specified under the Administrative Procedure Act, Code, Article 41, Section 244(a) (1957 Edition). In short, at best, it could apply to only some departments (executive) of State Government and not to all, which in itself would present some difficult and additional questions.

To read the above-suggested order in context with each of the statutory provisions regulating, by license, the activities of the several executive agencies and of various licensees, would permit a virtually endless series of conclusional possibilities, depending upon the particular problem and factual situation involved. This is so because of the vagueness of the order and the most uncertain guidelines it establishes. Neither the Department head nor the person seeking to maintain a position or secure a right or advantage apparently provided by it could be certain of its scope or whether the same is meant to extend beyond those limits as now defined and charted by the Laws of Maryland as passed by the General Assembly.

It may be one thing, e.g., for the State Board of Commissioners of Practical Plumbing under Code, Article 43, Section 326, et seq. (1957 Edition and 1962 Supplement) or the Board of Medical Examiners, under Code, Article 43, Section 119, et seq. (1957 Edition and 1962 Supplement) to refuse to qualify an applicant for licensing to work or practice in the State upon the grounds of race, religion,

color, creed, or national origin. Such an action by an admitting board would clearly be in violation of applicable law and within the power of the Executive to police and correct. It would be another thing entirely for either board, once having qualified persons for work or practice, under the relevant provisions, to act, under the above-outlined color of executive authority, to revoke or suspend such license for reasons that such persons discriminate *in their work or practice*, on the grounds of race, religion, color, creed, or national origin. The power of the Executive in these two contrasted situations and certainly in the absence of additional legislation, is hardly the same. Even with supplemental legislation, the extent of his power and obligation, in relation to those licenses already issued, though now certain, may in future time be modified. See the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed. 2d 207, 226, 82 S. Ct. 248.

Thus, the phraseology of such an Executive Order as we have considered, by virtue of its vagueness and indefiniteness, poses enormous questions of interpretation. It may be said to cover virtually everything or only to restate the power of the Executive to "faithfully execute," consistent with existing statutes, the Laws of Maryland as they have been promulgated by the Legislature. For us to say that such an order could be extended beyond the latter consideration would be for us to act in violation of our own duty under the Constitution. The Executive, we suggest, has no plenipotentiary power, under the guise of executing the will of the Legislature, to brush aside any legislative act or to superimpose thereon his own view of what is necessary for the public good. For him to arrogate unto himself such powers would do violence to the time-honored principle of the separation of powers as spelled out in Article 8 of the Maryland Declaration of Rights.

Consequently, if it would be the intention of the Executive to exercise, pursuant to this order, any power in relation to the State's licensing of persons or organizations, not now possessed by him or which has not heretofore specifically

been given to him under either the Public General or the Public Local Laws of Maryland, then such exercise must be an empty and invalid act, under the law as we now find it.

Our research has disclosed no decision of any court of this State or of the federal courts, including the Supreme Court of the United States, holding that a State, in the absence of specific legislation, has the right to revoke a license granted to a business enterprise or professional person because of the failure of the licensee to serve all persons regardless of race, religion, color, creed, or national origin.

We call to your attention, however, the fact that the Supreme Court of the United States now has pending before it two cases originating in Maryland in which the question presented here might well be considered and decided. In these cases, *William L. Griffin, et al. v. Maryland*, No. 26, October Term, 1962 (378 U.S. 130) and *Robert Mack Bell v. Maryland*, No. 167, October Term, 1962 (378 U.S. 226), the Court will decide questions of substantial similarity to the problem here under discussion, the *obligation* (as opposed to the right) of the State to compel a licensee to serve the public indiscriminately. Until such time, however, as the Supreme Court shall make a determination of the question presented, it is the opinion of this office that no such authority exists in the Executive branch of the State Government.

THOMAS B. FINAN, *Attorney General*.

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

ROBERT F. SWEENEY, *Asst. Attorney General*.

CONSTITUTIONAL LAW—REQUIREMENT THAT PRESIDING OFFICER OF THE HOUSE BE PRESENT WHEN BILLS ARE SIGNED BY GOVERNOR IS CONSTITUTIONAL REQUIREMENT—RULES OF THE HOUSE OF DELEGATES—LEAVE OF ABSENCE TAKEN BY SPEAKER.

February 27, 1963.

*Hon. Lloyd L. Simpkins,
Secretary of State.*

We are informed that on February 20, 1963, the Honorable A. Gordon Boone, Speaker of the House of Delegates, announced to the House in open session that he desired a leave of absence as Speaker; and, in accordance with the provisions of Rule 7 of the House of Delegates of Maryland, adopted at the regular session in the year 1963, the Chairman of the Committee on Ways and Means was designated as Temporary Presiding Officer of the House and, as such, vested with all the powers of the Speaker. A question has arisen as to which of these two individuals shall be deemed the Presiding Officer for purposes of compliance with Section 30 of Article III of the Maryland Constitution. That provision, relating to the presentation and signing of bills by the Governor, reads as follows:

Section 30.

“Every bill, when passed by the General Assembly, and sealed with the Great Seal, shall be presented to the Governor, who, if he approves it, shall sign the same in the presence of the presiding officers and Chief Clerks of the Senate and House of Delegates. Every Law shall be recorded in the office of the Court of Appeals, and in due time, be printed, published and certified under the Great Seal, to the several Courts, in the same manner as has been heretofore usual in this State.”

In *Annapolis v. Harwood*, 32 Md. 471, the Court, interpreting the identical provision in the Constitution of 1864, noted that the object of the quoted provision was to guard

against controversy in respect to the contents of laws; that to attest the validity of the contents of a law all these solemnities are invoked; and that "Not only must it be sealed with the Great Seal, and signed by the Governor, but it must be so signed in the presence of those officers of the two Houses, who are best qualified to know whether the contents of the paper, being signed, are the identical contents of the law which passed their respective Houses".

Dr. Carl N. Everstine, in his classic work on the "Legislative Process in Maryland", appearing in 10 Maryland Law Review 91, assumes, at page 120-121, that reference to the Presiding Officers in our constitutional provision refers to the Speaker of the House and the President of the Senate, and he notes that some thirty other states require the Presiding Officers of their respective legislative bodies to sign all bills enacted into law. While our constitutional provision does not require the Presiding Officers to sign the bills (only their presence is required), nevertheless, we understand that, historically, the manner in which the Presiding Officers have indicated their presence is by signing the bills in the presence of the Governor.

Section 19 of Article III of the Maryland Constitution provides that each House shall appoint its own officers and determine the rules of its own proceedings. As above indicated, the only reference in the Rules of the House of Delegates of Maryland which pertains to succession to the Speaker's Chair is contained in Section 7 of such Rules, reading as follows:

"7. Temporary Presiding Officer. The Speaker may from time to time name any Member temporarily to perform the duties of the Chair, but such designation shall in no one instance be for a longer period than three days. If the absence of the Speaker shall extend beyond the time for which he has made such a designation, or if he has made none, the Chairman of the Committee on Ways and Means shall perform the duties of the Chair during the absence of the Speaker. If the

Chairman of the Committee on Ways and Means is absent or not available for such duties, they shall be performed by the Chairman of the Committee on Judiciary. Any Member so temporarily performing the duties of the Chair shall during such time be vested with all the powers of the Speaker."

While in this instance some question might be raised as to whether Rule 7 provides sufficient legal predicate in its present form to authorize the designation as Speaker of the Chairman of the Committee on Ways and Means, and thus validly constitute him as the "Presiding Officer" within the meaning of Section 30 of Article III of the Maryland Constitution, it is, nevertheless, our view that all such possible controversy can be removed by having both Mr. Boone, who has not officially resigned as Speaker, and Mr. Mandel, Temporary Presiding Officer under Rule 7, be present at the signing of all bills by the Governor, with each attesting to his presence by the traditional method of signing their names to the bills. In reaching this conclusion, we are not unmindful of the fact that a large number of bills will be signed after the present session is concluded. It is our opinion, however, that the presence of both individuals at the time such bills are signed by the Governor will remove any possible controversy as to whether the powers of the Temporary Presiding Officer under Rule 7 expire upon final adjournment of the House.

THOMAS B. FINAN, *Attorney General*.

ROBERT C. MURPHY, *Deputy Attorney General*.

CORRECTION, DEPARTMENT OF

JAIL BOARD OF BALTIMORE CITY—THE DEPARTMENT OF CORRECTION HAS THE SOLE AUTHORITY TO DETERMINE WHAT PRISONERS SHALL BE RECEIVED FOR TREATMENT IN THE HOSPITALS OF THE PENAL INSTITUTIONS UNDER ITS JURISDICTION AND CONTROL.

January 14, 1963.

Mr. Harry D. Kaufman,
President, Jail Board.

We have your recent letter inquiring as to whether judges of the Supreme Bench of Baltimore City have authority to order hospital treatment at the Maryland Penitentiary for prisoners awaiting trial at the Baltimore City Jail.

Section 89 of the Charter and Public Local Laws of Baltimore City (1949 Edition) provides as follows:

“Whenever any person has been committed to the Baltimore City Jail, whether before or after sentence, and he is certified to the Board by the physician of the Jail as a proper subject, by reason of disease or other physical disorder, for the Baltimore City Hospitals, the Board shall have the power to transfer such person to such hospital, for a period not longer than the term of the commitment, with such provision governing his custody therein as the Board shall find feasible.”

There is no other provision for the transfer of sick prisoners in the City Jail than the one quoted above, so that the legislative intent is unequivocal as to how these transfers shall be made.

Reviewing Sections 667, et seq., of Article 27 of the Annotated Code of Maryland (1962 Supplement), relating to the Department of Correction, and setting forth its powers and duties, it is to be noted that the said Department is vested with full control and authority over the penal institutions under its jurisdiction. This authority

would include the determination as to who is to be admitted to the Maryland Penitentiary hospital for treatment.

In light of these facts, and in the absence of any provision of law specifically authorizing judges of the Supreme Bench of Baltimore City to order such transfers described herein, it is our opinion that no such authority exists.

THOMAS B. FINAN, *Attorney General*.

JACQUES E. LEEDS, *Asst. Attorney General*.

DEPARTMENT OF CORRECTION—MARYLAND INSTITUTION FOR
MEN—MARYLAND INSTITUTION FOR WOMEN—NOT
PENAL, BUT REHABILITATORY INSTITUTIONS—ELIGIBILITY
FOR FEDERAL DONABLE COMMODITIES.

April 19, 1963.

*Mr. Adam G. Uhl, Chief,
Purchasing Bureau, Department of
Budget and Procurement.*

You have requested our advice as to whether Chapter 123 of the Laws of the General Assembly of 1962, which added Section 689 to Article 27 of the Annotated Code of Maryland, has changed the character of the Maryland Institution for Men and the Maryland Institution for Women, which were formerly known as the Maryland State Reformatory for Males and the Maryland State Reformatory for Women.

Your inquiry has arisen from the fact that the Food Distribution Division of the Agricultural Marketing Service of the United States Department of Agriculture has questioned the eligibility of these institutions to receive donable commodities under the Donable Foods Program supervised by the United States Department of Agriculture. Under that program and the regulations promulgated by the Secretary of Agriculture in regard thereto, public institutions which are nonpenal and noneducational in character are eligible to receive certain commodities free of charge. The Maryland Institution for Men and the Maryland Institution for Women, under their former designations as the Maryland State Reformatory for Men and the Maryland State Reformatory for Women, have received such commodities for approximately six years and have been considered by the Secretary of Agriculture to be eligible under the program during that entire period. This eligibility was based upon a letter of the Attorney General dated May 1, 1957, with regard to the Maryland State Reformatory for Males and a letter of the Attorney General dated July 26, 1957, relating to the Maryland State Reformatory for Women. These opinions advised in

essence that the institutions in question were essentially nonpenal in character and existed for the prime purpose of rehabilitation.

Chapter 123 of the Laws of 1962 was a general restatement of the laws relating to the Department of Correction and its jurisdiction over the operation of the penal and reformatory institutions within the State. Section 689 of Article 27, which was added to that Article by Chapter 123 provides as follows:

“§689. Enumeration; sentence to Maryland House of Correction, Maryland State Reformatory for Males or Maryland State Reformatory for Women; female offenders sentenced to death.

- (a) The penal institutions under the Department of Correction are:
- (b) The Maryland Penitentiary.
- (c) The Maryland House of Correction.

(1) When any person is convicted before any justice of the peace having criminal jurisdiction, of any misdemeanor, committed after October 1, 1916, and punishable by imprisonment in jail, or by fine and imprisonment in jail (other than imprisonment in default of fine), the justice of the peace may sentence such person to be confined in the Maryland House of Correction; and all sentences of imprisonment for over six months imposed by the justice upon such person shall be to the Maryland House of Correction. All sentences to the Maryland House of Correction under this section may be for a term of imprisonment up to but not exceeding the maximum term in jail which the justice might have imposed for the offense committed had this section not been enacted; provided, however, that in no case whatsoever may any justice sentence any person to imprisonment in the Maryland House of Correction for more

than three years nor for less than three months, except that any sentence under §455 of this article may be imposed in accordance with the provisions of said §455. Nothing in this section may be construed to prevent any justice having jurisdiction from committing any minor to any industrial school or juvenile reformatory to which minors may now be committed under existing law.

(d) The Maryland State Reformatory for Males, which is a place of confinement and training for male offenders from sixteen (16) to twenty-five (25) years of age, both inclusive. In those cases in which the judge of the Supreme Bench of Baltimore City, who is assigned to exercise jurisdiction in juvenile causes, may waive jurisdiction and order a minor under the age of sixteen, and the judge of any circuit court in any county exercising jurisdiction in juvenile causes, may waive jurisdiction and order a minor under the age of eighteen, to be held for action under the regular procedure that would follow if such act or acts had been committed by an adult, then and in that event the judge presiding in the criminal courts of Baltimore City and the judge of the circuit court of any county upon assuming jurisdiction in such case and upon conviction may commit the minor to the Maryland State Reformatory for Males regardless of age. The courts of this State, instead of imposing sentences of fixed duration upon male offenders included within this subsection may sentence them to the Reformatory for Males for an indeterminate period of time which may not exceed the maximum term of imprisonment provided by statute for the offenses of which said person was convicted; and in the event no penalty is prescribed by statute for said offenses then the court shall prescribe the maximum term of imprisonment; but nothing in this sentence applies to any case in which the sentence is life imprison-

ment or to the service of time for nonpayment of a fine.

(e) The Maryland State Reformatory for Women, which is the place of confinement and training for all female offenders who are sentenced to imprisonment in any institution other than a jail, for an offense for which the maximum penalty exceeds three (3) months.

(1) Any female offender who may be sentenced to death shall be detained in proper segregation and under adequate control in the Maryland State Reformatory for Women until not less than twenty-four hours prior to the time fixed by the Governor for the execution of such offender, at which time the offender shall be transferred, by authority of the Department of Correction, to the death house in the Maryland Penitentiary for such execution, to be performed under the direct supervision of the warden of the Maryland Penitentiary in accordance with the provisions of §§71 to 79, both inclusive, of this article, and in the presence of female officers assigned for this purpose. The courts of this State, instead of imposing sentence of fixed duration upon female offenders, may sentence them to the Reformatory for Women for an indeterminate period of time which may not exceed the maximum term of imprisonment provided by statute for the offense of which said person was convicted and in the event no penalty is provided by statute for said offense then the court shall prescribe the maximum term of imprisonment; but nothing in this subsection relating to the imposition of an indeterminate sentence applies to any case in which the sentence imposed is life imprisonment.

(f) The Department of Correction is authorized to operate correctional camps as established from time to time."

Because of the statutory listing of the institutions under the designation of "penal", the above mentioned Food Distribution Division of the Department of Agriculture has concluded that Maryland law definitely designates the two institutions in question as penal institutions and that thereby, by definition, they are ineligible to receive donated commodities. However, this conclusion is not supported by a reading of Chapter 123 of the Laws of 1962, as a whole or by a reading of Sections 667 through 704 of Article 27, which sections were added or amended by the General Assembly when it established the Department of Correction with new or additional duties, by the aforesaid Chapter 123. The function and the operation of the two institutions were not changed by that Act. In every reference to the institutions within the State contained in the Act the words "penal or reformatory" appear as descriptive of those institutions with the exception of Section 689. For instance, the title of the Act as originally introduced contained the language "generally revising and changing the laws concerning the Department of Correction, its officers and employees, the Board of Correction and the several penal institutions and agencies thereunder;" before the Bill was enacted into law the above language was amended to designate the institutions as "*penal and reformatory*." Section 670 of Article 27 which was added by Section 1 of Chapter 123 as originally introduced, referred to the institutions as "reformatory institutions" but was amended prior to enactment to refer to them as "*penal and reformatory institutions*." Section 681 (a) of Article 27 also was added by Section 1, as originally introduced, referred to articles of handicraft made by the inmates of "penal institutions" but was amended prior to enactment to refer to "*penal and reformatory*" institutions. Section 681(c) refers to "the penal and reformatory institutions." Section 691 of Article 27 as added by Chapter 123 as originally introduced referred to the "State penal institutions" and was amended before enactment to refer to the "*State penal or reformatory institutions*."

In view of the clear recognition in other portions of the Act of the creation or continuance of two types of institutions within the State under the control of the Department of Correction, namely those institutions which are penal and those institutions which are reformatory in nature, it would be improper to assume that the General Assembly intended by adding Section 689 to limit the jurisdiction of the Department of Correction only to penal institutions and to designate each of the institutions mentioned in that section as a penal institution. If this conclusion were reached the specific addition of the words "and/or reformatory" in the several instances mentioned above would have been superfluous since no reformatory institutions would be included among those institutions under the control of the Department of Correction. The proper explanation is that the State Reformatory for Males and the State Reformatory for Women were by definition reformatory institutions and it appeared unnecessary to the General Assembly to add the words "and/or reformatory" in line (a) of Section 689. This was, indeed, an oversight since the confusion which has now arisen would have been obviated by the addition of such language. However, its omission in no way changes the character of the institutions in question. No line, word, paragraph or section of Chapter 123 in any way changes the character or operation of the two institutions and, as a matter of fact, their rehabilitative nature remains precisely as it was prior to the enactment of Chapter 123 and as it was at the time of the Attorney General's letters of May 1st and July 26th, 1957. It is interesting to note that the duties of the correctional director as set forth in Section 679 of Article 27, which section was also added by Chapter 123, placed that officer in charge of "* * * problems and procedures for treatment and *rehabilitation* of inmates in the several institutions and agencies in the department." Furthermore, Section 689 in referring to the Maryland State Reformatory for Males retains the language "is a place of confinement and training for male offenders from sixteen (16) to twenty-five (25) years of age, both inclusive." In referring to the

Maryland State Reformatory for Women the same section provides that "the Maryland State Reformatory for Women * * * is the place of confinement and training for all female offenders who are sentenced to imprisonment in any institution other than a jail * * *." The words "and training" were added by the General Assembly after introduction of Chapter 123 and before its enactment. In referring to the authority of the courts to confine persons in each of these institutions the General Assembly added new language clearly distinguishing the confinement therein from imprisonment. See subsections (d) and (e) (1) of Section 689 of Article 27.

The purpose of the Maryland Institution for Men and the Maryland Institution for Women now, as in 1957 and for the entire period from 1957 to the present, was to provide institutions whereby youthful offenders who might be too old to qualify as juveniles could be rehabilitated. It was thought that if such youthful offenders were placed in the regular penal institutions with adult criminals a difficult problem of rehabilitation would be presented.

Both institutions provide intensive programs of individualized treatment for the persons committed to them. The programs include courses of academic education from the elementary through high school grades, diversified vocational and on the job training activities, individual and group psychotherapy, counselling and guidance. Both institutions attempt to prepare those persons committed to their care for successful occupational adjustment in free society and constructive participation in community living when they are released from confinement.

In view of the fact that the Secretary of Agriculture has considered these institutions to be eligible since the rendition of the above mentioned Opinions of the Attorney General in 1957, and since there has been absolutely no change in the character of the institutions since that time, we believe that there is no basis upon which a denial of that eligibility can be based at this time. The obvious and unintentional omission of the words "and/or reformatory"

in one line of Section 689 of Article 27 certainly cannot be considered controlling in view of the clear language of the other portions of Chapter 123 of the Laws of the General Assembly of 1962 which enacted Section 689 as well as the other sections of Article 27, setting forth the duties and authority of the Department of Correction. It should be pointed out that Section 689(d) is substantially the same as Section 674 of Article 27 of the Annotated Code of Maryland (1957 Edition) which is the same as Section 760 of Article 27 of the Annotated Code of Maryland (1951 Edition) which was the section involved when the Attorney General's opinion of May 1, 1957, was written. Section 689(e) is substantially the same as Section 676 of Article 27 of the Annotated Code of Maryland (1957 Edition) which is the same as Section 764 of Article 27 of the Annotated Code of Maryland (1951 Edition) which was the pertinent section of the law when the Attorney General's opinion dated July 26, 1957, was written.

We reiterate our previous opinions that the Maryland Institution for Men and the Maryland Institution for Women (previously designated as the Maryland State Reformatory for Males and the Maryland State Reformatory for Women) are nonpenal, rehabilitatory institutions, and that the Department of Agriculture has been for six years correct in considering them eligible to receive federally donated commodities. In the absence of any change in their character this eligibility should continue.

We suggest that you submit this opinion to the United States Department of Agriculture and request that this matter be reviewed in line with the foregoing.

In the event that there is any further information or advice which will be required by the Department of Agriculture please do not hesitate to communicate with us.

THOMAS B. FINAN, *Attorney General*.

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

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

COUNTY COMMISSIONERS

COUNTY COMMISSIONERS—OFFICE OF PROFIT—WHERE MEMBERS OF BOARD OF COUNTY COMMISSIONERS ALSO SERVE AS COUNTY ROADS BOARD, THERE IS NO VIOLATION OF ART. 35, DECLARATION OF RIGHTS, SINCE ALL COMMISSIONERS SERVE ON ROADS BOARD, AND NO PERSON OTHER THAN A COMMISSIONER MAY SO SERVE, THE LEGAL EFFECT IS THAT THE TWO BOARDS ARE ONE AND THE SAME.

October 16, 1963.

*Honorable Mary L. Nock, State Senator,
Wicomico County.*

By recent letter you have asked us to advise you if the Board of County Commissioners of Wicomico County may also serve as the County Roads Board for Wicomico County.

Your inquiry is occasioned by a recent decision of the Court of Appeals of Maryland in the case of *Howard County Metropolitan Commission, et al. v. Westphal, et al.*, 232 Md. 334, and by recent opinions of this office interpreting Article 35 of the Declaration of Rights.

Article 35 says, in its entirety:

“Art. 35. That no person shall hold, at the same time, more than one office of profit, created by the Constitution or laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State.”

Since there is no question that a member of the Board of County Commissioners of Wicomico County is a person holding an office of profit, it is apparent that if membership on the County Roads Board of Wicomico County constitutes holding another such office of profit, then the same individual may not simultaneously hold both positions.

We have carefully scrutinized the provisions of Section 257 of the Code of Public Local Laws of Wicomico County (1959 Edition). That section states in pertinent part:

"257. Created; duties, powers.

A County Roads Board for Wicomico County is hereby created, and the Board of County Commissioners of Wicomico County is hereby constituted said County Roads Board.***"

Section 260 of that same code provides:

"260. Roads Board; compensation, meetings.

The members of the County Roads Board for Wicomico County shall each receive, in addition to their compensation as County Commissioners, compensation from the County at the rate of Twenty-five Dollars (\$25.00) a day as members of said County Roads Board, payable only upon attendance in performing their duties as members of said Board but not otherwise. ***"

Our examination of Sections 257, *et seq.*, reveals that no person other than a member of the Board of County Commissioners of Wicomico County is entitled to be or serve as a member of the said County Roads Board, and that each and every one of the County Commissioners is a member of the said Roads Board.

It is obvious that the passage of Sections 257, *et seq.*, was for the purpose of transferring to county authorities the authority formerly vested in the State Roads Commission of Maryland to undertake, carry out and perform the construction and maintenance of county roads. Such a transfer of authority is fully authorized by the provisions of Section 222 of Article 89B of the Annotated Code of Maryland (1957 Edition). It appears from Section 222 that this transfer of authority could have been made from the State Roads Commission to the County Commissioners of Wicomico County, *per se*, and that the creation of the County Roads Board was done solely for the purposes of simplification.

We believe that the facts of the situation now at hand are materially different from the facts presented to the

Maryland Court of Appeals in the *Howard County Metropolitan Commission, et al. case, supra*. In that case, one of the members of the County Commissioners of Howard County was designated to serve *ex officio* as a member of the Howard County Metropolitan Commission, a completely separate agency, for which services he was entitled to receive additional compensation. The Court of Appeals held that this dual service constituted the holding of more than one office of profit and was, therefore, in violation of Article 35 of the Declaration of Rights.

42 Am. Jur., *Public Officers*, Section 62, states, as a general rule:

“A prohibition against the holding by one person of two or more offices at the same time is not violated by the holding of a single office which is formed through the consolidation of two or more offices, or an office which has been clothed with added powers or burdened with additional duties, even though such powers and duties have been withdrawn from another office. ***”

(See *Tayloe v. Davis*, 102 So. 433).

It is our opinion that the effect of Section 257 was to add additional powers or duties to the preexisting Board of County Commissioners, and that the Board of County Commissioners and the County Roads Board should be considered as one and the same body in interpreting Article 35 of the Declaration of Rights. The fact that compensation is provided separately for the duties of the individual while acting as a member of the County Roads Board, and separately for his other duties as a member of the Board of County Commissioners, is not material, in our opinion. This additional compensation is equivalent to an increase of salary to the members of the Board of County Commissioners for the additional duties imposed upon them by the provisions of Sections 257, *et seq.*, and we see no constitutional objection now existing from such division of compensation.

If it were permissible under the statute for some person other than a County Commissioner to serve as a member of the County Roads Board, then the *Westphal* case would be controlling, as an express exception by our Court of Appeals to the general rule stated above, but such, in fact, is not the case.

You are therefore advised that it is the opinion of this office that the service of the County Commissioners of your County as the County Roads Board of your County, does not constitute holding more than one office of profit, and that your Commissioners may continue to serve as the Roads Board without violation of Article 35 of the Declaration of Rights.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

CRIMINAL LAW

POLICE—AUTHORITY TO STOP A MOTOR VEHICLE TO INSPECT FOR MECHANICAL DEFICIENCIES. BASES UPON WHICH MOTORIST MAY BE DETAINED AND ARREST MADE, WITHOUT A WARRANT.

August 26, 1963.

*Honorable Carey Jarman, Superintendent,
Maryland State Police.*

You have asked the opinion of this office as to what specific authority, if any, a police officer may have to stop a motor vehicle to inspect the same for mechanical deficiencies.

The Maryland Code, Article 66½, Section 270, (1957 Edition) provides:

“(a) In general.—It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, or for any person to do any act forbidden or fail to perform any act required under this article.

“(b) Exceptions.—The provisions of this article with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors except as herein made applicable.”

Section 338 of said article makes it a misdemeanor “to violate any of the provisions of this article unless such violation is by this article or other law of this State declared to be a felony.” See *Sharpe v. State*, 231 Md. 401, 404.

The Court of Appeals has previously held, in *Bradley v. State*, 202 Md. 393, 397, 398, that, under the Code, Article 66½, Section 97 (1957 Edition), an officer in uniform may permissibly stop a vehicle for the sole purpose of determining whether or not the operator has an operator's license in his possession. See 43 Opinions of the Attorney General, 249, 250.

An officer clearly is authorized to make an arrest without a warrant for a misdemeanor committed in his presence. *Allen v. State*, 229 Md. 253, 356; *Sharpe v. State*, *supra*, at page 403. For a discussion of the right of police officers to detain a suspect for questioning without an actual arrest, see *Price v. State*, 227 Md. 28, 34.

In *Matthews v. State*, 228 Md. 401, 403, the Court found that admission of peace officers (policemen and police-women) into a house and assignment of a room to them, without inquiry as to their marital status and without their being asked to register, was sufficient *probable cause* for the officers to believe that the misdemeanor of keeping a disorderly house was being committed in their presence and to justify the arrest of appellant without a warrant. See *The Law of Arrest in Maryland*, 5 Maryland Law Review, 125.

To advert to the question at hand, on the basis of the above authorities examined and considered, we suggest these rules:

1. An officer may, without warrant, make an arrest for a misdemeanor committed in his presence. This, of course, includes the traffic violation, penalty for which is established under Maryland Code, Article 66½, Section 338.

2. An officer may, without warrant, stop and detain, subject to investigation, a motorist where he has sufficient *probable cause* to believe that Section 270 of said code is being violated in his presence.

3. An officer may, where, under Section 97 of the Code, he has stopped a vehicle for the *sole* purpose of determining whether or not the operator has an operator's license in his possession, reasonably detain a motorist further, for inspec-

tion, without a warrant, where he has sufficient *probable cause* to believe that Section 270 is being violated in his presence. If investigation of the condition of the vehicle substantiates his belief that said Section 270 is being violated, he may then arrest, notwithstanding he has no warrant.

4. An officer may not, at random, intercept, stop, and/or detain a vehicle or motorist solely for the purpose of examination of the vehicle, where Section 270 is not being violated in his presence or where the officer has not sufficient *probable cause* to believe it is being violated in his presence.

Whether Section 270 is being violated in the presence of an officer or whether said officer has sufficient *probable cause* to believe that it is being violated in his presence will, in any given situation, constitute a question of fact, is a question of judgment to be exercised by the officer, and to be resolved, ultimately, by the court, where a case goes to trial.

THOMAS B. FINAN, *Attorney General*.

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

DIVORCE

VALIDITY IN MARYLAND OF MEXICAN "MAIL ORDER" DIVORCE.

May 22, 1963.

*Mr. G. A. MacKinnon,
Acting District Director,
Immigration and Naturalization Service,
United States Department of Justice.*

This will acknowledge receipt of your letter of May 17, 1963, addressed to the Attorney General, which has been referred to me for reply. In your letter you ask for an opinion from this office as to whether or not a "Mexican Mail Order Divorce" would be recognized as valid in this state by our courts. By the term "mail order divorce" I assume that you are referring to the situation where neither party makes a personal appearance in Mexico but instead each executes a power of attorney to counsel resident in Mexico so that they might be represented before the court.

I understand that this problem has arisen in your Department of Immigration and Naturalization because of the recent application by a resident of this state for benefits under the Immigration and Nationality Act to be accorded to his second wife who is a national of a foreign country. If a valid marriage exists between this resident and his second wife, then she will not be subject to the appropriate immigration quota. You have advised us that prior to his marriage to this second wife the resident was married to another woman and that in 1961 the parties were divorced by a "Mail Order" Mexican divorce. Since the validity of the second marriage is contingent upon the validity of the Mexican divorce, and since it has been the policy of your Department to have this issue resolved by the law of the state of the residence of the applicant, you seek our aid in this matter.

Unfortunately, there has been no occasion where the Court of Appeals of Maryland has been called upon to

determine the validity of a Mexican "mail order" divorce. However, for the reasons expressed below, it is our opinion that should such a case arise the Court of Appeals would hold such a divorce to be invalid.

Unlike the situation with regard to divorce decrees validly entered by sister states, there is no requirement under the Federal Constitution that a state give full faith and credit to a divorce decree of a foreign country. Thus, where such recognition is in fact given, it is done so on the basis of comity rather than constitutional requirement. *Golden v. Golden*, 68 P. 2d 928 (N.M.). As a rule a foreign decree will be recognized, not by reason of any obligation to recognize it but upon considerations of utility, possible reciprocity, and mutual convenience. On the other hand, no comity will be extended if the decree contravenes the public policy of the state in which recognition is sought, or when the foreign court has no jurisdiction to enter such a decree.

The decisions of our various sister states which have been called upon to determine whether or not, through comity, they will recognize the validity of Mexican Mail Order Divorces have been uniform in their holding that no comity will be extended. These cases base their reasoning both on the ground of public policy and upon the recognition that in the absence of residence within Mexico the Mexican courts are without jurisdiction to sever the marital relationship. As stated by the Court of Appeals of New York in *Caldwell v. Caldwell*, 81 N.E. 2d 60 (1948) :

" . . . we have presented to us a situation where two persons attempt to confer jurisdiction upon a court of a foreign nation by means of the execution of powers of attorney to counsel residing there and then forwarding such instruments by mail without ever visiting that nation or establishing their domicile there. This is the device which results in what we have come to denominate 'a mail order divorce'. There is not even the slightest semblance or color of jurisdiction justifying action

by a court. The spouses here never submitted themselves to nor involved the jurisdiction of a court of the foreign nation as we understand those terms . . . the decree of the Mexican court is a nullity . . .”

For similar cases reaching the same result, see for example, *Hensgen v. Silberman*, 197 P. 2d 356 (Cal.); *Golden v. Golden*, 68 P. 2d 928 (N. Mex.); *Christopher v. Christopher*, 31 S.E. 2d 818 (Ga.); *Tonti v. Chadwick*, 64 A. 2d 436 (N.J.); *Kirk v. Kirk*, 238 P. 2d 808 (Okla.); *De Rosay v. De Rosay*, 57 A. 2d 685 (Pa.); *Bergeron v. Bergeron*, 192 N.E. 86 (Mass.); *Smith v. Smith*, 50 N.E. 2d 889 (Ohio). See also Berke, *Mexican Divorces*, 7 Prac. Law 75 (Mar. 1961); Stern, *More on Mexican Divorces*, 7 Prac. Law 75 (May, 1961); *Recognition in New York of Foreign Nation Divorce Decrees*, 17 N.Y.U. Intra L. Rev. 239 (May, 1962). For a discussion of the doctrine of estoppel when the issue of the validity of a Mexican divorce is raised between the parties thereto see *Sears v. Sears*, 293 F. 2d 884 (U.S.C.A. D.C.).

The Maryland Court, although never confronted with the problem of a Mexican divorce, has been quick to deny recognition to divorces granted in sister states when the parties thereto, because of lack of domicile, have been unable to confer jurisdiction. See, for example, *Naylor v. Naylor*, 217 Md. 615; *Colby v. Colby*, 217 Md. 35; *Gregg v. Gregg*, 220 Md. 578; and *Pelle v. Pelle*, 229 Md. 160. In view of this judicial treatment of divorces granted by sister states, there is no reason to believe that the court will not act in the same manner when presented with a Mexican divorce obtained without appearance of either party. It is for this reason we feel justified in saying that in our opinion, should the question ever arise, the Maryland Court of Appeals would follow the lead of her sister states and would refuse to accord any validity to a Mexican “mail order” divorce.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

ECONOMIC DEVELOPMENT, DEPARTMENT OF
INDUSTRIAL BUILDING REVENUE BONDS—MUNICIPALITIES
AND COUNTIES—LEGISLATIVE BODIES OF THE MUNICI-
PALITIES AND COUNTIES MUST DETERMINE WHETHER
OR NOT A DEPRECIATION ACCOUNT IS NECESSARY IN
CONNECTION WITH THE PURCHASE OR CONSTRUCTION
OF AN INDUSTRIAL BUILDING WHICH IS TO BE RENTED
TO AN INDUSTRIAL CONCERN.

December 10, 1963.

*Mr. William A. Pate, Deputy Director,
Department of Economic Development.*

You have requested our opinion regarding the meaning of the term "depreciation" as used in Section 266A through Section 266-I of Article 41 of the Annotated Code of Maryland (1957 Edition, 1963 Cumulative Supplement), enacted by Chapter 290 of the laws of Maryland of 1963.

Section 266B of Article 41 provides that:

"In order to relieve conditions of unemployment and to encourage the increase of industry in this State, any municipality or county may borrow money by issuing negotiable bonds for the purpose of defraying the cost of acquiring any industrial building or buildings, either by purchase or construction, but only after an ordinance or resolution has been adopted by the legislative body of the municipality or county specifying the proposed undertaking, the amount of bonds to be issued and the maximum rate of interest the bonds are to bear. The ordinance or resolution shall further provide that the industrial building is to be acquired pursuant to the provisions of this sub-heading, and shall also provide that the industrial building is to be acquired for a bona fide tenant, as evidenced by a letter of intent or similar agreement between the prospective tenant and the municipality or county issuing the bonds. Nothing

herein shall be construed to authorize any municipality or county to acquire any industrial building or buildings by eminent domain." (Emphasis supplied).

Section 266E (b) provides as follows :

"The municipality or county, at the time the bonds are issued, only may make an agreement or contract with the industrial concern which is to occupy and use the building, buildings, and other facilities provided for in this subheading, that at the time the principal of and interest on the bonds (or so much thereof as may be applicable to the particular industrial concern) have been paid in full, the industrial concern may or shall purchase or otherwise acquire whatever building, buildings, and other facilities were acquired with the proceeds of these bond funds. *In such event, the consideration for the conveyance or acquisition may be set at a nominal figure.*" (Emphasis supplied).

The references to "depreciation" and "depreciation account" are contained in Sections 266G and 266H of Article 41, which reads as follows :

"266G.

"(a) At or before the issuance of bonds the legislative body of the municipality or county, by ordinance or resolution, shall set aside and pledge the income and revenue of the industrial building or buildings into a separate and special fund to be used and applied in payment of the cost thereof and in the maintenance, operation, *and depreciation thereof*. The ordinance or resolution shall definitely fix and determine the amount of revenue necessary to be set apart and applied to the payment of principal and interest of the bonds, and the proportion of the balance of the income and revenue to be set aside as *a proper and adequate*

depreciation account; and the remaining proportion of the balance shall be set aside for the reasonable and proper operation and maintenance of the industrial building or buildings.

“(b) The rents to be charged for the use of the building or buildings shall be fixed and revised from time to time so as to be sufficient to provide for payment of interest upon all bonds and to create a sinking fund to pay the principal thereof when due, and to provide for the operation and maintenance of the building or buildings and an adequate depreciation account.” (Emphasis supplied).

“266H.

“(a) If a surplus is accumulated in the operating and maintenance funds equal to the cost of maintaining and operating the industrial building or buildings during the remainder of the calendar, operating or fiscal year, and during the succeeding like year, any excess over such amount may be transferred at any time by the legislative body of the municipality or county to the depreciation account, to be used for improvements, extensions, or additions to the building or buildings.

“(b) The funds accumulating to the depreciation account shall be expended in balancing depreciation in the industrial building or buildings or in making new constructions, extensions or additions thereto. Any such accumulations may be invested as the legislative body of the municipality or county may designate, and if invested, the income from such investment shall be carried into the depreciation account.

“(c) Upon liquidation of the project or the conveyance of the property under the terms of this sub-heading, all funds remaining in the depreciation account or other surplus funds accruing to

the project shall revert to the general funds of the municipality or county." (Emphasis supplied).

In determining the intention of the Legislature as to "depreciation" and "depreciation account" it is necessary to consider Chapter 290 in its entirety. Of primary importance is the purpose of the Act as set forth in Section 266B. The Legislature, in order to relieve conditions of unemployment, desired to encourage the increase of industry in this State. The Legislature, therefore, authorized municipalities and counties to borrow money by issuing revenue bonds in order to obtain funds to acquire industrial buildings, by purchase or construction, which industrial buildings could be rented to industrial concerns at reasonable rentals in order to attract industry to the municipality or county. The revenue bonds are to be payable solely from the revenue derived from the buildings and are not an indebtedness to which the faith and credit of the municipality or county are pledged. However, the legislative body of the municipality or county must thoroughly consider the feasibility of any proposed acquisition. The legislative body of the municipality or county must determine the amount of rental which it must charge for a facility, which it builds or buys with the proceeds of a revenue bond issue, in order to insure that all interest and principal of the bond issue will be paid when due from the revenue and without the municipality or county incurring any cost or obligation. The solvency and stability of the tenant must be thoroughly evaluated and the legislative body must be satisfied that the tenant is capable of performing all his duties under the terms of the lease, so that all interest and principal of the bond issue will be paid when due.

The fact that Section 266E (b) of Article 41 provides that the municipality or county may agree with the tenant that at the time the bonds are paid in full, the tenant may purchase the facility for a nominal figure, indicates that the Legislature did not intend that the municipality or county was to profit financially from the venture, but

merely intended that there be sufficient funds available to pay the interest and principal on the bonds in full. In the case of *Bennett v. City of Mayfield*, 323 S.W. 2d 573 (Kentucky, 1959), the Court was specifically faced with a taxpayer's suit, challenging the legality of a proposed issuance of revenue bonds by that city, and an express challenge to an option provision which enabled the tenant to purchase the facility by merely paying all outstanding bonds. The Court sustained the issuance of the bonds, and expressly approved of the option provision as follows:

"The City will then have nothing tangible. But it started out on the venture with nothing. Meanwhile the City will have had the benefits from a large local enterprise and the community will in the future have that, plus the taxes on the property."

See also *Gregory v. City of Lewisport*, 369 S.W. 2d 133 (Kentucky, 1963), which approved an issuance of Industrial Building Revenue Bonds under the Kentucky law. The rentals were not sufficient to provide for a "depreciation account", and this point was not even raised by the party seeking to prevent the issuance of the bonds. The Kentucky legislative provisions with regard to the acquisition of industrial buildings through the issuance of revenue bonds are almost identical with the provisions of Section 266A to Section 266-I, inclusive, of Article 41 of the Annotated Code of Maryland, and, in fact, served as a guide in the preparation of the Maryland statute.

It, therefore, appears that the legislative intent is to attract industry and not primarily to profit financially from the rental or sale of the industrial buildings. In order to attract industry, the rental which any particular industrial concern is to be required to pay must be reasonable and competitive. With this in mind, we can then consider what the Legislature intended with regard to "depreciation" and "depreciation account".

Since the facility may be sold at the time the bonds are paid in full for a nominal figure, it appears that the Legislature did not intend that there be sufficient funds in any

“depreciation account” to completely rebuild the facility unless the legislative body of the municipality or county deems it desirable in the exercise of its discretion. The legislative body may determine that requiring such an “account” may prevent any industrial concerns from participating, since the rental cost would be exorbitant. An additional indication, that the “depreciation account” was not intended to be available for the complete rebuilding of the facility, is the fact that funds accumulating in the “depreciation account” may be used in making new constructions, extensions or additions to the facility.

It, therefore, appears that the Legislature only intended for a “depreciation account” to be available, *if the legislative body of the municipality or county deems it to be necessary*, to preserve the operating integrity of the facility and to insure that the facility would be maintained in a rentable condition throughout the entire period required to pay the interest and principal of the bonds, in full, without any cost or obligation for the maintenance of the facility upon the municipality or county.

In discussing “depreciation” and the “depreciation account” the Legislature always refers to what is “proper and adequate” as determined by the legislative body of the municipality or county. The legislative body must carefully weigh the responsibility and ability on the part of the tenant to fulfill the obligations under the lease. Section 266G (b) requires that the rents as fixed or revised from time to time must be sufficient “to provide for payment of interest on all bonds and to create a sinking fund to pay the principal thereof when due, and to provide for the operation and maintenance of the building or buildings and an adequate depreciation account”. This appears to require that the rentals provide all funds which may be required to be expended in the operation of the facility, so that no funds are required to come from the municipality or county. If in the exercise of sound and prudent business judgment, the legislative body determines that a responsible tenant fully assures that the interest and principal of the bonds,

when due, will be paid from the revenues realized from the rentals, and assures that the operating integrity of the facility will be maintained by the tenant at the tenant's own cost and expense, that the tenant will keep the facility in good repair, will keep the facility fully insured, and will maintain the overall operating efficiency of the facility, then the legislative body may also determine any possible depreciation of the facility is adequately provided for and that no specific "depreciation account" is necessary.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

EDUCATION

STATE SCHOLARSHIP PROGRAM—ELIGIBILITY OF “ADVANCED PLACEMENT STUDENT”.

January 16, 1963.

*Mr. William Anthony,
Executive Director,
Maryland State Scholarship Board.*

In your letter of January 15 you requested our advice and assistance in regard to the applicability of the law establishing General State Tuition scholarships to advanced placement students.

The problem arises from the fact that several high schools within the State have a program whereby students who are of exceptional standing and who have reached a certain level of academic achievement are capable of entering directly into the first year of college at the conclusion of their junior or third high school year. Such students under this program are permitted by the school authorities to enter immediately into college without having received a high school diploma and are readily accepted for such admission by the best colleges and universities.

The law under which General State Tuition scholarships are administered conditions eligibility for such scholarships upon, among other things, the applicant's status as a “high school graduate(s)”. You have inquired whether, in view of the foregoing, such advanced placement students can qualify as recipients of grants under the State Scholarship Program either through action of the State Scholarship Board in approving a regulation to that effect or by action of the Executive Director under his administrative power in regard to the program.

Our review of the law indicates that it could not have been the legislative purpose in enacting Sections 284D through 284G of Article 77 of the Annotated Code of Maryland to exclude from the benefits of the State Scholar-

ship Program those students who, by reason of the very academic excellence which would in all probability otherwise entitle them to scholarships, have been excused from the necessity of completing a fourth high school year as a prerequisite to entering college. Despite the fact that Section 284G(a) describes eligible students as high school graduates, the Act as an entirety shows an intent that scholarships be awarded to those applicants who have satisfied all requirements for college enrollment and who have satisfied the other conditions of eligibility specifically enumerated in the Act. It would be incorrect and we believe improper to construe the Act so as to thwart this purpose and deny eligibility to advanced placement students merely because they have not completed a fourth year of high school if they have been accepted for enrollment in an eligible institution and if they are otherwise eligible for scholarships.

Therefore, it is our opinion that you may consider such students as high school graduates for the purposes of the administration of the State Scholarship Program and there is no necessity for the enactment of a regulation in this regard either by the Board or by the Executive Director. Rather it may be done merely in the course of your administration of the program.

We would caution you, however, that this opinion is meant to be limited in scope solely to the situation described herein and the eligibility of applicants other than those who meet the description set forth above must be considered separately as and when problems concerning such eligibility might arise.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—COUNTY SCHOOL BOARDS—EMPLOYMENT OF ARCHITECTS.

February 8, 1963.

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

In your letter of January 16 you raised the question whether, under the law and under the regulations of the Board of Education relating to planning school plants, county school boards are required to employ architects in order to repair, improve and construct school buildings. The applicable provisions of law are as follows:

Article 77, Section 40

The State Superintendent of Schools shall, subject to the rules and regulations of the State Board of Education, pass upon all proposals for the purchase of ground, school sites or buildings, or for the sale of the same, and also upon all plans and specifications for the remodeling of old school buildings or the construction of new school buildings costing three hundred dollars (\$300) or more. In case the construction is to be done by the county board itself, it shall be illegal for the county board to proceed until the plans and specifications shall have been approved in writing by the State Superintendent of Schools; in case the construction is to be done by contract, the contract shall be invalid without the written approval of the State Superintendent of Schools.

Article 77, Section 56

The county board of education shall divide the county into appropriate school districts, shall keep full records of the boundaries thereof, and shall locate and maintain schools, as needed, within each district.

They are authorized and empowered with the approval of the State Superintendent of Schools, to

purchase grounds, school sites or buildings, or to sell the same; to rent, repair, improve and construct school buildings, or approve contracts for so doing, when the plans conform to the rules and regulations of the State Board of Education, and are approved by the State Superintendent of Schools, as provided for in § 40 of this article.

They shall employ an architect or architects on the recommendation of the county superintendent of schools to assist in the preparation of plans and specifications for remodeling old buildings and for constructing new buildings.

* * *

Article 77, Section 151

The county superintendent of schools shall recommend for condemnation school buildings which are unsanitary and unfit for use; he shall recommend all repairs, the purchase of grounds, school sites and buildings, or the sale of the same, and shall prepare or cause to be prepared all plans and specifications for the remodeling of old buildings, and the construction of new buildings, subject to the provisions of § 40 of this article; and he shall recommend, in his discretion, to the county board of education, an architect or architects to assist in the preparation of the plans and specifications for remodeling old buildings or the construction of new buildings, and shall supervise such remodeling and construction. He shall approve in writing all contracts of whatever kind entered into by the county board of education, and no contract entered into by the county board of education shall be valid without the written approval of the county superintendent of schools.

Our interpretation of these provisions indicates that the county board of education under the provisions of Section 56 is only required to employ an architect when such em-

ployment is recommended by the county superintendent of schools. Under Section 151 the county superintendent is given certain discretion and it is reasonable to conclude that such discretion goes not only to the particular architect to be selected but also to the question of whether or not an architect shall be selected. It is therefore our opinion that under Sections 56 and 151 the selection of an architect is not mandatory but is within the sole discretion of the county superintendent of schools who, once he has determined that an architect should be employed, can require that the county board of education employ such architect.

However, Section 40 of Article 77 makes it plain that securing the approval of the State Superintendent of Schools is a mandatory prerequisite for the construction of new school buildings and the remodeling of old school buildings, and this prerequisite may not be bypassed. Similarly, it is clear that under Section 56 the approval of the State Superintendent of Schools and conformity of plans to the rules and regulations of the State Board of Education are mandatory prerequisites to any action by the county boards. It would seem to be within the discretion of the State Superintendent of Schools in granting or refusing his approval and of the State Board of Education in prescribing rules and regulations to require that an architect be employed as a prerequisite to approval. If this discretion is exercised fairly and not arbitrarily, it will not be disturbed by the courts and certainly will not be in conflict with the law.

Therefore, although the law by its very terms does not make the employment of an architect mandatory in every case, it strongly suggests that one should be employed and places within the broad discretion of the State Board of Education and the State Superintendent of Schools the right to require such employment.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—DRIVER EDUCATION—APPLICATION OF GENERAL
STATE FUNDS.

February 21, 1963.

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

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

We have been requested to amplify our letter of December 28, 1962, concerning the use of State general funds to support driver education, in order to clarify the extent to which such funds are prohibited from being used for driver education.

In determining the extent to which the 1961 Amendment to Section 90 of Article 66 $\frac{1}{2}$ of the Annotated Code of Maryland (enacted by Chapter 268 of the Laws of 1961) had the effect of prohibiting the use of State general funds for driver education, we must examine the legislative history of that Act as well as the pertinent provisions of other laws to attempt to discover the legislative intent.

Prior to 1961 driver education was provided only by statutory permission to the various county boards of education to include courses therein in the educational program either as a required or elective course, or not at all, at the option of the county board, Article 77, Section 212, enacted by Chapter 312, Section 191A of the Laws of 1941. Under this statute, those counties which provided driver education received partial State support for their programs in the same manner as they did for other educational programs from State general funds under the provisions of Section 220 of Article 77, as enacted by Chapter 544 of the Laws of 1945, and as amended from time to time, the last amendment being enacted by Chapter 1, Section 3 of the Laws of 1958, and from the equalization fund. Under Section 220 as amended, the sum of \$1,000.00 per classroom unit is paid

to each county and Baltimore City, classroom unit being determined by the number of full-time teachers.

In addition, "equalization" aid is paid to each county requiring such aid, under Section 215 of Article 77, on the basis of the amount required, over and above local revenues and other State assistance to support the "minimum program" in each county. The "minimum program" in the secondary schools is basically determined by the ratio of teachers to pupils set up by regulation of the State Board of Education as applied to the schedule of minimum teachers' salaries established by law. In addition to the total annual minimum salary requirements a certain percentage thereof is included in the minimum program for requirements other than teachers' salaries. Under this formula, only that number of teachers which is within the teacher-pupil ratio forms a basis for equalization aid, whereas, under the aid-per-classroom formula, \$1,000.00 is paid for each teacher whether within or in excess of that ratio.

It is apparent, then, that prior to the enactment of Chapter 268 of the Laws of 1961, the counties were receiving substantial State aid for their driver education programs, although this aid was not specifically earmarked for such programs, but was included within the aid-per-classroom or equalization grants. If the inclusion of a driver education program increased the number of teachers to a number in excess of that number prescribed by the teacher-pupil ratio, the excess teachers would entitle the county to \$1,000.00 for each such teacher in excess of the minimum program established by the teacher-pupil ratio, since the aid-per-classroom grant is not limited solely to those teachers within the minimum program. The salaries of such excess teachers, however, would not qualify for equalization funds, since such funds are limited to the aforesaid minimum program. If, on the other hand, the county did not exceed the teacher-pupil ratio when it set up its driver education program, but rather substituted that program for an existing subject, it would qualify for

both aid-per-classroom and equalization payments from the State as part of the State contribution to equalization of the minimum program.

Under this practice, the State Department of Education calculated in 1960 that during the 1958-1959 scholastic year, approximately \$355,000.00 of combined State and local money was spent in support of driver education programs then in existence in all but six of the twenty-four educational units within the State, giving driver education to an estimated 7,900 students at an average per-student cost of forty-five dollars (\$45.00). A major portion of this total amount was paid in that scholastic year and in previous years by the State under the aid-per-classroom and equalization formulae.

When, in the General Assembly of 1961, Chapter 268 of the Laws of 1961 was enacted, it amended Section 90 of Article 66½ of the Annotated Code so as to raise the fee for a driver's license from \$1.00 to \$5.00, and provided for the application of the additional \$4.00 to a statewide driver education fund to be distributed among the various subdivisions annually by the Department of Education on the basis of the number of students enrolled in the driver education programs in the respective subdivisions. It was then estimated that the additional fee would bring in revenue of approximately \$548,000.00, which, on the basis of a cost of \$45.00 per student, would educate in excess of 12,000 additional students. See, generally, *Report of Legislative Council of Maryland to General Assembly of 1960*, pp. 31, 234. (Although Chapter 268 was enacted in the 1961 session, it was reported by the Legislative Council to the 1960 session.)

It is absolutely clear from the legislative history of Chapter 268 of the Laws of 1961, as specifically set forth in the Report of the Legislative Council Committee on the Revision of the Motor Vehicle Laws, *op. cit. supra*, pp. 233, 235, as well as from the Act itself, that there was no intent on the part of the General Assembly to prohibit the continuation of the use of aid-per-classroom and equalization funds

for driver education in the same manner and to the same extent as they had been used prior to the Act. The Report of the Committee states at page 234:

“According to an estimate supplied by the Department of Education, 7900 students enrolled in driver education courses during the 1958-1959 academic year. Approximately \$355,000.00 was spent by the State and local subdivisions in order to provide this driver education. The Committee recognizes that some portion of this amount will be used for other educational purposes if the proposed plan is adopted. Yet, it is the Committee’s intent to augment the present system rather than merely substitute State for local funds in this area. Hence, if the same amount of local resources would be used in addition to the projected State plan, nearly 20,000 students could take a course in driver instruction annually.”

There may, at first, seem to be some confusion in the Committee’s use of the phrase “the same amount of *local* revenues.” However, analysis shows conclusively that the Committee was referring to the \$355,000.00 which was previously mentioned as being local funds augmented by State funds. If the revenue from the new license fee would educate more than 12,000 students, and the Committee intended by the Act to provide education for a total of 20,000 students, the number to be educated by “local revenues” would be approximately 7900, which, at \$45.00 per student, would amount to approximately \$355,000.00.

Moreover, the Act made no attempt to modify Section 212 of Article 77 which specifically allows county Boards of Education the option to include driver education in their educational programs. As long as this specific authorization remains (or possibly even without it, under the general authorization of Section 65 of Article 77 of the Code in the absence of a State Board regulation to the contrary) the county Boards may include driver education in the minimum program to qualify it for both equalization aid

and aid-per-classroom, or provide for it outside the minimum program and qualify for aid-per-classroom. Nothing in Chapter 268 of the Laws of 1961 or in its history indicates an intent to change or restrict the authority of the *county* Boards under the State aid program.

A further problem exists, however. Although the Committee for Revision of the Motor Vehicle Laws realized that some portion of the previous equalization and aid-per-classroom funds might be diverted to other educational needs by reason of the provision of special funds for driver education under the new Act, the possible extent of such diversion might be greater than anticipated. From a practical standpoint, with special funds available, all the counties most probably will inaugurate driver education programs in order to qualify for a share of such funds, if they have not already done so. In addition, since State funds outside the minimum program are available for driver education, the counties most probably will devote as much as possible of their equalization funds to subjects other than driver education and severely limit the use of aid-per-classroom funds for driver education. In view of the expanded program by reason of the institution of driver education in six additional counties, and the distribution of the special fund on a pupil enrollment basis, it is clear that the amount available per pupil could be far short of the \$45.00 per pupil required for an adequate driver education course, and that the courses given might well be dangerously inadequate.

In view of this, the State Board of Education, under the power given in Section 208 of Article 77 to establish teacher-pupil ratios in the secondary schools, on September 19, 1962, enacted an Amendment to its Bylaw 74, changing the existing ratio by allowing an additional teacher for the equivalent of each 125 pupils enrolled in thirty hours of classroom instruction and six hours of behind-the-wheel training in driver education. Since this ratio determines entitlement to equalization funds under the minimum program, the effect of the amendment was to provide addi-

tional State general fund equalization money directly for driver education. See, Minutes of Meeting of State Board of Education, May 31, 1962, pages 37, 38; September 19, 1962, pages 1 through 5. Although the purpose of the State Board was salutary, i.e., to prevent inadequate driver education programs by reason of a failure to allocate sufficient sums to them, nevertheless it must be determined whether this action was in keeping with the intent of the law.

It cannot be denied that absent any statutory provision to the contrary the State Board of Education has the power to determine the ratio of teachers to pupils in the secondary schools and thereby determine, indirectly, the entitlement of the various equalization units under the State minimum program. Article 77, Section 208, Annotated Code of Maryland. It is equally clear that, absent statutory authority to the contrary the State Board of Education has the overall authority to provide for required courses in the secondary schools. Article 77, Sections 26 and 65, Annotated Code of Maryland. However, the General Assembly has specifically dealt with the question of courses in driver education and has set up the framework and conditions under which such courses may be given. Article 77, Section 212, Annotated Code of Maryland. In the last cited section, the General Assembly limited the State Board's function in regard to such courses to determining the credit to be given and the actual course requirements. Other determinations in regard thereto are either controlled by the Act itself or are specifically left to the County Boards and the Superintendent of the Maryland State Police. This section clearly indicates that the inclusion of such courses has been placed in the discretion of the County Boards, without the limitation of Sections 65 and 26 of Article 77. Section 212 also manifests a legislative intent that driver education be a subject within the exclusive domain of the General Assembly and that the State Board shall have only such quasi-legislative powers in regard thereto as are specifically delegated to it, notwithstanding the provisions of Section 26 of Article 77. It should be borne in mind that House Bill 15 of the General Assembly of 1958 would have amended Section 212 by elim-

inating the option of the County Boards with respect to courses in driver education, and substituting the language:

“The State Board of Education is directed to take appropriate action to implement the intent of the General Assembly that instruction be made available in the safe operation of motor vehicles to public high school students in the various counties and Baltimore City.”

This Bill failed to pass. In enacting Chapter 268 of the Laws of 1961, which was otherwise similar to House Bill 15, the General Assembly did not amend Section 212, indicating an intent to maintain its pre-emptive control over driver education, to the extent it had not specifically delegated that control.

It is our opinion therefore, that although the State Board of Education has and maintains the power to fix teacher-pupil ratios in general, in regard to matters other than driver education, and thereby determine entitlement under the minimum program, it may not fix such ratios specifically in regard to driver education in such way as to determine the amount of State financial assistance which will be given specifically to instruction in that subject, as distinguished from State financial assistance generally. If this were not so, the State Board could effectively thwart the will of the General Assembly by, conversely to its action in the present instance, excluding driver training teachers from the teacher-pupil ratio for equalization purposes. To the extent, therefore, that the State Board's resolution of September 19, 1962, provides a specific teacher-pupil ratio for driver education, it is a nullity.

We are not unmindful that the Board's resolution was enacted only after consultation with this office, and that its action was taken in a well founded belief that it was not exceeding its authority. However, at the time of that consultation, we were not aware of all of the factual and historical considerations now before us; any such contrary oral advice heretofore rendered is hereby rescinded to the extent of any inconsistency herewith.

In sum, we advise that the full import of our letter of December 28, 1962, is that general fund payments under both aid-per-classroom and equalization aid as they may have been applied to driver training prior to the enactment of Chapter 268 of the Laws of 1961 were not affected by that Act and may validly be continued in whatever amounts may, from year to year, be properly determined; on the other hand no new general fund money may be diverted to driver education by reason of an increase in teacher-pupil ratios specifically for driver education.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—STATE GENERAL SCHOLARSHIP PROGRAM—
 PREVIOUS ATTENDANCE AT SCHOOL OF COLLEGE RANK
 —STATUS OF JUNIOR AND COMMUNITY COLLEGES.

March 21, 1963.

*Mr. William Anthony, Executive Director,
 Maryland State Scholarship Board.*

In your letter of March 15 you requested our opinion as to whether a high school graduate who may have attended one or two evening courses at institutions of collegiate rank is thereby precluded under the provisions of Section 284G(a) of Article 77 of the Annotated Code of Maryland (1962 Supplement) from eligibility for a scholarship under the General State Scholarship Program.

The above cited section provides that an eligible student must be a high school graduate who resides in the State and who, *inter alia*, has not "previously attended a school of college rank . . ." A strict reading of this provision would indicate that the industrious graduate who, prior to enrollment as a full time college student, supplements his education by enrolling in sporadic individual college courses would be thereby denied opportunity to compete for a scholarship.

We are of the opinion that the General Assembly did not intend that such a strict interpretation be applied. It is our opinion that attendance as used in the quoted portion of the statute must be interpreted to mean full time enrollment in the institutions described therein for however short a period. We realize that there may be borderline cases which will require administrative determination from time to time. We are of the opinion, however, that if the problem becomes of such magnitude that general precision appears necessary in determining the status of such applicants, the Board is empowered under Section 284E to make such rules as may be necessary and proper to clarify the situation.

You have also requested our opinion as to whether Junior and Community Colleges are to be considered schools of

college rank for the purposes of Section 284G. By reason of the fact that such Junior and Community Colleges are included among "eligible institutions" as described in Section 284G (a), we are of the opinion that they are to be likewise considered "schools of college rank" for the purposes of that section.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—TEACHERS—STATE TEACHERS COLLEGES—NO
REVIEW OR HEARING PROVIDED IN LAW FROM ACTION
TERMINATING CONTRACTS OF TEACHERS WITHOUT
TENURE.

April 25, 1963.

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

In your letter of April 10th, acting upon the direction of Mr. Jerome Framptom, Jr., Chairman of the Board of Trustees of the State Teachers Colleges, you requested our advice as to the proper steps to be taken by the Board in the following circumstances:

The President of Frostburg State Teachers College gave notice to four members of his teaching staff that the college does not intend to renew their appointments beyond June 30, 1963. Thereafter, on April 8, 1963, you received a letter dated April 5, 1963, from Fred E. Weisgal, Esq., indicating that he represented the four faculty members and requesting that a special meeting of the Board of Trustees of the State Teachers Colleges be called in order to afford the four faculty members "a hearing in accordance with Article 77, Section 165 of the Annotated Code of Maryland."

Before discussing the question of the faculty members' right to the requested hearing, it is necessary that we make some comment upon the background of their tenure rights and the manner in which they were notified of the non-renewal of their appointments.

Three of the faculty members were employed under a form of contract adopted by the Board of Trustees on September 13, 1962. This form of contract was adopted as a by-law or regulation of the Board of Trustees and will be referred to hereinafter as the "new form."

The fourth faculty member, Mr. Norris L. Merchant, was employed under a form of contract which had been adopted by the Board of Trustees in 1933 and which was super-

seded by the "new form." This form of contract was also adopted as a by-law or regulation of the Board of Trustees and will be referred to hereinafter as the "old form."

Generally, teachers in public educational institutions whether on the elementary, secondary, or collegiate level have no "tenure" in their positions unless a statute, regulation, or authorized contract has established such tenure. In the absence of such provision they may be dismissed or terminated at will in accordance with the terms of their contracts. See, generally, *State v. Board of School Directors*, 27 N.W. 301 (Wisconsin 1937); 110 A.L.R. In Maryland there is no statute which specifically provides tenure of any sort in public educational institutions. However, it has been held by the Court of Appeals of Maryland that teachers in the public school system (as distinguished from those in the State Teachers Colleges) have a right to academic tenure under certain conditions by reason among others of the contract which such teachers sign and which has been officially adopted as a by-law or regulation of the State Board of Education. *Board of Education v. Cearfoss*, 165 Md. 178 (1933). The contract in question in that case was substantially similar to the above mentioned "old form" and provided that it could be terminated by either party at the end of the first or second year of the teacher's employment by either party's giving thirty (30) days' notice to the other during the months of June or July, of an intention to terminate the contract. The court construed this contract as establishing academic tenure for those teachers whose contracts had not been terminated in the manner prescribed at the end of either the first or second year and that therefore such teachers could thereafter be dismissed only for one of the specific causes set forth in the contract with the attendant right to a prior hearing before the County Board of Education which was a party to the contract. The court's opinion is equally applicable to the State Teachers College especially in view of the fact that Section 165 of Article 77 of the Annotated Code of Maryland provides, inter alia, that "the board of trustees shall * * * fix the salaries and tenure of all teachers and

all assistants of whatever kind;.” No specific provision is found in the law directing the State Board of Education to fix the tenure of teachers in the elementary and secondary schools.

Prior to February, 1962, the Board of Trustees had not adopted any detailed regulations fixing academic tenure for teachers and assistants at the State Teachers Colleges. However, the Board had adopted and had used for many years the “old form” contract mentioned above. Since that contract had been adopted in a by-law or regulation of the Board, under the apposite reasoning of the *Cearfoss* opinion, tenure was fixed in accordance with the terms of the contract and was and has been governed solely by the contract. Under that contract any teacher not given thirty (30) days’ notice of termination of his contract during the months of June or July of his first or second year has automatically achieved academic tenure in that he can thereafter be dismissed only for the causes set out in the contract, with the attendant right of prior hearing before the Board. Applying this background to instructor Merchant, whose rights are governed by the “old form” contract, we are of the opinion that no effective action has been taken as of this time to terminate his appointment. The “old form” contract provides that notice of termination may be given by “either of the parties to this contract.” The parties to the contract are the instructor and the Board of Trustees of the State Teachers College at Frostburg, by its President, Mr. Framptom, and the State Superintendent of Schools as Secretary of the State Board of Education. No provision exists either in the “old form” contract or in any regulation or by-law relating to the “old form” contract which gives the President of the institution authority to terminate the contract by giving notice of nonrenewal. As a matter of fact, this unwieldy circumstance was among the numerous reasons for the adoption of a “new form” of contract and a specific tenure policy in February and September, 1962, respectively. Furthermore, the notice, even if authorized, must be considered premature since the “old form” contract prescribes that notice must be given during

the months of June or July and the President's notice, having been given in March, does not comply with the terms of the contract. It must be noted that instructor Merchant's contract was entered into on August 30, 1961, prior to the adoption of specific tenure regulations by the Board of Trustees. The Board provided that teachers employed prior to July 1, 1962, might retain the "old form" contract. Mr. Merchant's rights thereunder are, therefore, unaffected by those regulations and are governed by the terms of the contract until that contract is terminated or lawfully abrogated. Should he not receive notice of termination during the months of June or July, 1963, which would be the end of his second year under the contract, he would achieve tenure under the "old form" notwithstanding the new regulations.

Therefore, as to instructor Merchant we must advise you that his status must be considered unchanged by reason of the notification dated March 28, 1963, from the President of Frostburg State Teachers College. The question of his right to a hearing at this time is moot. If termination of his appointment is desired for any reason whatsoever the Board of Trustees has the right upon the recommendation of the President to give notice of such termination in writing during the months of June or July, 1963, and thereby effectively terminate his appointment. This is a matter which the Board may consider at its discretion.

We now come to the question of the other three faculty members who were employed under the "new form" contract and who are subject to the new regulations of the Board specifically fixing the tenure of teachers.

Consideration of their request for hearing requires examination of the new form contract and the by-laws or regulations specifically fixing tenure at the college. Each of those faculty members is a party to new form contracts entered into in January, 1963, covering the academic year 1962-1963. As previously mentioned, the new form contract was adopted on September 13, 1962. However, the specific by-laws or regulations fixing tenure were adopted by the

Board on February 28, 1962, to be supplemented by the new form contract. As alluded to above, these regulations give to the President of each State Teachers College certain specific duties and powers in regard to the termination of appointments which powers and duties were not contained in the old form contract. Specifically, he was and is authorized to give notice regarding renewal or nonrenewal of appointments of probationary teachers (those who have not yet attained tenure), subject to certain time limitations more fully described *infra*. He was also authorized and empowered to notify teachers who have successfully completed their probationary periods, of their attainment of tenure status, and to suspend a faculty member whom he recommends for dismissal. These provisions were incorporated into the "new form" contract and are specifically agreed to by the signatories of such contracts. They were enacted by the Board because of the practical considerations: (1) that the President of the college is in a closer relation to his staff members than the Board and is therefore better able to judge, first hand, the qualifications of those who are on probationary status; and (2) that effective notification of termination or renewal could be given at an earlier date by the President than could be done by the Board which can act only in meetings assembled; probationary faculty members would thereby be given a longer period of time after such notification to make their personal plans.

Such regulations are in accord with Section 165 of Article 77 of the Annotated Code of Maryland and with Section 166 of that Article which provides, *inter alia*:

"The principal (now 'President' by reason of Section 244 of Article 77) shall be the head of his respective school and shall be responsible for the discipline and successful conduct of his school and for the administration and supervision of all its departments. The principal (now 'President' as above) shall nominate for appointment by the Board of Trustees, and may recommend for dis-

missal by said board, all heads of departments, all teachers and all assistants of whatever kind."

The regulations and contract are also in accord with the policies of the American Association of University Professors. In the Spring, 1957, publication of that organization, AAUP Bulletin, Volume 43, Number 1, page 113, et seq. the Association set forth a statement of principles relating to academic tenure which had been adopted in 1940. We direct your attention to section (a) (2) of that statement:

"(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period."

More specifically, the present new form contract was submitted to the American Association of University Professors for comment prior to its adoption and was considered "good" by that organization. See Minutes Board of Trustees of State Teachers Colleges, September 13, 1962, p. 12.

Under the regulations or by-laws, the contract and Section 165 of Article 77 of the Code, only those teachers who have attained academic tenure by completing their probationary periods are entitled to a hearing prior to dismissal for the causes set forth therein. The contracts of such

teachers are automatically renewed each year. On the other hand, the contracts of teachers still within their probationary periods expire at the end of each contract year provided the prescribed notice is given. The failure to give such notice constitutes a reappointment for an additional contract year. Other than the notice provisions, such probationary teachers have no more right to be reappointed than an applicant for initial employment has to be initially appointed. The President of the college is given the statutory right and duty to nominate for appointment all heads of departments, all teachers, and all assistants of whatever kind. Section 166, Article 77, Annotated Code of Maryland. Although the Board need not act on such nomination, it could not appoint one not so nominated. The President has similarly been given the authority, under the Board's by-laws or regulations relating to tenure, to determine whether or not a probationary teacher should be reappointed. Neither the law nor the regulations place any limitations upon this authority. No provision exists either in the law, the regulations, or the contract for review of the President's action in this regard. It would be anomalous if the Board could reappoint, without nomination by the President, one whose contract of employment has expired in accordance with its terms by reason of the giving of appropriate notice of termination.

Each of the three teachers is now in his first year at the college. The contract and the by-laws or regulations provide that notice of termination in such cases must be given no later than April 1. The notices given on March 28 were, therefore, timely.

We are of the opinion that since the three faculty members are probationary teachers, who have not been dismissed, but whose contracts will have expired in accordance with their terms, they have no right to a hearing under Section 165 of Article 77 of the Code, and the Board, having no authority to appoint without the nomination of the President, has no authority to review his action in giving notice of termination. If the Board feels that the Presi-

dent's authority in this regard is too broad, its proper procedure would be to abrogate that power by amending its by-laws or regulations as to tenure.

This is not to say, however, that the Board is precluded from consulting, if it so desires, with the teachers in question and with the President in order to determine whether or not the President should be requested to reconsider his action. That is an administrative matter which is within the discretion of the Board.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—COUNTY SUPERINTENDENT OF SCHOOLS AND
COUNTY BOARDS OF EDUCATION—CONFLICT OF INTEREST
—TEACHERS AND SIMILAR TYPE EMPLOYEES NOT EN-
GAGED IN A “CONTRACT OR PURCHASE” WITH COUNTY
BOARD AND, THEREFORE, SPOUSES WHO ARE BOARD
MEMBERS HAVE NO “DIRECT FINANCIAL INTEREST”.

May 31, 1963.

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

This will confirm my telephone conversation with your office this past Wednesday during which you asked for my opinion as to the coverage of Senate Bill 594 (the conflict of interest statute relating to members of county boards of education and county school superintendents). In particular you asked if it would be permissible for the wife of a county superintendent or board member to be employed as a teacher in the county school system, and also if it would be permissible for a child of such a superintendent or member to be employed as a secretary in the county department of education.

Senate Bill 594, which will be codified as Section 74 of Article 77 of the Maryland Code, makes it unlawful for any member of a county board of education, or any county superintendent to have “a direct financial interest in any contract or purchase to which the board of education in that county is a party.” Section 74 also contains certain exceptions to this prohibition which are not here relevant. Section 74 defines a “direct financial interest” as including the situations where a child or spouse of the member or superintendent is party to a contract or purchase with the county board of education.

If the term “contract or purchase” as used in Senate Bill 594 includes employment relationships of the type referred to above, then they would not be permitted where the spouse or parent was a board member or superintendent. I am, however, of the opinion that the term “contract or purchase”

does not encompass employment either as a teacher or as a secretary of the board.

As you are aware, I served on the committee which recommended the adoption of Senate Bill 594 and also served on the subcommittee which reviewed the bill as originally drafted by Mr. Haile of the Baltimore County Solicitor's Office. I think it is fair to state that it was never the intention of that committee that the term "contract" be extended to personal employment relationships of the type referred to above. To the extent that personal service contracts were to be included within Senate Bill 594, they were to be of the independent contractor variety—such as providing school bus service—and not of the traditional master-servant relationship. Although a master-servant relationship is sometimes referred to as a "contract," it is of a nature quite different from that usually meant when that term is employed. See Vol. 1, M.L.E., *Agents*, Section 2 and Vol. 9, *Employment; Work and Labor*, Section 4, et seq.

Also not to be overlooked is the fact that the enforcement provisions of Senate Bill 594 are essentially penal in nature and, therefore, it is not unreasonable to assume that a court, called upon to construe the provisions thereof, would apply the time-honored principle that penal statutes are to be strictly construed in favor of the accused.

For the reasons expressed above it is my opinion that it would not constitute a violation of Senate Bill 594 for a board member or the county superintendent to have a spouse or child employed in the capacity of teacher or secretary within the county school system.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

DEPARTMENT OF EDUCATION—SOLICITORS FOR NON-PUBLIC
SCHOOL COURSES OF INSTRUCTION—PERMITS AND BONDS
REQUIRED.

July 10, 1963.

Dr. David W. Zimmerman,
Deputy State Superintendent,
Maryland State Department of Education.

You have asked for our opinion as to whether a person or firm conducting a business in Maryland of soliciting students for courses of study offered by non-public schools within or without the State must secure solicitor's permits under Section 306 of Article 77 of the Maryland Code (1961 Supplement) for each of his or its employees actively engaged in such solicitation or whether a single permit issued in the name of the employer conducting such business would suffice.

It is our opinion that the provisions of Section 306 of Article 77 require that every individual proposing to engage actively in the business of soliciting students for such courses of study first obtain a solicitor's permit, and that a single permit issued only to the employer of such individuals would not meet the requirements of the aforesaid statute.

Sections 305 to 309 of Article 77 were originally enacted in 1961 as Chapter 322 of the Laws of 1961 and provide for a comprehensive system for the regulation and licensing of all persons engaged in this State in the solicitation of students for non-public school courses of study. Section 306 requires all "solicitors" to apply annually for permits with the State Superintendent of Schools and requires further that information both about the solicitor and the courses of instruction offered be supplied to the State Superintendent with such application. Section 305 defines a solicitor as "* * * a person engaged in the business of soliciting for compensation or offering to solicit students * * *."

It has been established that where regulatory licensing provisions are directed fundamentally at the person conducting a particular type of business the licensing of his employees is not required, but where the regulatory licensing is directed at the individuals actively engaged in transacting the details of the business, such employees who are so engaged must be licensed. 33 Am. Jur., *Licenses*, Section 48. For example, a statute regulating and providing for the licensing of "persons conducting the junk dealing business" does not require the licensing of a junk dealer's salaried employees, 1 Opinions of the Attorney General, 160, whereas a statute requiring the licensing of "hawkers or peddlers" does apply to any employees so engaged. *Brown v. State*, 177 Md. 324, 332 (1939).

A consideration of the language of the sections under review leads to the conclusion that it is the person actually soliciting the students and not merely the person conducting the business which employs him that was intended by the Legislature to be regulated and licensed. The definition of a "solicitor" in Section 305 encompasses all persons engaged in the business of soliciting students for compensation and no distinction is made as between employers and employees. The word "solicit" in its ordinary sense means to entreat, petition, or importune, Webster's New International Dictionary, Second Edition, and thus permits are required under the aforementioned provisions of any person who is actually engaged in such activity with respect to prospective students.

With respect to your second inquiry it appears from subsection (d) of Section 306 of Article 77 that it is the school which must furnish the surety bond to the State of Maryland, such bond to be in such form as the State Superintendent shall determine to be necessary, and conditioned on the faithful performance of all agreements and contracts with students and on the compliance with the provisions of Sections 305 to 309 of Article 77. It may be pointed out here that when a school has executed such a bond in connection with the issuance of one solicitor's

permit it is not required to execute any further bonds for any additional solicitors requesting permits to represent the same school.

THOMAS B. FINAN, *Attorney General.*

MATHIAS J. DEVITO, *Asst. Attorney General.*

EDUCATION—PROHIBITION AGAINST DISTURBING PUBLIC SCHOOL IN SESSION AS AFFECTED BY FREEDOMS GUARANTEED BY FIRST AND FOURTEENTH AMENDMENTS—JUDGMENT AS TO WHAT SERVES TO DISTURB TO BE MADE PRIMARILY BY SCHOOL, RATHER THAN POLICE OFFICIALS.

September 4, 1963.

Honorable Bernard J. Schmidt,
Police Commissioner.

Your letter of August 21, 1963, directs our attention to the provisions of Code, Article 77, Sections 96 and 231 (e) (1957 Edition), and asks the following question:

Whether the above cited Code provisions are now applicable to such problems as sit-ins, demonstrations, boycotts, etc., or have court decisions since 1954 modified these sections as to the manner and circumstances in which they may be invoked.

Code, Article 77, Section 96, provides:

“Any person who shall disturb any public school in session shall, upon conviction thereof before a justice of the peace, be deemed guilty of a misdemeanor, and shall forfeit and pay twenty dollars, to be collected as other fines, to be paid to the board of district school trustees for the benefit of the schoolhouse district; or said offender shall be imprisoned not exceeding thirty days, or both, in the discretion of the justice of the peace.”

Subsection (c) of Section 231 of said Article provides:

“Any person who induces or attempts to induce any child to absent himself unlawfully from school, or employs or harbors while school is in session any child absent unlawfully from school, shall be deemed guilty of a misdemeanor, and be fined not more than fifty dollars.”

In connection with these sections the language of Mr. Chief Justice Warren in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L.Ed. 873, 880, 74 S. Ct. 686, 38 A.L.R. 2d 1180, is apropos:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a *right* which must be made available to all on equal terms." (Emphasis supplied)

As stated in *Edwards v. South Carolina*, — U. S. —, 9 L.Ed. 2d 697, 703, 83 S. Ct. —, re Section 96:

"The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."

Nor would, we think, school or police officials be constitutionally permitted to refuse parties access to school grounds *merely* because they disagreed with such parties' views. See Mr. Justice Clark's dissenting opinion in *Edwards, supra*, at 704.

The instant inquiry, insofar as it relates to Section 96, presents a number of possible types of activity by demonstrators, both with reference to school buildings and portable school facilities. The related questions must be what

"disturb," as used in the referred-to section, means and whether, notwithstanding certain activities "disturb," to a greater or lesser degree, a public school in session, they permissibly may be prohibited.

We are not of the view that the word "disturb" is vague or meaningless. Webster's *New International Dictionary* defines the word thus: ". . . throw into disorder or confusion." See *City of Clovis v. Archie*, 60 N.M. 239, 290 P. 2d 1075, 1076. See also 13 *Words and Phrases* 46. In *Fowler v. State*, 93 Ga. App. 883, 93 S.E. 2d 183, 185, the court, in reversing conviction of a party whose sole activity was to distribute pamphlets on school grounds, to teachers, commented that the words "wilfully interrupt or disturb" in a statute prohibiting, as a criminal act, certain activities in connection with a public school, meant "a disturbance and interruption of those present which is great enough to have that effect without voluntary cooperation on the part of others."

"Disturb" also means an interference with the lawful enjoyment of a right. See *McCleary v. Bratton*, Mo. App. 307 S.W. 2d 722, 725.

The U. S. Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 304, 84 L.Ed. 1213, 1218; 60 S. Ct. 900, 128 A.L.R. 1352, had occasion to state: ". . . a state may . . . safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Accord: *Schneider v. State*, 308 U.S. 147, 160, 84 L.Ed. 155, 164, 60 S. Ct. 146. First Amendment freedoms are not absolutes "immune from necessary state action reasonably designed for the protection of society." See dissenting opinion of Mr. Justice Clark, in *Edwards*, *supra*, at 9 L.Ed. 2d 704.

We cannot say where, as here, the statute is clothed with a presumption of constitutionality, that recent rulings of the Supreme Court in the area of First Amendment guaranties have circumscribed, or should be said to have done so, a clear and salutary expression by the Legislature of Maryland of

the proposition that no person "shall disturb any public school in session."

Factually, we are not in a position to single out the permissible activity from that which is not. What may be proper, peaceful, orderly, and quiet picketing or assemblage outside a public school building may take on the character of an intolerable disorder when done within the same building or adjacent to a classroom. And what might serve only to interest or annoy an adult may disorganize a group of impressionable children and dislocate their training program. The normal and proper discipline of children in their classroom surroundings may not necessarily suffice to block out a disturbance from without by a gathering, one of whose indirect aims may be said, under the cited statute, to be a disturbance of those children's routines.

If the State cannot reasonably, by statute, as here, assure that its children may be taught and be free to learn, in public schoolrooms, without being subjected to calculated and disrupting influences, vocal or otherwise, emanating from the perimeters of their classrooms, then the State has lost considerably more of its police power and prerogative than had heretofore been imagined. We think such rights as demonstrators have to speak, assemble, and petition for redress of grievance must be exercised in context with the unquestioned right of our youth to the education we all know they have and must obtain.

In our view, insofar as it becomes necessary to determine what will serve to "disturb" a public school in session, such a judgment should be made primarily by school, rather than police, officials, because of the obviously greater experience and training of the former in such matters.

In respect of subsection (c) of Section 231, above quoted, we are of the like opinion that such is fully enforceable. The State has clearly evinced its desirable public policy that children to the age of sixteen years attend school regularly. The reasons for such a policy are clear. Interference with the attendance of a child at school may, in the case of a parent

or guardian, support a finding of unfitness. (See *In Re Cromwell*, Maryland Court of Appeals, decided July 12, 1963) and under Code, Article 77, Section 231(c) is made a misdemeanor, no matter who causes it.

THOMAS B. FINAN, *Attorney General*.

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

EDUCATION—VOLUNTARY STUDENT PRAYER CONSTITUTIONAL
UNDER CERTAIN CIRCUMSTANCES—FORT HILL HIGH
PROGRAM IS UNCONSTITUTIONAL.

December 16, 1963.

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

You have requested our opinion whether daily religious exercises may be conducted by students on a voluntary basis in the public schools of this State without contravening the Constitution of the United States, and specifically, you inquire whether a program of morning devotional exercises presently carried on in Fort Hill High School in Allegany County is in violation thereof. We have concluded that certain voluntary religious exercises, conducted under circumstances hereinafter described, would be lawful but that, unfortunately, the long standing program at Fort Hill High School, as it is presently constituted, would be found objectionable under the interpretation given by the United States Supreme Court to the Establishment Clause of the First Amendment of the Constitution.

We will first consider the Fort Hill High School program. Several years ago, the Student Council there initiated a program, still in effect, whereby a student chosen by the Council conducts opening exercises each morning over the school's public address system. The exercises are begun immediately after the tardy bell has rung and at a time when all students are required, under school policy, to be present in their seats. The exercises consist of (1) a reading of parts of the Holy Bible selected by the student conducting the program, (2) a recital of the Lord's Prayer by the student body in unison, (3) the salute to the Flag by the student body, (4) a closing quotation of a philosophical, but nonreligious, nature selected by the student conducting the program and referred to as "a thought for the day." After these exercises, announcements of a general nature are made over the public address system and classes begin.

No part of the program (except possibly the announcements) is planned or conducted by the faculty or by any

administrative official of the school. In the event that any student does not desire to listen to, or participate in, the program he may either remain silent at his seat or leave the room and wait in the hall, where the public address system is not in operation, until the exercises are concluded.

This particular form of morning exercise is conducted not as a result of any directive by the school administration, although it may be fairly said that the school administration has incorporated this practice into its official school curriculum. When the program was originally initiated several years ago it received the approval of the student body at a popular vote, but since that time the question of its desirability has never been resubmitted either to the students or their parents.

We are of the opinion that the described program constitutes activity which is proscribed by the Establishment Clause of the First Amendment of the United States Constitution, applicable here by virtue of the Fourteenth Amendment.

The question of the permissibility of Bible reading or prayer in the public schools under the Federal Constitution was most recently considered by the Supreme Court of the United States in *Abington School District v. Schempp*, 374 U. S. 203 (1963). That decision involved two cases, one from Abington Township in Pennsylvania (the *Schempp* case) and the other from Baltimore City (the *Murray* case). The *Schempp* case involved an attack upon the constitutionality of morning devotional exercises conducted in the Abington Senior High School over the public address system in precisely the same manner as those carried on at Fort Hill High School, except that in Abington Senior High School they were required by the school administration pursuant to a Pennsylvania statute making daily reading of the Bible, without comment, mandatory in the public schools. In the *Murray* case, the challenge was to the constitutionality of a rule of the Board of School Commissioners of Baltimore City requiring, in the schools of that city, the reading, without comment, of a chapter of the Bible and/or the use

of the Lord's Prayer. In both the *Schempp* and *Murray* cases the applicable law permitted students to be excused from attending the exercises at the request of their parents.

The Supreme Court held, with only Justice Stewart dissenting, that the exercises involved in both cases, and the laws requiring them, were unconstitutional, in violation of the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment. The Court said:

"These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools."

With respect to the fact that students were permitted to refuse to attend the exercises, the Court said:

"Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."

Applying the principles of the aforementioned decision to the program under consideration, it necessarily follows that the same result must be reached here.

The morning devotional exercises conducted at Fort Hill High School are identical in practically every detail to the program rendered invalid by the Supreme Court at Abington Senior High School. Both programs were designed to be conducted as a part of regular school activity, at the beginning of the day when the students are required under school regulations to be in attendance. The format is the same—verses from the Bible, chosen by a student are read over the public address system, followed by the recitation of the Lord's Prayer and the salute to the Flag by the entire student body in unison. The operative effect of both of these programs upon the life of the individual student is the

same. The only difference that we can find between the two programs lies in the manner in which they were initiated and perpetuated.

The Abington High School program was designed by the school administration and enforced by it, apparently without student approval, in an attempt to comply with a Pennsylvania statute requiring the daily reading of Bible verses. The Fort Hill program was not the product of a statutory or school board requirement, but was established originally by the voluntary action of the student body. In years following its introduction it was perpetuated by the action of the respective Student Councils, with the consent and approval of the school administration. In these differences there is little ground for distinction.

The activity which the Supreme Court regarded as offensive to the Establishment Clause in *Schempp* is present in the Fort Hill program. The conduct of a religious ceremony in a public school as part of the established curriculum, at a time when student attendance is normally required, is the practice proscribed and it is no less unlawful simply because the State, acting through the school officials, permits it rather than requires it. Cf. *McCullum v. Board of Education*, 333 U. S. 203 (1948).

The constitutional infirmities of the Fort Hill program would not, in our opinion, be rectified by the submission of the same to the student body or their parents each year for approval. It is the State's participation in the program by permitting the ceremony to become a part of the regular school curriculum that renders it invalid, and not the fact that in recent years the program may not have been completely voluntary on the part of all of the students involved.

There are circumstances under which, we think, voluntary student worship in the public schools would be constitutionally permissible. While the First Amendment prescribes governmental neutrality toward religion, it does not necessarily prevent any and all accommodation to it, and in our view the mere use of school facilities by the students

for religious services, on a voluntary basis and without any State participation whatsoever, is in the area of permissible accommodation. As Justice Goldberg said in his concurring opinion in the *Abington Township* case, *supra* :

"The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and non-religion, and that it work deterrence of no religious belief. But devotion even to these simply stated objectives presents no easy course, for the unavoidable accommodations necessary to achieve the maximum enjoyment of each and all of them are often difficult of discernment. There is for me no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.

"It is said, and I agree, that the attitude of the state toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commends, but of a breeding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

"Neither the state nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases

that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation on one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty."

While the line between "participation" and "accommodation" may at times be shadowy and difficult to draw, we think it can be drawn here.

Any truly voluntary program of student prayer carried on upon the school premises which is not a part of the established and required school program, and which is not in any way promoted or supervised by the teachers or the school officials, would be an activity that we would regard as permissible. For example, if the religious part of the present Fort Hill High School program were being conducted at that school on a completely voluntary basis prior to the beginning of the school day, when student attendance was not required, there would have been, in our view, no objection to it on constitutional grounds.

We at present express no opinion as to the constitutionality of other types of exercises which may occur during the school year, in general assemblies or elsewhere, which may have historic, traditional and religious connotations. We would much prefer to render a separate opinion on specific facts presented to us regarding these problems as they may arise.

We also feel, that in order that one should not lose the proper perspective regarding this sensitive area, that it is

well to refer to the words of Dean Erwin N. Griswold of Harvard Law School, who in his penetrating analysis of this question recently said ["Absolute Is In The Dark", February 27, 1963]:

"It is perfectly true, and highly salutary, that the First Amendment forbade Congress to pass any law 'respecting an establishment of religion or prohibiting the free exercise thereof.' These are great provisions, of great sweep and basic importance. But to say that they require that all trace of religion be kept out of any sort of public activity is sheer invention. Our history is full of these traces: chaplains in Congress and in the armed forces; chapels in prisons; 'In God We Trust' on our money; to mention only a few. God is referred to in our national anthem, and in 'America,' and many others of what may be called our national songs. Must all of these things be rigorously extirpated in order to satisfy a constitutional absolutism? What about Sunday? What about Christmas? Must we deny our whole heritage, our culture, the things of spirit and soul which have sustained us in the past and helped to bind us together in times of good and bad?"

In view of what we have said above, it is our opinion that you should instruct the Superintendent of Schools for Allegheny County that the Fort Hill High School program, as presently conducted, should be discontinued.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

ELECTIONS

NOMINATION BY PETITION FOR OFFICE OF MEMBER CITY COUNCIL, BALTIMORE CITY—AT LEAST 500 VOTERS MUST SIGN—PETITION MUST BE FILED AT LEAST FIFTEEN DAYS PRIOR TO DAY OF PRIMARY ELECTION.

January 9, 1963.

*Mrs. Betty M. Silbert, Chairman,
Board of Supervisors of Elections.*

By letter of December 28, you have asked us to advise you as to the required number of signatures needed on a nominating petition for the office of Member of the City Council of Baltimore City; and also the final date on which such a petition may be filed.

Article 33, Section 67, of the Annotated Code of Maryland (1957 Edition, as amended in 1961) is controlling in these circumstances. Subsection (b) of that section says, in pertinent part:

“ . . . Said petition shall be signed by not less than 5,000 voters when the nomination is for an office to be filled by an election participated in by the voters of the entire State; not less than 1,500 when the nomination is for an office to be filled by an election to be participated in by the voters of an entire congressional district and not less than 7,500 when the nomination is for an office to be filled by an election participated in by the voters of the City of Baltimore except that not less than 7,500 is required in case the candidate for nomination has been registered as a declined voter for five (5) years prior to the election; not less than 750 when the nomination is for an office to be filled by an election to be participated in by the voters of Allegany County, Anne Arundel County, Baltimore County, Frederick County, Harford County, Howard County, Montgomery County,

Prince George's County and Washington County;
*and not less than 500 for nominations for all other
 elections. . . .*"

Prior to 1961 this subsection required only 1,500 signatures for nomination for an office to be filled by the voters of Baltimore City, and specifically required not less than 750 signatures for any office to be filled by the voters of any *legislative district* of Baltimore City. (No specific provision for a councilmanic district is made either before or since the 1961 amendment.)

The 1961 amendment increased the number of signatures required for a nominating petition for nomination to an office to be filled by the voters of Baltimore City to 7,500, and eliminated specific reference to legislative districts in Baltimore City. We believe that the law, in its present form, must be read to require not less than 7,500 signatures for nomination to an office participated in by *all* of the voters of the City of Baltimore and that nominations to offices to be filled by voters of any one councilmanic or legislative district fall within the designation of "all other elections," for which 500 signatures are required.

It is, therefore, our opinion that at least 500 signatures are required on a nominating petition for the office of Member of the City Council of Baltimore. This requirement, we might add, applies to a nominee who is registered as a member of a political party, as well as a nominee who is a "declined" or "independent" voter.

Your second question asks us the final date by which such a nominating petition may validly be filed.

The final sentence of subsection (b) of Section 67 states:

"The petition for nomination shall be filed at least fifteen days prior to the date set by law for the primary election."

The date of the primary election is March 5, 1963. We have computed the fifteen-day period in accordance with Article 94 of the Annotated Code of Maryland (1957

Edition) and in accordance with the decision of the Court of Appeals in the case of *Pumphrey v. Stockett*, 187 Md. 318, and you are therefore advised that the final date for filing a nomination by petition is Monday, the 18th day of February, 1963.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ELECTIONS—BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY—ARRANGEMENT OF PRIMARY ELECTION BALLOT FOR AUTOMATIC VOTING MACHINES.

January 11, 1963.

*Mrs. Betty M. Silbert, President,
Board of Supervisors of Elections
of Baltimore City.*

This will acknowledge receipt of your letter of January 8, 1963, in which you have forwarded to this office a sample of the March 5th Mayoralty primary ballot. You ask us to advise you whether or not Section 94(c) of Article 33 of the Maryland Code (1957 Edition) relating to the form and arrangement of ballots is applicable in this instance. In your letter you state that in determining the location of the various candidates on the ballot you have been governed by the following three rules:

- (1) Candidates' names are listed alphabetically
- (2) All vertical columns are made as even as possible
- (3) All columns are made as short as possible

Your letter points out, in essence, that irrespective of what arrangement is made with respect to the arrangement of the various candidates' names on the ballot some candidates will feel that they are at a disadvantage and that you have followed the three rules set forth above in an effort to be fair to all concerned.

The sample ballot which you have forwarded to this office pertains to a "forty candidate" type machine manufactured by the Automatic Voting Machine Corporation. We understand that this type machine is in general use throughout the City of Baltimore. This ballot contains nine rows (designated lines A through I) running horizontally across the ballot with 40 columns (designated 1 through 40) running vertically, thus providing places for the insertion of the names of 360 candidates.

The space across the top of the ballot lists the various offices to which the candidates seek nomination while the left side provides space for designating the political party with which the candidates in any given row are associated. The sample ballot allocates rows A, B, and C to the candidates running in the Democratic Primary; row D is left blank; row E is devoted to listing the various offices which the Republican candidates are seeking; row F is devoted to the candidates running in the Republican Primary; and rows G, H, and I are left blank.

Attached hereto and marked as Exhibit A is a photocopy of your sample ballot which you sent me, showing the locations of the names of the various candidates seeking nomination and the offices to which they aspire.

We understand that the location of the candidates for the offices of Mayor, President of the City Council, and Comptroller will remain the same on the sample ballots for the other five councilmanic districts within the city; however, there will be some variations in the number of spaces occupied by the candidates for the City Council from the various districts since presumably there will be variations from district to district in the number of aspirants thereto.

Voting machines have been in general use in Baltimore City since prior to the advent of World War II. The cases of *Norris v. Mayor and City Council*, 172 Md. 667 (1937) and *Jackson v. Norris*, 173 Md. 579 (1938), which give the history of the use of voting machines in Baltimore City, indicate that voting machines were used on an experimental basis for a number of years prior to the enactment of Chapter 94 of the Acts of 1937 which made mandatory the use of voting machines in all elections in Baltimore City after January 1, 1938. We understand that for some years voting machines have been in general use throughout the State and that in all but a very few of the counties the Automatic Voting Machine Corporation's product is the machine in use.

We also understand that the mechanism contained within the Automatic Voting Machine is so designed that the

names of the various offices to which the candidates seek nomination could be placed in the area to the left of the candidates' names, with the candidates listed horizontally across the machine rather than in the vertical fashion which is now employed. However, we further understand that such a horizontal arrangement has never been used in Baltimore City and that it could be utilized only in situations where a very few offices were the subject of the election since there are only 9 horizontal rows as opposed to the 40 vertical columns. An entire horizontal row would be devoted to one office while theoretically each of the 40 vertical columns could be the subject of a different office. Thus, listing the candidates in a vertical fashion provides greater flexibility in the machine's use in elections where a substantial number of offices are at stake.

The significant portion of the Maryland law relating to the form to be utilized in composing the ballots to be used in voting machines is set forth in Sections 94 and 122 of Article 33 of the Maryland Code (1957 Edition). These sections were enacted in 1957 as a part of Chapter 739 of the Acts of 1957 which was a comprehensive revision of the entire election law. Section 122(a) provides as follows with respect to the ballot labels to be used in voting machines:

“§ 122. Ballot labels.

“(a) *Requirements.*—The form and arrangement of ballot labels shall be in accordance with the provisions as to ballots contained in § 94 of this article except that: . . .”

The Section 94 referred to in § 122(a) relates to the form to be used in the printing of paper ballots. Subsections (b) through (l) of Section 122 indicate that the reference to Section 94 is applicable to both primary and general elections and lists a number of exceptions to the form therein prescribed. The most pertinent of these exceptions are as follows: (1) that in primary elections the ballot labels may be printed on paper of different colors (to differentiate the political parties), (2) that the titles to the offices may be

arranged either horizontally or vertically, with the names of the candidates arranged longitudinally under, or transversely opposite, the title, and (3) that in primary elections the ballot labels containing the names of candidates seeking nomination by a particular party shall be segregated on the face of the machine in adjacent rows or columns, by parties.

Section 94, relating to the form of ballots, contains 9 subsections (a through i). However, only subsection (c), which is quoted in part below, is pertinent to the instant inquiry. The relevant portion of subsection (c) is as follows:

“(c) *Columnar listing*.—All candidates for office shall as far as possible be placed in one column; but when the names to be printed upon the ticket are over thirty-six, another column may be added in which names shall be printed. When two or more columns are used the same number of names, so far as possible, shall be printed in each column * * *”.

An analysis of this subsection shows that three considerations are involved in determining the candidate's position on the ballot:

(1) All candidates shall, as far as possible, be placed in one column

(2) That when the column reaches 36 names another column may be added

(3) That when two or more columns are used, each column, so far as possible, shall contain an equal number of names

In attempting to apply these three considerations to the sample ballot with which we are here concerned, several problems arise. The first such problem is to determine the length of the vertical columns, i.e., the number of horizontal rows to which each political party is entitled. In the instant primary election only two political parties have offered candidates for nomination under the primary election law.

Subsection (c) of Section 122 requires that the candidates affiliated with these two parties be kept segregated.

We are of the opinion that irrespective of what allocation is made between the two political parties that eight of the nine horizontal rows must be devoted to this purpose and, therefore, that only one row should be utilized to divide the two parties. On the sample ballot which you forwarded to me two rows are used for this purpose. One is designated as simply a blank divider slip (Row D) whereas Row E is utilized to carry the designations of the offices to which the candidates seek nomination. We have examined the specimen ballots which have been used in all of the Mayoralty primary elections from 1939 to date (with the exception of the primary election occurring in 1947 for which the sample ballot is not available) and find that in none of these Mayoralty elections have two lines been devoted to separation of the political parties. In view of the past practice of your office in not employing a two-line divider strip, which practice was in effect in 1957 at the time the election laws were revised, we do not believe that you would be justified in using more than one of the nine horizontal rows for this purpose. It is unlikely that the elimination of this dividing strip would cause confusion since the candidates from each party will be designated by different colored ballot labels as required by Section 122(b), and the locking mechanism contained within the machine would prevent a Republican voter from voting in the Democratic Primary and vice versa.

In determining the number of horizontal rows to be allocated to each political party, reference must be made to the requirements that candidates' names be listed as far as possible in one column. This requirement, in our opinion, eliminates the possibility of making an even distribution in the instant situation of four horizontal rows each to the two parties. Since the office of Mayor is the first office to be listed on the ballot, it should be the primary factor in determining the number of rows to be allocated to each political party with the limitation that in the event the candidates for nomination for Mayor of both political parties exceed

in the aggregate eight in number then in the interests of an equitable division on the ballot, when possible each party should be entitled to four rows with one row to be used as a dividing strip. Applying the single column requirement to the candidates for nomination for the office of Mayor for each political party, it appears that the three Republican candidates may be listed one below the other, and thus in one column, if they are located in positions 1G, 1H, and 1I on the ballot.

In line with this reasoning, Rows A, B, C, D, and E should be devoted to the candidates for the nomination in the Democratic Primary, Row F should be used as a dividing strip and should carry the designation for the offices to which the candidates seek nomination, and Rows G, H, and I should be utilized by the candidates seeking nomination in the Republican Primary.

The next problem which arises is to reconcile the provisions of Section 94(c) which require that the candidates as far as possible be placed in one column, and the requirement that when the column reaches 36 names, another column may be added. It is apparent that the prohibition against adding a second column until such time as the number of candidates in the first column exceeds 36 cannot reasonably be applied to an automatic voting machine of the type used within the City of Baltimore. Although it is theoretically possible to comply with this provision if all candidates for one office were to be placed longitudinally across the machine, rather than in vertical columns, we would not consider this alternative to have been contemplated by the Legislature at the time of the passage of the revised election law in 1957 in view of the long-standing practice in Baltimore City to place the candidates in vertical columns rather than horizontal rows. To require the candidates to be placed in horizontal rows in the instant election might give rise to confusion among the voting public who are used to voting on machines where, by long practice, the candidates have been listed vertically.

Since three rows have been allocated to the Republican Primary, all of the Republican candidates for Mayor may be placed in a column three lines in length. Because there are more than five candidates for the nomination to the office of Mayor in the Democratic Primary, of necessity more than one column must be used, in spite of the provision of Section 94(c) requiring a 36-name column before a second column is begun. This requirement must be modified in the instant situation with respect to the Democratic party to permit the addition of another column when the column exceeds five candidates.

The fact that the 36-name requirement which is contained within Section 94(c) of Article 33 cannot be complied with does not mean that that section must be discarded in its entirety. The courts on many occasions have stated that where a part of a statute is invalid or inapplicable and is severable from the rest, the portion which is valid may stand if capable of being given legal effect. See *McKeldin v. Steedman*, 203 Md. 89 (1953), and *Bell v. Prince George's County*, 195 Md. 21 (1950), 12 M.L.E. *Statutes* 12. Such a result is achieved if the 36-name requirement of Section 94(c) is modified by interpreting it as permitting the addition of a second column when all spaces reasonably available in the first column have been taken.

It is, therefore, the opinion of this office that when the candidates seeking nominations to the various offices in the Democratic party are five or less in number, they are to be arranged in vertical columns one beneath the other. Thus, the four candidates running for the office of Comptroller in the Democratic Primary are to be placed one beneath the other on Lines A, B, C, and D. By the same token where the candidates for nomination for offices in the Republican Primary are three or less in number, they are to be arranged in vertical columns one below the other. Thus, the three candidates for Mayor in the Republican Primary are to be placed one below the other on Lines G, H, and I, and the two candidates for President of the City Council in the Republican Primary, are to be placed one below the other on Lines G and H.

The third problem which is presented by the instant sample ballot is to determine what is meant by the requirement that, when two or more columns are used, each column so far as possible shall contain an equal number of names. This requirement must be interpreted in the context of the other provisions contained within Section 94(c) which carry the requirement that the candidates so far as possible be placed in one column. The essence of this problem is to determine whether or not the law requires that the second column be completely filled before a third column is started, or whether once a second column becomes necessary as many additional columns may then be used irrespective of whether they are filled or not, i.e., whether the requirement relating to equality of columns overrides the legislative design that as few columns as possible be used. Unfortunately, Section 94(c) does not explicitly deal with this problem since this section contemplates columns of at least 36 candidates in length.

Implicit within Section 94 (c), however, is a legislative intent that as few columns as possible be used. This intent is evidenced by the requirement that a second column cannot be started until the first column is 36 names long. Had the Legislature felt that the addition of a 37th name would open the door to the use of an unlimited number of columns, some legislative regulation would have undoubtedly been provided since the only way 37 names may be placed in columns of equivalent length is to have 37 columns, each with a single name—a situation which would create a ballot of unwieldy size. In view of this and in view of the recognition in the requirement with respect to equality of columns that these columns may not always be of absolutely equal length, we are of the opinion that no names for a single office may be placed in a single column until the number of candidates of that office exceed the number of spaces available in the existing column or columns. Thus, with respect to the candidates seeking nomination for the office of Mayor in the Democratic Primary, it is our opinion that of the nine candidates five should be placed in the first column and four

in the second, each column to run vertically and the names to be placed in alphabetical order.

With respect to the candidates for nomination to the office of President of the City Council in the Democratic Primary, since there are more than five candidates for this office they must be placed in two adjacent columns. Except for the requirement relating to equality of columns, these candidates would be placed five in one column and two in the next; however, in view of this requirement, the candidates should be placed four in the first column and three in the second, each column to run vertically and the names to be placed in alphabetical order.

As previously indicated, the four candidates seeking nomination to the office of Comptroller in the Democratic Primary should be placed one below the other in alphabetical order, in a single column.

With respect to the candidates seeking nomination to the office of Member of the City Council from the Third District in the Democratic Primary, they are 39 in number and, therefore, these candidates should occupy eight vertical columns with five candidates each in the first through seventh columns and with four candidates in the eighth column, the names to be in alphabetical order.

As previously indicated, the three candidates seeking nomination for the office of Mayor in the Republican Primary should be placed one below the other in a single column in alphabetical order, and the two candidates seeking nomination to the office of President of the City Council should be placed one below the other in alphabetical order.

With respect to the candidates seeking nomination to Member of the City Council in the Republican Primary, since they are more than three in number, a second column is authorized and these candidates should be arranged with three in one column and two in an adjoining column in alphabetical order.

THOMAS B. FINAN, *Attorney General.*

RUSSELL R. RENO, JR., *Asst. Attorney General.*

ELECTIONS—SECRETARY OF STATE—REFERENDUM PETITIONS
 —WHERE FINANCIAL STATEMENT REQUIRED BY THE
 PROVISIONS OF ARTICLE 33, §169C (A) IS NOT AT-
 TACHED TO REFERENDUM PETITIONS FILED PRIOR TO
 JUNE 1ST, SUCH PETITIONS MUST BE TREATED AS IN-
 VALID. THE FACT THAT SUCH STATEMENT DOES AC-
 COMPANY REFERENDUM PETITIONS LATER FILED, DOES
 NOT CURE THE ORIGINAL DEFECT. SUCH FINANCIAL
 STATEMENT, UNDER THE STATUTE, IS REQUIRED TO BE
 FILED WITH EVERY PETITION OR PORTION OF A PETI-
 TION DEPOSITED WITH THE SECRETARY OF STATE.

June 5, 1963.

The Honorable Lloyd L. Simpkins,
Secretary of State.

By hand delivered letter you have asked us to advise you concerning your duties in regard to a referendum petition that has been submitted to you to refer Chapter 365 of the Acts of 1963.

You advise us that at the time the petition attempting to refer this Act was filed with your office no certified statement was filed giving the name and address of the contributors to the expenses of the petition as required by Article 33, §169C (a).

You ask us to advise you as to what action you should take relative to this referendum petition. You further advise us that it is your feeling that this petition is invalid, for want of the required certification, and that you should not accept it.

This appears to be the first matter to arise involving the validity of a referendum petition since the decision of the Court of Appeals in the case of *First Continental Savings and Loan Association, Inc. v. Director*, 229 Md. 293; and we feel that we should call to your attention the language of the Court at page 301, wherein the Court comments on the opinion of the Attorney General in such matters as follows:

“The views of the Attorney General as to compliance with the requirements of Article XVI are advisory only and cannot operate to terminate the suspension of a referred law any more than his opinion that a law is unconstitutional make that law inoperative. Only a court has the power to declare a statute invalid because it does not comply with constitutional requirements, and only a court can effectively hold that an attempted referral is fatally faulty.”

The language of the Court in that case, however, does not restrict your authority as the Secretary of State to determine whether or not the referendum petitions filed with you comply on their face with all constitutional and statutory requirements thereto relating, including §169C of Article 33 of the Maryland Code. See *Tawney v. Supervisors*, 198 Md. 120.

Nor does the language of the Court in that case alter the constitutional duty of the Attorney General to advise you as to legal questions that arise in connection with the duties of your office.

As you note in your letter §169C (a) requires statement of contributions and expenditures. Section 169C (a) was added to our election law by Chapter 43 of the Acts of 1962. This section provides, in its entirety:

“Filing and certification—At the time of filing with the Secretary of State a petition (including an associated or related set of petitions) under the provisions of Article XVI of the Constitution, the person, persons, association, or corporation which files the petition shall file with it a statement showing the contributions and expenditures for the petition. This shall be certified by the person, persons, association, or corporation which files the petition, giving (1) the name and post-office address of every contributor to the expense of the petition, and the amount paid by each; and (2)

the name and post-office address of every person to whom, and for what service, any money was paid or promised on account of the petition or which is owed to be paid."

Subsection (b) of §169C is of major importance on the issue you present, and that section, in its entirety, states:

"Effect of failure to file—If such a certified statement is not filed with the petition, the Secretary of State shall treat the petition as invalid and shall not certify the question of the referendum to the several Boards of Supervisors of Election."

We believe that your question concerning your duties in this matter is categorically answered by the provisions of §169C (b). We can come to no other conclusion than that this section is a clear, specific, legislative prohibition restraining you from treating any petition as valid if the required certified statement as to expenses is not attached thereto.

We also believe it to be the clear legislative intent that this section shall apply equally to a referendum petition filed in its entirety prior to the 1st day of June, as well as to referendum petitions wherein not less than one-half of the required signatures were filed with you by the 1st day of June as permitted by Article XVI, §3B of the Constitution of Maryland. We believe that this is manifest by the provisions of §169C (a) itself, wherein it is stated that a petition shall include "an associated or related set of petitions." We can see no other intent on the part of the Legislature in including that language than to require that with every petition or portion of a petition filed with you a financial statement listing expenses and contributors to the date of filing must simultaneously be filed.

We believe that such a requirement is a reasonable one, since if the financial statement was not required to accompany the initial group of petitions, and the sponsors of the referendum petition thereafter abandoned their referendum

efforts, no financial statement would therefore ever be filed, although the initial acceptance of the petition by the Secretary of State would have suspended the operation of the law for a thirty day period.

You are therefore advised that we concur in your conclusion that you must abide by the provisions of the statute and treat the petition as invalid because of the failure of the sponsors to file with you the required financial statement. In view of the strict and concise language of §169C (b) we see no discretion vested in you in this matter.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ELECTIONS—REFERENDUM—CRITERIA TO BE APPLIED TO DETERMINE IF SIGNATURE ON REFERENDUM PETITION IS VALID ON ITS FACE—STATUTORY PROVISIONS RELATING TO REFERENDUM PETITIONS ARE MANDATORY AND OMISSION OF REQUIRED DATA RENDERS SIGNATURE INVALID.

NOTARY PUBLIC MUST AFFIX SEAL OR THE AFFIDAVIT IS A NULLITY—OMISSION OF DATE ON WHICH ACKNOWLEDGEMENT MADE DOES NOT INVALIDATE AFFIDAVIT.

June 13, 1963.

*The Honorable Lloyd L. Simpkins,
Secretary of State.*

By hand delivered letter of June 12, 1963, you have advised us that your office has conducted a count of the signatures on a petition submitted to you for the purpose of referring Chapter 227 of the Acts of 1963 to the electorate, at the November, 1964, election. You advise us that your count of such signatures on that petition discloses that an insufficient number of valid signatures have been filed with you to effectively suspend the law and refer this measure.

You advise us that your interpretation of your constitutional duty is that you may count only those signatures which appear to you to be valid on their face. We believe this is a correct statement of the duties of the Secretary of State in this situation. See *Tawney v. Supervisors*, 198 Md. 120.

You ask our opinion concerning the criteria which you have applied to determine whether or not a signature is valid on its face. Those criteria are:

1. The petitioner must have signed his name.
2. The petitioner must have printed or typed his name below his signature.

3. The petitioner must have indicated his place of residence.
4. The petitioner must have indicated his voting district or precinct.
5. The petitioner must have noted the county, (or Baltimore City) in which he voted.
6. Each paper constituting a part of the petition must bear the text of the law attempted to be referred.
7. Each paper constituting a portion of the petition must contain a valid affidavit of the circulator of the petition, stating that all signatures thereon are genuine and bona fide.

We find no constitutional or statutory provision that each signer must indicate with his signature the county, or Baltimore City, *in which he voted*. The omission of this information pertaining to the political subdivision in which a signator *voted*, therefore, would not render any signature invalid on its face. We believe, however, that the statutory requirement of Section 169 of Article 33 that each petitioner must indicate his place of residence requires that the county or city in which such signator *resides* be included as an integral part of his residence address. If the name of the political subdivision in which a signator resides is not included, it cannot be ascertained if more than one-half of the signers of a referendum petition reside in any one county, and thus it will not be possible for a determination to be made as to whether or not the provisions of Section 3 (a) of Article XVI of the Constitution have been complied with.

It is our opinion, however, that if the political subdivision in which the signator resides is not affixed to his signature, but that there is on the affidavit required to be affixed to every paper a statement that all of the signators thereon are residents of a named political subdivision, such language in the affidavit would serve to correct the omission of the county of residence adjoining the name of the signer.

Regarding the required affidavit, you have advised us that you have discounted the names contained on one paper because the affidavit does not bear the date on which it was made. We are not aware of any constitutional or statutory provision requiring that such an affidavit contain the date on which it was made and it is our opinion that names contained on that paper are not invalid on their face. Obviously, signatures contained on a paper to which no affidavit is affixed may not be counted (*Tyler v. Secretary of State*, 229 Md. 397); and affidavits which fail to include the name of the person furnishing the information to the notary public do not comply with Section 4 of Article XVI of the State Constitution, and the names contained on such papers are invalid on their face and may not be counted.

This office has previously determined that an affidavit which does not contain the seal of the notary public is invalid (26 Opinions of the Attorney General 279) and you are correct in assuming that signatures attached to such papers are invalid on their face. We call to your attention, however, the fact that justices of the peace in this State and certain judicial officers may make a valid acknowledgement in the same manner as a notary public, and no seal is required for a valid affidavit from such officer.

With the exceptions mentioned above, it is our opinion that the criteria you have applied in determining whether or not a signature is valid on its face are correct. See the opinion of the Honorable Ferdinand C. Sybert, Attorney General, at 42 Opinions of the Attorney General 179 and the opinion of the Honorable John T. Tucker in the case of *Reddick v. Secretary of State*, Baltimore City Court, 1958, which opinion is set out in full in the appendix to Volume 42 of the Opinions of the Attorney General at page 495.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ELECTIONS—REFERENDUM—SIGNATURES ON A REFERENDUM PETITION MAY NOT BE WITHDRAWN BY SIGNATOR AFTER PETITION SUBMITTED TO SECRETARY OF STATE—CODE REQUIREMENT AS TO ADDRESS OF SIGNATOR REFERS TO RESIDENCE ADDRESS—IN CERTAIN INSTANCES, THERE MAY BE A VALID DISCREPANCY BETWEEN RESIDENCE.

June 24, 1963.

*The Honorable Joseph W. Alton, Jr.,
State Senator from
Anne Arundel County.*

This will confirm our conversation by telephone of June 18, 1963, in which we responded to your request of June 17th. In your letter you asked the procedure by which signers of a referendum petition might notify the Secretary of State of their intention to withdraw their names from a referendum petition.

The Maryland Court of Appeals in the case of *Sterling v. Jones*, 87 Md. 141 has held that signatures signed to a nominating petition cannot be withdrawn so as to make that petition invalid, after the paper containing the signatures has been presented in due form. We believe it manifest that this same logic applies to signatures to a referendum petition and it is our opinion that a valid signature once submitted may not be withdrawn.

You also ask us what constitutes a valid address on a referendum petition, and if a voter has changed residence but has not changed his residence address on the voting records, if this constitutes an invalid signature.

The requirements as to an address are contained in Section 169 of Article 33, Annotated Code of Maryland (1957 Edition), which states in pertinent part:

“In every petition * * * under the provisions of Article XVI of the State Constitution, there shall be appended to the signature of each signer his residence, the precinct or district wherein he is registered as a voter, * * *”

Please be advised that it is our opinion that the requirements as to the residence are fulfilled as to a public local law, if the street address at which the signator resides at the time of signing the referendum petition is annexed with his name, as well as the precinct or district wherein he is registered as a voter. We point out that there may be a valid discrepancy between the residence at the time of signing and the residence listed on the records of the Board of Supervisors of Elections, as a voter is entitled to vote at a prior address until such time as he has qualified as a voter at a new address, under the provisions of Section 1 of Article I of the Constitution of Maryland.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ELECTIONS—MEMBERS OF THE ARMED FORCES—NAMES MAY NOT BE REMOVED FROM REGISTRATION RECORDS, EVEN IF MEMBER OF THE ARMED FORCES HAS REMOVED HIMSELF FROM THE COUNTY, UNLESS THE REGISTRANT HAS NOT VOTED AT LEAST ONCE WITHIN THE PERIOD OF FIVE CALENDAR YEARS. EVEN WHERE THE NAME OF SUCH A MEMBER OF THE ARMED FORCES IS REMOVED FROM THE REGISTRATION RECORDS, THAT INDIVIDUAL MAY RE-REGISTER, AS WELL AS VOTE, BY ABSENTEE BALLOT UNDER THE PROVISIONS OF THE CODE.

September 6, 1963.

*Honorable W. R. Williams, President,
Supervisors of Elections
of Harford County.*

We have your letter of July 31st in which you ask certain questions pertaining to the election laws of this State. Although the counsel to your board, and not the Attorney General, is the legal advisor to you, we are pleased to offer our comments on the question that you have presented.

You have asked us if you may remove from your lists of registered voters the names of certain members of the armed forces who no longer reside at the address from which they registered.

You advise us that certified letters sent to such individuals are returned to you marked "moved left no address" or "unknown." You further advise us that several such letters were also marked "authorized time for forwarding has expired" which notation according to postal authorities means that the registrant has been removed from the address in question for more than two years.

You are understandably anxious to remove from your registration records the names of persons no longer authorized to vote in your county and you ask our opinion if the names of individuals such as those discussed above may be removed from the registration records.

Please be advised that it is the opinion of this office that you are not authorized to remove from the registration records the names of members of the armed forces under the circumstances outlined above. Under our absentee voting provisions a member of the armed forces of the United States formerly a resident of Maryland, and absent from the State while engaged in the military or naval service of the United States is nonetheless entitled to vote under the servicemen's absentee voting provisions of Sections 242 et al. of Article 33 of the Code. Such persons therefore are, in our opinion, within the scope of Section 33(f) of Article 33 and their names should not be erased from the registration records. We also believe that the opinion of the Court of Appeals of Maryland in the case of *Jones v. Skinner*, 87 Md. 560 is of interest on the question you present. In that case the Maryland Court of Appeals held that a person who once lived in a ward is entitled to register and vote there until residence is established elsewhere. We believe that language to be particularly applicable to members of the armed services.

We call to your attention the provisions of Section 45(a) of Article 33 which provides that if a registered voter in any county has not voted at least once within five calendar years, it shall be the duty of the Board of Election Supervisors to cancel the registration of such voter. We believe that under the terms of this section you are entitled to remove the name of a voter, even if that voter is a member of the armed forces. Our thinking in this regard is buttressed by the fact that a member of the armed forces may, in this State, register or re-register as well as vote by absentee ballot under the provisions of Section 242 as mentioned above.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ELECTIONS—LOSS OF FRANCHISE—PERSON CONVICTED OF A FELONY IN A FEDERAL COURT IS DISBARRED FROM VOTING IN THIS STATE—SUCH A PERSON, UNLESS PARDONED, IS GUILTY OF A FELONY IF HE EVER THEREAFTER VOTES OR OFFERS TO VOTE IN ANY ELECTION IN MARYLAND.

September 17, 1963.

*Hon. Arthur A. Marshall, Jr.,
State's Attorney for
Prince George's County.*

By recent letter you have asked us to answer certain questions pertaining to Section 186 of Article 33 of the Annotated Code of Maryland. That article provides in pertinent part that "any person who shall have been convicted of bribery, a felony or other infamous crime, under the laws of this or any other state . . ." shall be guilty of a felony if he ever thereafter shall vote or offer to vote in any general, special or primary election in this State.

You advise us that an individual in your county was convicted of a violation of Section 1 of the Harrison Narcotics Act on January 14, 1931, and also on that same date convicted of violations of Sections 1 and 2 of the Jones-Miller Import and Export Act.

You ask us whether or not such a person, if unpardoned, is eligible to vote in this State.

Please be advised that it is the opinion of this office that such a conviction in a federal court is within the meaning of the phrase "under the laws of this or any other state." In 1957, Attorney General C. Ferdinand Sybert, in an opinion reported in 42 Opinions of the Attorney General 189, held that convictions in the federal courts were within the meaning of the words "any other state," as used in Section 186. In that opinion, Attorney General Sybert said that it would hardly have been reasonable for the Legislature to have intended that a person convicted of a felony under federal law would be permitted to vote in Maryland,

while a person convicted of a felony under the laws of a distant state would have that right, particularly since the right to vote in Maryland includes the right to vote for candidates for federal as well as for state office. We concur in that opinion and believe that it correctly states the law of this State.

You next ask us whether or not a conviction of some thirty-two years ago is in any way a bar to your proceeding against the individual in question. We see no bar to prosecution for violation of Section 186 arising from the length of time that has elapsed since the conviction of the crime in question.

We next come to the question of whether or not convictions under the Harrison Narcotics Act and the Jones-Miller Import and Export Act were infamous crimes or felonies under the laws of the United States. The test, of course, is not whether such crimes are now considered to be felonies, but whether or not they were in fact felonious or infamous at the time of the defendant's conviction.

Violations of the Harrison Narcotics Act are punishable by a term not to exceed five years imprisonment. Violations of the Jones-Miller Import and Export Act are punishable by terms not to exceed ten years imprisonment. On December 16, 1930 the Congress enacted 46 Stat. 1029, providing that all offenses punishable by death or by imprisonment for more than one year shall be deemed felonies. It is obvious, therefore, that the crimes of which the defendant in the instant case was convicted were at that time and are now felonious under federal law.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

EMPLOYMENT SECURITY, DEPT. OF

EMPLOYMENT SECURITY—REPAYMENT OF BENEFITS PAID BY VIRTUE OF PROVISIONS OF TEMPORARY UNEMPLOYMENT COMPENSATION ACT OF 1958—AUTHORITY OF EXECUTIVE DIRECTOR TO MAKE SUCH REPAYMENT FROM UNEMPLOYMENT INSURANCE FUND.

October 31, 1963.

*Mr. Stephen C. Cromwell, Executive Director,
Department of Employment Security.*

We have your letter of October 17, 1963, requesting our opinion respecting permissible methods of repaying to the Federal Government certain funds advanced by the United States for the payment of temporary unemployment compensation benefits, pursuant to the provisions of the Temporary Unemployment Compensation Act of 1958 (72 Stat. 171, Public Rule 85-441, 42 U.S.C.A., Sec. 1400, *et seq.*).

The history of the tax structure supporting the unemployment insurance program is exceedingly complex and a brief review thereof is deemed essential to a full consideration of the questions which you have raised.

In 1935, the Federal Congress enacted the Social Security Act, providing therein for a 3% payroll tax to be paid to the United States by employers of eight or more individuals. The Act provided that in those states enacting and maintaining Federally-certified unemployment insurance programs, employers therein paying state unemployment insurance contributions (taxes) would enjoy an offset of 2.7% against the Federal unemployment tax. The Federal Government, by virtue of this device, thus encouraged all states to pass laws providing unemployment insurance protection for workers and to conform those laws with Federal standards, so that the tax offset might be enjoyed.

Since the time of the original enactment, there have been many changes in the taxes and coverage provisions of both the state and Federal laws. Presently, the Federal unem-

ployment tax is payable by employers of four or more persons, and the state unemployment insurance contribution is paid by employers of one or more persons. The total Federal unemployment tax at the present time has been increased from the original 3% to 3.5%. Employers in this State still enjoy a 2.7% offset against that tax because the Maryland Act (Article 95A, Maryland Code) is accredited and certified by the Secretary of Labor. All Maryland employers, therefore, pay unemployment insurance taxes to the State, which may vary at the present time from 1.6% to 4.2%, depending upon the experience of the individual employer. Maryland employers of four or more persons pay, in addition thereto, a Federal unemployment tax of .65%, the difference between the 2.7% offset and 3.35% Federal tax total.

As an outgrowth of a period of economic decline occurring in 1958, the Federal Congress enacted the Temporary Unemployment Compensation Act of 1958, pursuant to which the United States advanced moneys with which states entering into an agreement with the Federal Government could pay extended benefits to eligible individuals for an additional thirteen weeks, thus extending the twenty-six week benefit period provided in the laws of many states to thirty-nine weeks. One of the provisions of the Temporary Unemployment Compensation Act of 1958 was that the funds advanced for the payment of such benefits would have to be repaid.

The State of Maryland participated in this program and received from the United States advances in the amount of \$12,043,817, which it paid out to eligible claimants in the form of temporary unemployment compensation during the effective period of the Act. By the provisions of the Act, the State had the option of repaying the moneys so advanced in a lump sum, on or before November 10, 1963, failing which payment, the Federal Government would recover the sum by reducing the tax offset enjoyed by Maryland employers by .15% for the year 1963, and by larger amounts during subsequent years, until the money is fully recovered.

By reason of Section 10 of Article 95A (Unemployment Insurance Law) of the Maryland Code (1957 Ed.), the moneys in the Maryland "Unemployment Insurance Fund" are expendable only for payment of benefits and the making of refunds. Because of this limitation, it was believed that special statutory authority would be required in order for the Department of Employment Security to repay from this Fund the moneys advanced under the provisions of the Temporary Unemployment Compensation Act of 1958. Chapter 206 of the Acts of 1963 (not codified) was, therefore, enacted by the Maryland Legislature, effective June 1, 1963, providing, in pertinent part, as follows:

"(a) The Executive Director of the Department of Employment Security is hereby authorized to requisition from the moneys credited to the account of the State of Maryland in the Unemployment Trust Fund, established and maintained pursuant to Section 904 of the Federal Social Security Act, as amended, (49 Stat. 640; 52 Stat. 1104, 1105; 42 USC. 1104) and to pay into the Treasury of the United States a sum not to exceed \$12,043,817 as the repayment of the total benefit payment of temporary unemployment compensation made pursuant to Section 101 of the Temporary Unemployment Compensation Act of 1958, as amended, to individuals who exhausted their benefit rights under the Maryland Unemployment Insurance Law; provided that the repayment is made on or before the 10th day of November 1963."

It is, of course, entirely clear from the quoted provision that the moneys owing to the United States may be repaid out of the Maryland Unemployment Insurance Fund (referred to in Chapter 206 as the "Unemployment Trust Fund"), so long as such repayment is made on or before November 10, 1963; and that if such repayment is made, it would have the beneficial effect of preventing a reduction of the tax offset and of securing the benefit thereof to Maryland taxpayers.

You now advise us that two identical bills are pending in the Congress of the United States which, if enacted, would permit the states to make the required repayment out of the Unemployment Insurance Fund (Trust Fund) in five installments, rather than in one lump sum. Under these bills, the first installment is to equal the sum which would have been raised by a reduction of the tax offset in the amount of .15% in Maryland. This amounts to \$3,041,000. Taking advantage of this opportunity to repay the moneys in installments would give the result of earning interest at the going rate on the unpaid balance for that period of time when the moneys are retained in the Trust Fund. You estimate that in the first year (1964) the balance remaining unpaid would earn for the Fund approximately \$270,000.

Against this background, you ask whether you have the authority under the provisions of Chapter 206 of the Acts of 1963 to repay only part of the \$12,043,817 debt on or before November 10, 1963. You also ask whether, if such partial payment is permissible and is made, will it then be necessary to enact further legislation at the forthcoming session of the General Assembly to authorize the Executive Director to pay from the Unemployment Trust Fund, after November 10, 1963, the balance of the debt owing to the United States in successive annual payments?

Irrespective of whether the pending Federal legislation is or is not enacted prior to November 10, 1963, it is our view that you, as Executive Director of the Department of Employment Security, are authorized by the said Chapter 206 of the Acts of 1963: (a) to pay from the Unemployment Insurance Fund (Unemployment Trust Fund) the full amount of \$12,043,817 on or before November 10, 1963, or (b) to pay a sum less than the full amount due and owing on or before November 10, 1963, or (c) to pay no part of the amount due from the Fund prior to the critical date of November 10, 1963. In the event, however, that a sum less than the full amount of \$12,043,817 is paid, then the balance due and owing cannot, in the absence of further enabling legislation, be paid from the Unemployment Insur-

ance Fund (Trust Fund), since the only payment from that Fund authorized to be made under Chapter 206 must be made prior to November 10, 1963. It would be necessary, as heretofore indicated, that the Legislature authorize by new legislation further payments from the Unemployment Insurance Fund (Trust Fund) after November 10, 1963; otherwise, should you pay a lesser sum than the full sum due and owing on or before November 10, 1963, and the Maryland Legislature does not enact such further enabling legislation, as herein described, the effect will be an increase (by reducing the tax offset) in the Federal unemployment taxes paid by Maryland employers in the years 1964, 1965 and 1966. Should you pay less than the full sum due and owing prior to November 10, 1963, and the Legislature does authorize further payments to be made from the Unemployment Insurance Fund (Trust Fund) after November 10, 1963, and the pending Federal legislation herein referred to is in fact enacted, then the effect will be no increase in the Federal unemployment taxes to be paid by Maryland employers by reason of the Temporary Unemployment Compensation Act of 1958; and, further, the Fund will earn interest on the moneys retained therein, the amount of which you estimate (at 3%) as \$270,000 in the year 1964. The ultimate decision is, of course, an administrative one, and we are sure you will be guided largely by whether the pending Federal legislation is enacted prior to November 10, 1963.

While you have not asked for our opinion concerning subsection (b) of Chapter 206 of the Acts of 1963, relating to the repayment of administrative funds advanced out of the Special Administrative Expense Fund (Section 14(c) of Article 95A of the Maryland Code), nevertheless, we advise you that it is our view that the reasoning herein set forth relative to repayment of the benefit amounts under subsection (a) of said Act applies alike to the repayment of such administrative funds from the said Special Administrative Expense Fund.

ROBERT C. MURPHY, *Deputy Attorney General.*

BERNARD S. MELNICOVE, *Spec. Asst. Attorney General.*

FUNERAL DIRECTORS & EMBALMERS, BOARD OF
RULE-MAKING AUTHORITY OF.

December 6, 1963.

*Mr. Frank H. Newell, Secretary,
Board of Funeral Directors
and Embalmers.*

We have reviewed the regulation passed by your Board at its meeting on November 8, 1963, submitted to this office for approval.

You have advised us that the regulation in question, wherein funeral directors are prohibited, *inter alia*, from having any interest, directly or indirectly, in a cemetery or memorial park, is similar to a regulation existing in Pennsylvania.

As you know, the Board's only authority for adopting such rules and regulations (unlike that of the Pennsylvania Board) is derived from Section 360 of Article 43 of the Annotated Code of Maryland (1957 Edition, as amended), entitled "Rules and regulations of Board; enforcement of subtitle". This section provides:

"The Board of Funeral Directors and Embalmers may adopt and promulgate such rules and regulations for the enforcement of the provisions of this subtitle and for the performance of their duties under this subtitle as in their judgment from time to time they deem necessary. . . ."

There being no specific statutory provision in Article 43 encompassing the subject matter of the proposed regulation, we are of the opinion that the regulation proposed exceeds the Board's authority.

Unless and until the Legislature increases the Board's authority, it may pass only rules and regulations enforcing the provisions of the subtitle under which it was created, or for the performance of the Board's duties under the subtitle.

THOMAS B. FINAN, *Attorney General.*

R. RANDOLPH VICTOR, *Asst. Attorney General.*

GAME AND INLAND FISH COMMISSION

REGULATED SHOOTING AREAS—COMMISSION MAY ISSUE REGULATIONS GOVERNING GAME RAISED IN CAPTIVITY ON REGULATED SHOOTING AREAS AT ANY TIME AFTER DUE NOTICE TO PARTIES AFFECTED.

June 14, 1963.

*Mr. George B. Shields, Assistant Director,
Game and Inland Fish Commission.*

In your letter of June 12, 1963, you requested our opinion as to whether the Game and Inland Fish Commission could adopt regulations for the taking of game on Regulated Shooting Areas after April 25th in any one year.

Sections 180-185 of Article 66C of the Maryland Code set forth the licensing procedures and regulatory powers of the Game and Inland Fish Commission for the regulation of the hunting of game raised in captivity on specially licensed shooting grounds. Section 181(b) provides as follows:

“The Game and Inland Fish Commission may issue permits authorizing the establishment and operation of regulated shooting grounds when in the judgment of the Commission such areas will not conflict with any reasonable prior public interest. * * * The Commission shall govern and prescribe by regulations the size of the areas, the method of hunting, the open and closed seasons, and taking of game—namely: wild turkey, pheasant, bobwhite, quail, chukar partridge, and mallard ducks with tags furnished by the Commission at a reasonable fee, the releasing, possession and use of legally propagated game birds thereon; and may require such reports as deemed necessary concerning the operation of said areas. Any permit issued under the provisions of this section may be

revoked for a violation of any provision or any regulation made by the Commission relating to privately regulated shooting grounds."

You will note that the above cited Section gives the Commission the authority to prescribe by regulations the method of hunting and the open and closed seasons for regulated shooting grounds.

In the general regulatory powers of the Commission set forth in Section 115(a) of Article 66C, there is a restriction in the setting of the seasons for wild game and wild birds as set forth in Sections 132, 133, 207 and 210 of that Article. Regulations setting the State-wide seasons, pursuant to Section 132, must be adopted annually on or before April 25th of each year. The shooting of wild game and birds on Regulated Shooting Areas would be regulated by the seasons prescribed pursuant to Section 132.

However, it is our opinion that regulations concerning the taking of game and birds raised in captivity in Regulated Shooting Areas could be promulgated *at any time* by the Commission, pursuant to Section 181(b). The restriction in Section 132 as to the designation of State-wide open seasons prior to April 25th in each year would not apply. Of course, the Commission, prior to adopting regulations under Section 181(b), must publish the proposed regulations, notify the owners of the Regulated Shooting Areas affected and generally afford interested parties an opportunity to express their views in writing or at a hearing. Article 41, Section 245(c).

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

GAME AND INLAND FISH COMMISSION—ANTLERLESS DEER
SEASON ON STATE-OWNED HUNTING LANDS IN ANY
COUNTY CANNOT BE RESTRICTED TO RESIDENTS OF
THAT COUNTY.

July 15, 1963.

*Mr. Ernest A. Vaughn, Director,
Game and Inland Fish Commission.*

In your recent letter you requested our opinion as to whether the closed season on antlerless deer in Garrett, Allegany, Washington, Frederick and Carroll Counties applies to State-owned public hunting lands in those counties.

Chapter 754, 1963 Laws of Maryland, the latest re-enactment and revision of Section 132 (a), Article 66C of the Maryland Code, provides that antlerless deer may be hunted by special permit in most counties of the State; but that no such period for hunting antlerless deer shall be authorized in Carroll, Frederick, Allegany, Washington and Garrett Counties, with certain exceptions as to the latter two counties. Chapter 754 further provides:

"In any county or election district of the State, the Commission may reduce the deer population in areas suffering from crop damage after thorough investigation shows that such action is justified. The method of reducing the deer population shall be at the discretion of the Commission except that wherever feasible trapping shall be preferred. The deer which may be taken under this provision shall be disposed of by the Director of the Commission as he may deem advisable and for the best interests of the State."

Section 190, Article 66C provides that land to which title has been acquired by the State for the use of the Game and Inland Fish Commission may be used for the purposes of creating and maintaining State game refuges; and as much thereof as deemed necessary may be used for hunting

grounds by consent of the Director, with the approval of the Commission. Section 193 of Article 66C empowers the Director to formulate, adopt, and post such rules and regulations for the government of lands and waters under his control as he may deem necessary for their proper use and administration. This section further provides that, "Such rules and regulations shall be the law of this State controlling such lands or waters . . ."

The Game and Inland Fish Commission is empowered by Section 115, Article 66C to determine to what extent and by what means it is desirable to enlarge, extend, restrict, and prohibit the provisions of law for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters and may adopt regulations for such purposes. However, any regulation adopted by the Commission concerning these activities shall be effective only within the limits prescribed in Sections 132, 133, 207 and 210, Article 66C.

In other words, where the hunting of antlerless deer is prohibited at all times in certain counties by Section 132 (a), the Commission may not permit such hunting even on State lands within those counties except where crop damage is a factor. However, should the Commission find after thorough investigation that the surrounding area is suffering from crop damage, the Commission could, pursuant to its powers, open State-owned hunting lands in such counties for the hunting of antlerless deer to reduce the deer population.

You have further requested our opinion as to whether non-residents and non-landowners in Dorchester, Wicomico, Somerset, St. Mary's and Worcester Counties could be eligible to hunt with permission of the Director during the special three-day antlerless deer season on State-owned and administered public hunting lands in such counties in the light of Chapter 754, 1963 Laws of Maryland. This statute provides that:

"In Dorchester, St. Mary's, Somerset, Wicomico and Worcester Counties, there shall be a three-day open season for antlerless deer including the Saturday immediately prior to November 15 of each year, as established from time to time by the Commission for residents and landowners of said counties only and no permits are required for this privilege in said counties . . ."

We construe the above quoted portion of the statute to provide for a three-day open season in those five (5) counties, in the discretion of the Commission, for residents and landowners of those counties; and that such residents and landowners need not obtain permits. It would seem that in determining whether such a season would be justified, the Commission should take into account the estimated number of resident and land-owning hunters available to reduce the deer population during the special season.

Since the wild game on State-owned hunting lands belong to all residents of the State of Maryland and such lands belong to the people of this State, it is our opinion that the restriction on the season for hunting antlerless deer to residents and landowners of such counties does not apply to State-owned hunting lands within borders of such counties. To hold otherwise would raise serious constitutional questions. The Director through his regulatory power over the State-owned hunting lands may permit or exclude where he deems it advisable, the hunting of antlerless deer on State-owned hunting grounds by any persons, regardless of residency in Dorchester, St. Mary's, Somerset, Wicomico and Worcester Counties.

We further advise that it is our opinion that the power of the Commission to reduce the deer population in areas suffering from crop damage is not circumscribed by the restrictions on the hunting of antlerless deer set forth in other portions of Section 132 (a), Article 66C, as amended by Chapter 754, 1963 Laws of Maryland.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

GAME AND INLAND FISH COMMISSION—NATURAL RESOURCES
INSTITUTE—SCIENTISTS OF NATURAL RESOURCES INSTITUTE OF THE UNIVERSITY OF MARYLAND REQUIRED TO OBTAIN PERMITS FOR COLLECTION OF WILD ANIMALS AND BIRDS PURSUANT TO SEC. 141 (A), ART. 66C.

August 27, 1963.

*Mr. Ernest A. Vaughn, Director,
Game and Inland Fish Commission.*

You have recently requested our opinion as to whether the Game and Inland Fish Commission may require biologists of the Natural Resources Institute of the University of Maryland to obtain permits for the scientific collection of wild animals and birds pursuant to Section 141 (a) of Article 66C, Annotated Code of Maryland (1957 Edition). You have indicated that there have been numerous complaints from the public concerning the shooting of squirrels, deer and other game during the closed season in various parts of the State by scientists and other employees of the University of Maryland, none of whom had in their possession permits from the Game and Inland Fish Commission allowing such activity.

Pursuant to Section 18 of Article 66C, the Natural Resources Institute was created as a department of the University of Maryland to supersede the Department and Commission of Research and Education in 1961. The Natural Resources Institute employs a number of scientists and other persons engaged in a comprehensive research and educational program covering the nonagricultural and forestry resources of the State. It is charged with aiding the agencies of Maryland responsible for managing those resources (Section 19, Article 66C.) Section 19, Article 66C states that "a program of research and study shall be maintained in cooperation with the agencies of the Board of Natural Resources, * * * and appropriate State * * * agencies * * *." Section 19 (4) provides that "the staff of the Institute is hereby authorized to collect *in accordance with the existing law* such animals, plants and other samples,

and to use such collecting devices, techniques, and seasons as are necessary for and pertinent to the research and educational program." (Emphasis supplied.)

The Game and Inland Fish Commission, one of the agencies comprising the Board of Natural Resources, is charged with the conservation, protection and management of the wild animals, wild birds, game, and fresh water fish resources of this State. See Section 115, Article 66C. Among the duties of the Commission is the regulation of the collection of birds, their nests or eggs, and the capturing or killing of birds or fur-bearing animals for scientific purposes. This activity is regulated through the issuance of permits only to persons who present to the Director written testimonials from two well-known ornithologists certifying to the good character and fitness of the applicant to be entrusted with such privilege pursuant to Section 141 (a), Article 66C. The game wardens control this activity by investigating the collection of such birds and animals, frequently acting on complaints from the public. Permits issued pursuant to the above quoted section may be revoked where the taking of such bird or animal is not for purely scientific purposes. Section 141 (a) was enacted in 1943 when the State Game and Fresh Water Fish Law, of which it is a part, went into effect. The licensing of scientific collectors of birds and wild animals under the existing law, as set forth above, has proceeded smoothly and with the cooperation of scientists from all institutions of this State until this past season.

It is our opinion that the authorization by Section 19 (4), Article 66C to the staff of the Natural Resources Institute to collect animals and birds "in accordance with the existing law" means that such persons, even though employees of the State, are required to obtain permits from the Game and Inland Fish Commission pursuant to Section 141 (a).

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

GAMING—SLOT MACHINES

MONIES IN GAMBLING DEVICE CONFISCATED BY LAW ENFORCEMENT OFFICER MAY BE RETAINED FOR USE IN A CRIMINAL PROSECUTION, BUT WHEN NO LONGER NEEDED FOR THAT PURPOSE, MUST BE RETURNED TO OWNER, UNLESS COUNTY INVOLVED IS ONE OF SIX IN WHICH STATUTE PROVIDES FOR CONFISCATION.

May 22, 1963.

The Honorable Mary L. Nock.
State Senator, Wicomico County.

By recent letter you have asked us concerning the proper disposition of monies contained in a slot machine which was confiscated by the Sheriff of Wicomico County.

Please be advised that it is the opinion of this office that such monies may be retained by the law enforcement officer for the purpose of being used as evidence in a criminal prosecution. At the conclusion of such a prosecution, however, or in the event that no trial is had these funds must be returned to the rightful owner.

We reach this conclusion because of the provision of Section 264 of Article 27 of the Annotated Code. This section provides for the forfeiture of money seized in connection with illegal gaming devices in six counties of this State. Wicomico County is not among those six counties. By making such a provision for the six counties named in Section 264 we believe it apparent that it was the intention of the Legislature that monies seized in any of the remaining seventeen counties not be subject to confiscation.

On at least three previous occasions our office has come to the same conclusion on similar questions. See 20 Opinions of the Attorney General 296; 10 Opinions of the Attorney General 211 and 6 Opinions of the Attorney General 140.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Asst. Attorney General.*

GAMING—SLOT MACHINES—INTERPRETATION OF CHAPTER
617, LAWS OF 1963.

May 23, 1963.

*Hon. J. Frank Raley, Jr.,
State Senator, St. Mary's County.*

We have reviewed the questions set forth in your letter of May 8, 1963, with regard to House Bill 475, which has been signed by Governor Tawes and is to take effect on July 1, 1963.

Your questions and our answers thereto are as follows:

1. Can a place of business have more machines than were licensed last year?

We do not believe that a place of business can have more machines than were licensed for the place of business as of March 1, 1963, on or after the effective date of the Act. Please note also that on and after July 1, 1965, the number of machines cannot exceed the number which was on the premises as of January 1, 1963, and if more than 30 machines were on the premises as of January 1, 1963, the number shall be limited to 30 after July 1, 1965.

2. Can a new place of business transfer from another discontinued place of business?

We do not believe that a new place of business can transfer machines from another discontinued place of business after the effective date of the Act. The Act is specific that the number of machines is to be equal to the number of machines on the premises as of March 1, 1963. Any new place of business which would not have had any machines as of March 1, 1963, would therefore not qualify under the Act.

3. Since licenses are issued in the name of the individual, not per location, how can the county and the clerk of the court limit the number of licenses sold to a location?

This question does pose a problem for the clerk of the court. It would appear that the clerk of the court will have to require that an applicant for licenses be required to list the number of machines located on each premises serviced by the applicant as of March 1, 1963, and the number of machines which are to be placed in each premises after the effective date of the Act. If possible, the licenses, when issued, should indicate the premises in which each machine is licensed to be used.

We enclose an additional copy of this letter in the event that you desire to submit a copy to Mr. C. Benedict Greenwell, clerk of the court, since we notice that a copy of your letter was sent to Mr. Greenwell.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

GAMING—SLOT MACHINES—EFFECT OF USE OF THE WORDS
“STORED” AND “OPERATED” IN CHAPTER 617 OF THE
LAWS OF 1963—DEFINITION OF THE WORD “PREMISES”
IN CHAPTER 617 OF THE LAWS OF 1963.

August 8, 1963.

*George F. Zverina, Esq.,
Attorney for the Board of County
Commissioners of Charles County,
Maryland.*

You have submitted a request for our opinion on two questions arising as a result of the passage of House Bill 475, 1963 Session (Chapter 617, Laws of 1963).

Your first question inquires whether or not slot machines *stored* on a particular premises in Charles County as of March 1, 1963, can be *operated* on that premises subsequent to the effective date of Chapter 617 of the Laws of 1963.

In each instance in Chapter 617, dealing with the so-called “phase out” period for those counties in which slot machines are not immediately proscribed, it is indicated that it shall be unlawful “to possess, keep, or maintain” more slot machines than were “located, kept, possessed, maintained or operated” in any “place of business, building or premises” as of the date set forth in Chapter 617. It is, therefore, our opinion that it is not required that a slot machine must have been actually operated in a particular premises in Charles County as of the date set forth in Chapter 617 in order to be permitted to be operated in such premises after the effective date of Chapter 617. It is sufficient if the slot machine was located, kept, possessed, or maintained.

Your second question was whether or not the definition of “premises” includes land with no buildings thereon.

The definition of “premises” contained in Chapter 617 is as follows:

"For the purposes of this section, the term 'premises' shall mean any parcel or tract of land, whether improved or unimproved, under single ownership, or under the ownership of any combination of persons, firms, or corporations associated together in any joint or common venture."

Unimproved land would include land with no buildings thereon and, therefore, the definition of "premises" does include unimproved land.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

GENERAL ASSEMBLY

LEGISLATURE—COMMITTEES—LEGISLATURE BY SINGLE HOUSE
RESOLUTION CANNOT APPOINT COMMITTEE TO SIT AFTER
IT ADJOURNS SINE DIE—SUCH COMMITTEE CAN SIT ON
A VOLUNTARY BASIS BUT IT HAS NO POWER.

August 1, 1963.

The Honorable Robert J. Dentz,
Delegate, Prince George's County.

We have your letter of July 25, 1963, wherein you inquire (requested an opinion from this office as to) whether or not the committee created by House Resolution No. 24 and designated as the "Prince George's County Study Committee on Conflicts of Interest" has the power to subpoena witnesses and the authority to compel such witnesses to testify under oath. You also requested our opinion as to whether an Assistant State's Attorney could serve without compensation as General Counsel to this committee and whether the committee members and the witnesses would be liable in any civil or criminal action for words spoken by them during a regular constituted meeting of the committee.

Before this office attempts to answer the questions you proposed, it must first determine if the General Assembly had the power to create your committee by a single house resolution with authority to sit after adjournment *sine die*. The overwhelming weight of authority is to the effect that neither house of a legislature may lawfully appoint a committee by single house resolution with power to sit after adjournment *sine die*; in fact, every state court that has considered this problem has so held. See *Tipton v. Parker*, 71 Ark. 193, 74 S.W. 298; *State v. Guilbert*, 75 Ohio St. 1, 78 N.E. 931; *Ex Parte Caldwell*, 61 W. Va. 49, 55 S.E. 910; *Commonwealth v. Costello*, 21 Pa. Dist. R. 232; *State v. Childers*, 90 Okl. 11, 215 P. 773; *Brown v. Brancato*, 321 Pa. 54, 184 A. 89 and *Petition of Special Assembly Interim Committee*, 83 P. 2d 932.

The theory of the above-cited cases, holding that a single house resolution cannot lawfully create a legislative investigating committee with power to sit after the legislature adjourns *sine die*, seems to be based on the following facts. Under the various state constitutions, including that of Maryland, the Legislature, with the approval of the Governor, has the power to legislate—that is the power to make laws; each house of the Legislature has the power to initiate legislation. Incident to and implied from this power to legislate, each house has the implied and auxiliary power to appoint committees for the purpose of aiding it in the proper performance of this function. This power to appoint committees exists by implication, only because of the existence of the express power to legislate; consequently, when the power to legislate ceases, then the power to investigate for the purpose of aiding the Legislature in exercising this power ceases. Stated another way, when the main power of legislating dies, the incidental or implied powers die with it. Upon adjournment *sine die*, the legislative powers of both houses of the Legislature cease.

The Court of Appeals of Maryland in the case of *Marshall v. Harwood*, 7 Md. 466, in speaking on the power of a library committee of the Legislature, at page 482, said:

“Committees have no power to act as such during the recess of the Legislature, unless they are authorized specially to do so.”

The Honorable Hall Hammond, former Attorney General of Maryland, in 36 Opinions of the Attorney General 168, after citing the *Marshall* case stated:

“* * * that a legislative committee, which is to function when the Legislature itself is not sitting must have its powers spelled out by a *legislative act*.” (Emphasis supplied.)

A “legislative act” has been defined to mean a statute or law made by a legislative body. See Bouvier’s Law Dictionary, Volume 1, page 116. A resolution of the Legislature is not a “law”. Ex Parte Hague, 9 N.J. Misc. 89, 158 A.

322. See also Sections 27, to and including 33 of Article III of the Constitution of Maryland.

Based on the above, this office must conclude that your committee has no legal authority to sit after adjournment *sine die* as an authorized committee of the General Assembly. However, we can perceive no reason why your committee cannot act on a voluntary basis by treating House Resolution No. 24 as a request. But by so doing, it will have no authority to issue subpoenas or to compel witnesses to testify under oath. Also the committee members and witnesses would not be immune from civil or criminal action resulting from libelous words. We see no reason why an Assistant State's Attorney cannot, on his own time, volunteer his legal services to this committee.

THOMAS B. FINAN, *Attorney General*.

GERARD WM. WITTSTADT, *Asst. Attorney General*.

GENERAL ASSEMBLY—NOTARIES PUBLIC—OFFICE OF PROFIT
AND TRUST UNDER THE CONSTITUTION OF MARYLAND—
MEMBER OF GENERAL ASSEMBLY OF MARYLAND, ALSO
A NOTARY PUBLIC—EXCLUSIVE AUTHORITY TO DETER-
MINE WHETHER VACANCY EXISTS BY REASON OF DUAL
OFFICE-HOLDING IS VESTED UNDER THE CONSTITUTION
IN THE GENERAL ASSEMBLY OF MARYLAND.

August 16, 1963.

*Honorable Bernard J. Medairy, Jr.,
Delegate, Baltimore County.*

By letter of August 13th you have asked us certain questions pertaining to the procedural steps to be followed to determine whether or not a vacancy exists in the House of Delegates seat to which you were elected in November, 1962.

You ask us if the acceptance of a Notary Public commission, and taking the oath for that office, automatically operates to terminate the term as a member of the General Assembly of the person accepting the Notary commission; or whether or not a determination as to the vacancy must be made (1) by the courts or (2) by the House itself.

It might be helpful if at this time we would review the sequence of events which have led to the question you now pose.

On May 24, 1963, this office was asked by the Clerk of the Circuit Court for Anne Arundel County if, under the laws of this State, one individual may simultaneously serve in the office of Notary Public and in the office of Delegate to the General Assembly. In our opinion, responding to this inquiry, we cited eight previous opinions of the Attorneys General of Maryland interpreting Article 35 of the Declaration of Rights of the Constitution of Maryland, which opinions unanimously hold that when an individual, holding an office of profit created by the Constitution or laws of this State, accepts another such office of profit, the acceptance of the latter office serves to vacate the former office. See unpublished opinion addressed to the Honorable Louis

N. Phipps on February 1, 1961 and 43 Opinions of the Attorney General 128; 24 Opinions of the Attorney General 610; 18 Opinions of the Attorney General 403; 17 Opinions of the Attorney General 279; 7 Opinions of the Attorney General 476; 6 Opinions of the Attorney General 231; 3 Opinions of the Attorney General 272.

Again, on June 25, 1963 this office responded to a request from the Clerk of the Circuit Court for Anne Arundel County and advised him of our opinion that the office of Alderman of a municipal corporation was an office of profit within the meaning of Article 35 of the Declaration of Rights and that an Alderman therefore could not simultaneously hold that office and any other State office of profit. In that opinion we cited the decision of the Court of Appeals of Maryland in the case of *Truitt v. Collins*, 122 Md. 526 wherein it was held that the office of Councilman in the municipal corporation of Snow Hill was an office of profit and that on accepting that office the person elected as Councilman had, by operation of law, vacated his position as a member of the Board of Supervisors of Elections of Worcester County.

It appears to be well settled that the office of Notary Public is an office of profit within the meaning of Article 35 of the Declaration of Rights and such a conclusion has been unanimously held by the Attorneys General of this State over a period exceeding forty years. See the Opinion of Attorney General Alexander Armstrong, December 15, 1921, 6 Opinions of the Attorney General 231; Opinions of Attorney General Thomas H. Robinson, January 17, 1928, 13 Opinions of the Attorney General 209 and October 19, 1928, 13 Opinions of the Attorney General 214. Of special interest is the opinion of Deputy Attorney General Willis R. Jones of May 4, 1933, reported at 18 Opinions of the Attorney General 404, which deals with this question in some detail. See also the opinion of Attorney General Herbert R. O'Connor, January 29, 1935, 20 Opinions of the Attorney General 584, and the opinion of Attorney General O'Connor on April 22, 1937, 22 Opinions of the Attorney

General 470. The most recent published opinion of this office on this particular point is the opinion of Attorney General C. Ferdinand Sybert of January 2, 1958, 43 Opinions of the Attorney General 128. The highest courts of some twenty-five of our sister states have unanimously held that a Notary Public is a public officer and that he holds a position of profit and trust. See 39 Am. Jur. 214 and cases cited. We do not set out those citations in detail because we believe that the point has been so well established by the Court of Appeals in a recent case as not to require extended discussion. In *Torcaso v. Watkins*, 223 Md. 49, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982, the status of a Notary Public as a public officer or the holder of an office of profit or trust was so obvious to the Maryland Court of Appeals that no extensive discussion on the point was made by the Court in its lengthy opinion, and that status was expressly conceded by all parties in that case.

We have no doubt that the principle of law enunciated in our two recent opinions to the Clerk of the Circuit Court for Anne Arundel County and in the previous opinions of this office are a correct statement of the law of this State.

Your request for an opinion, however, presents an additional question. You ask us if when a person holding an office of profit, qualifies and accepts another such office, is the first office automatically vacated or is some judicial determination required. From a close scrutiny of the laws of this State and the decisions of the Court of Appeals of Maryland on point, it would appear that the answer varies according to the specific offices involved. In most instances we believe a vacancy is immediately created by operation of law, when the holder of one office accepts another public office. In the case at hand, however, we are dealing with persons who have been elected, qualified and seated as members of the General Assembly of Maryland. In such case, by the express provisions of §19 of Article III of the Constitution of Maryland, as interpreted by the Court of Appeals of Maryland, in *Covington v. Buffett*, 90 Md. 569, only the affected house of the General Assembly has the

power to decide whether a vacancy as a member of such house exists.

Because of the importance of §19 to the question at hand, we set out its language in its entirety:

"Section 19. Each House to be judge of qualifications and elections of its members; appoint its own officers, make its own rules; punishment and expulsion of members.

Each House shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State; shall appoint its own officers, determine the rules of its own proceedings, punish a member for disorderly, or disrespectful behaviour, and with the consent of two-thirds of its whole number of members elected, expel a member; but no member shall be expelled a second time for the same offense."

The facts of the *Covington* case are as follows: Henry C. Dodson was duly elected State Senator from Talbot County in the year 1897 for a term of four years and he qualified and was seated in the Senate of Maryland. In 1899 the Democratic State Convention determined that Senator Dodson had rendered himself ineligible to continue as State Senator as he had accepted an office under the government of the United States, thus vacating his seat under the provisions of §10 of Article III of the Constitution; and also that he had removed himself from the county from which he had been elected, thereby creating a vacancy under §13 of that same article. The Democratic Convention determined that the office of Senator was vacant and that a special election should be held at the 1899 General Election to fill the remaining two years of Senator Dodson's term. That convention nominated J. Harry Covington as the candidate of the Democratic Party for the unexpired term, but the County Board of Supervisors of Elections declined to place Mr. Covington's name upon the ballot, asserting that it had no authority to declare that a vacancy existed or to conduct such a special election. Mr.

Covington thereupon sought a Writ of Mandamus to compel the Supervisors of Elections to conduct the election with himself as the Democratic nominee.

Judge Briscoe, speaking for a unanimous court, held that the question presented was whether a vacancy existed in the office of Senator for Talbot County and whether the court had power to determine the question. The court found at page 578:

“In the case at bar the courts are without jurisdiction to entertain the proceedings for the reason that each House of the General Assembly has the sole power to judge of the qualifications of its members to the exclusion of every other tribunal.”

The court went on to say:

“It cannot be doubted that either branch of the Legislature is thus made the final and exclusive judge of all questions whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof, and that while the Constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein cannot be disputed or revised by any Court or authority whatever.”

The Maryland Court concluded, in *Covington*, that only the Senate could determine whether a vacancy existed in the office in question, as the Senate was the tribunal having the exclusive authority under our Constitution to pass on the qualifications of its members or to determine if a vacancy existed in its own membership.

As to the scope of authority of the Legislature in determining title to an office, the Court of Appeals has made the additional statement in *Price v. Ashburn*, 122 Md. 514, wherein they reaffirmed the doctrine of the *Covington* case and added:

"The Senate of Maryland, itself, under §19, Article III of the Constitution, is the tribunal which has the sole power to decide and judge of the qualifications of its members, to the exclusion of every other tribunal. It is made the final and exclusive judge of all questions whether of law or of facts respecting such elections, returns or qualifications, so far or as they are involved in the determination of the right of any person to be a member thereof."

The Constitutions of most, if not all, of the states contain provisions to the effect that each house of the State Legislature shall be the judge of the elections and qualifications over its own members and it appears to be well settled that such a provision vests the Legislature with sole and exclusive power in this regard. In 49 Am. Jur. 251 it is said that:

"This power is not exhausted when once it has been exercised and a member admitted to his seat; it is, on the contrary, a continuous power and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass on the present qualifications of its own members."

"The action or decisions of the State Legislature, or a branch thereof, in such matters is final and conclusive and not subject to review or revision by the courts."

See also 81 Corpus Juris Secundum, page 944 and *Frantz v. Davis*, 131 S.E., 784, 144 Va. 820, wherein it was held that only the General Assembly has the power to declare when an office shall be deemed vacant.

We believe that the facts of the *Covington* case are completely analogous to the situation now at hand. In *Covington*, as in the instant situation, it was claimed that a member of the General Assembly had violated, knowingly or not, a provision of the State Constitution and had there-

fore rendered himself ineligible to continue as a member of the Assembly. Since, in *Covington*, the Maryland Court of Appeals held that only the Senate could determine whether or not one of its members had vacated his office, we can come to no other conclusion in the instant matter than that the determination as to whether or not the members of the House who became Notaries Public had vacated their Assembly seats must likewise be made by the affected house of the General Assembly.

In summation, we have no doubt as to the validity of the principle of law involved: (1) that the office of Notary Public is an office of profit or trust within the meaning of Article 35 of the Declaration of Rights, (2) that a member of the House of Delegates of Maryland holds an office of profit or trust within the meaning of Article 35 of the Declaration of Rights, (3) that a person holding one office of profit, on accepting another such office, vacates the first office held.

Because of the unique authority given to the General Assembly, however, enabling or authorizing them to sit as the exclusive judge of the qualifications of their own members, the delegates in question here have not vacated their office until such time as the House of Delegates, sitting as judges of the law and the facts, and with regard to the Constitution and laws of this State, shall declare such seats to be vacant. Until that action is taken, the members of the House here in question are and will continue to be entitled to their seats, salaries and perquisites of office. In the event that the House of Delegates shall declare the existence of such vacancies, the Governor shall then appoint a person to fill those offices from a list of persons whose names shall be submitted to him, in writing, by the State Central Committee of the political party with which the delegate vacating the office had been affiliated, as provided in §13 of Article III of the Constitution.

Although the *Covington* and *Price* cases and the weight of authorities throughout the country are to the effect that the courts are without jurisdiction to review the action of

the Legislature in determining whether a vacancy does or does not exist, we can make no firm statement on the authority of the courts today in that regard because of the recent cases in which both federal and state courts have by various means compelled actions of the Legislature in areas heretofore thought to be the exclusive prerogative of the legislative branch of the government. If any person should feel himself aggrieved by the decision of the House of Delegates on the instant matter, he may apply to the courts for such relief as the judicial branch of the government shall determine it has jurisdiction to grant in the situation.

Finally, we reiterate our belief that the situations for persons other than members of the General Assembly under analogous circumstances is materially different from the situation now at hand. It is our opinion that when a public officer, other than a member of the General Assembly, assumes another public office, a vacancy exists in the first office which may immediately be filled by the person authorized to fill such vacancies, and the courts of this State have sufficient jurisdiction to review or compel such action.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

GOVERNOR

GENERAL CONSTRUCTION LOAN ACT—VETO POWER—GOVERNOR MAY NOT REDUCE AMOUNT OF APPROPRIATION WHEN VETOING ITEM IN APPROPRIATION BILL—UNDER SECTION 11 OF ARTICLE 15A GOVERNOR MAY REDUCE APPROPRIATION UP TO 25%—RECOMMENDED LANGUAGE IN VETOING ITEM IN APPROPRIATION BILL.

April 30, 1963.

*Mr. James O'Donnell, Director,
State Planning Department.*

This will acknowledge receipt of your letter of April 10, 1963, in which you inquire as to the scope and extent of the Governor's power to veto certain items contained within Senate Bill No. 139, commonly referred to as the General Construction Loan Act of 1963. This bill authorizes the creation of a State debt in the aggregate amount of \$27,576,000, the proceeds of which are to be used for designated items of capital improvements within the State. We understand that a possibility exists that some of the items may be vetoed in toto and that the Governor may also be considering reducing the amount of other items.

The provisions of the State Constitution bearing on the issue of the power of the Governor to approve or disapprove bills passed by the Legislature are found within Section 17 of Article II thereof. The effect of the first two paragraphs of Section 17 is to require that the Governor, within six days of the presentation to him of any bill during the term of the Legislature, approve the same by signing it or return the bill with his objections to the house in which it originated. In the event that the bill is not returned by the Governor within six days after it has been presented to him, the same shall be a law in the same manner as if he had signed it, unless the General Assembly by adjournment prevents its return, in which case it shall not become law.

The last paragraph of Section 17 relates to the power of the Governor to disapprove an item contained within an appropriation bill. This paragraph relates only to bills making appropriations of money embracing distinct items and gives the Governor the power to

“* * * disapprove of any item or items of any Bills making appropriations of money embracing distinct items, and the part or parts of the Bill approved shall be the law, and the item or items of appropriations disapproved shall be void unless repassed according to the rules or limitations prescribed for the passage of other Bills over the Executive veto.”

Applying this paragraph of Section 17 to Senate Bill No. 139, it appears clear that the Governor has the power to veto in toto any of the various items of appropriations contained therein. Senate Bill No. 139 is a bill making appropriations of money embracing distinct items and thus the requirements contained within the last paragraph of Section 17 with respect to the type of bill to which a single item may be disapproved are fulfilled. In light of this, those particular items which are designated in blue pencil on the copy of Senate Bill No. 139 which you forwarded to us can properly be vetoed by the Governor.

A more complex question is presented with respect to those items contained within Senate Bill No. 139 circled with brown pencil, which we understand the Governor may contemplate reducing in amount. For example, on page 7 of the bill we understand that Governor Tawes is considering a partial veto of the item relating to the acquisition of additional land for the Gunpowder River Valley Park System. At present the amount of the appropriation is \$1,000,000 and the Governor is considering reducing the same to \$600,000. A similar type situation is presented with respect to the item for acquisition of additional land for Tuckahoe Lake State Park, which item is contained on page 9 of the bill.

The legal problem which is presented by these proposed reductions is whether or not the power contained within the last paragraph of Section 17 to disapprove "any item or items" of an appropriation bill includes the power to *reduce* an item of appropriation in amount, although not disapproving the same in toto. Although this problem has never been decided by our Maryland Court of Appeals, it was presented to that Court in the case of *Nowell v. Harrington*, 122 Md. 487 (1914). In this case, after the adjournment of the Legislature, a bill appropriating \$175.00 to be paid to a party named therein was presented to the Governor, who approved the bill as to \$125.00 and disapproved the bill as to \$50.00. Thereafter the party named in the bill was paid the \$125.00 but then filed a petition for Mandamus to compel the Comptroller to pay him the additional \$50.00.

In its opinion the Court of Appeals noted that the question of whether Section 17 of Article II authorized the Governor to approve part and disapprove the rest of an item of an appropriation was an interesting one, but stated that it would not pass upon it in that case since it was not necessary to do so. The Court was able to avoid passing on the question because even assuming the Governor did not have power to disapprove in part and approve in part, then his attempted partial disapproval would have the legal effect of no approval at all, thus operating as a total veto. The Plaintiff had already received \$125.00, which was the amount to which he would have been entitled if the Governor had the power of partial disapproval, which amount the State was not seeking to recoup, and consequently he was not prejudiced by the Governor's action, even assuming it to be improper. Thus, although the *Nowell* case did not decide the issue of whether or not the Governor has the power of partial veto under Section 17 of Article II, it did make the important determination of what the result would be in the event such a veto was improper. In such an event, as indicated by the Court's opinion, the item would be considered to have been vetoed in toto. Although the *Nowell* case involved the veto of a single-item appropriation bill, and

thus did not bring the last paragraph of Section 17 of Article II into play, we see no reason why the result would not be the same in a multi-item appropriation bill. Translating the *Nowell* case into the context of Senate Bill No. 139, should the Governor disapprove \$400,000 of the \$1,000,000 appropriation for acquisition of additional land for Gunpowder River Valley Park System, and should such a partial disapproval be held to be unconstitutional, then the effect of his action would be to have vetoed the entire \$1,000,000 appropriation.

Although the question of whether or not the last paragraph of Section 17 of Article II includes the right of the Governor to disapprove, in part, an item contained within an appropriation bill has never been passed upon in the State of Maryland, similar constitutional provisions have been construed in other states. In the vast majority of these other states the courts have held that the power to disapprove an item in an appropriation bill does not include the power to disapprove it in part, i.e., the item must be accepted in toto, or vetoed in toto.

A number of these cases are collected within an annotation contained in 35 A.L.R. at page 600 and supplemented at 99 A.L.R. 1277, entitled "Disapproval by Governor of a Bill in Part or Approval with Modifications." An example of the type of reasoning employed by the courts holding the majority view is found in *Mills v. Porter*, 222 P. 428 (Montana, 1924). In that case the applicable section of the Montana Constitution provided as follows:

"The Governor shall have the power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void, unless enacted in the manner following:"

Thereafter follows a sentence relating to the passage of bills over the veto of the Governor. The Governor of Montana, in an appropriation bill setting the salaries of various State

officers, had attempted a percentage reduction with respect to each salary item. The Montana Supreme Court, after discussing generally the origins of the veto power, held that it was a negative and not a creative power and could only be exercised when clearly authorized by specific constitutional provision. The court noted that the Montana constitutional provision (which is almost verbatim with that of Section 17 of Article II of the Maryland Constitution) was designed to prevent "omnibus" bills, "riders," and like evils in legislation. (In Montana the item veto was limited to appropriation bills since Montana, like Maryland, had another constitutional provision prohibiting a non-appropriation bill from encompassing more than one subject.)

The court also took note of the separation of powers concept which was embodied in the Montana Constitution and quoted with favor from the case of *Fergus v. Russell*, 110 N.E. 130 (Illinois, 1915) stating:

"The legislative branch of the government is vested with the discretion to determine the amount which should be appropriated for any particular object. The governor, as the chief executive of the state, is given the right to approve or disapprove of the action of the legislature in making such an appropriation. He may disapprove of it for the reason that in his judgment no appropriation should be made for such a purpose, or for the reason that the amount appropriated is too large, or for any other reason satisfactory to him, but he has not the right to disapprove of a certain portion of an item appropriated and approve of the remainder, and thus perform a function which belongs exclusively to the legislative branch—that of using the discretion necessary to determine the amount which should be appropriated for any particular object."

Cases from other jurisdictions reaching the same result on substantially similar constitutional provisions are *Fergus v. Russell*, *supra*; *Peebly v. Childers*, 217 P. 1049 (Okla-

homa, 1923) ; *Stong v. People*, 220 P. 999 (Colorado, 1923) ; *Wheeler v. Gallet*, 249 P. 1067 (Idaho, 1926) ; *Wood v. State*, 238 N.W. 16 (Michigan, 1931) ; *State ex rel. Teachers v. Holder*, 23 So. 643 (Mississippi, 1898) ; *State v. Baynard*, 15 So. 2d 659 (Louisiana, 1943) ; and *State ex rel. Hudson v. Carter*, 27 P. 2d 617 (Oklahoma, 1933). Compare *In Re Opinion of the Justices*, 2 N.E. 2d 789 (Massachusetts, 1936) wherein the Governor was given specific power by the Constitution of the State of Massachusetts to "disapprove or reduce" items in appropriation bills.

In opposition to the majority rule, which is followed in the various cases cited above, there is one case which seems to stand for the proposition that the provisions of the Pennsylvania Constitution, which are identical with those of the last paragraph of Section 17 of Article II of the Maryland Constitution, permit the Governor of Pennsylvania to veto a portion of an item within an appropriation bill. See *Com. ex rel. Elkin v. Barnett*, 48 A. 976 (Pennsylvania, 1901). The facts of this case, however, are somewhat vague as to precisely what was involved in the Governor's veto. The Legislature of Pennsylvania appropriated to the Public Schools the sum of \$11,000,000 for the two years 1899 and 1900 and provided that out of the amount so appropriated certain specified payments should be made as follows :

" . . . out of the amount received by the city of Philadelphia there shall be paid the sum of three thousand dollars to the Teachers' Institute of said city; the sum of three thousand dollars for the Philadelphia School of Design for Women for their corporate purposes, and the sum of ten thousand dollars to the Teachers' Annuity and Aid Association of said city . . . "

A reading of the majority opinion of the court seems to indicate that the Governor vetoed these three and other portions of the legislation relating to the disbursement to be made from the \$11,000,000 fund. A reading of the

dissent, however, indicates that the Governor in his veto message stated as follows:

"I approve of so much of this item which appropriates five million dollars annually making ten million dollars for the two years beginning June 1, 1899, and withhold my approval from five hundred thousand dollars annually, making one million dollars for the two school years beginning the 1st day of June, 1899."

Whether the sum of \$1,000,000 for the two school years which the Governor did not approve related to specific disbursements directed to be made out of the fund is unclear.

In any event the court, speaking of the specific allocations to be made to the various Philadelphia institutions of learning, stated as follows:

"In this portion of the section alone there are included four distinct and severable parts, each of which is an 'item,' within the purpose, intent, and meaning of the constitutional provision under consideration, namely, the public schools, the Teachers' Institute, the School of Design for Women, and the Teachers' Annuity & Aid Association."

The court did, however, state as follows in the same paragraph:

"The governor might, in his legislative judgment, have approved the beneficiary as a proper object of state aid, but have found the amount excessive. He was entitled to approve as to the object, and to disapprove as to a portion of the amount. That is what he has done in the present case, and his action was within his constitutional powers."

If the Governor's veto was simply to eliminate the various provisions relating to the particular disbursement to be made from the \$11,000,000 fund, no problem is presented since these particular disbursements may properly be considered each to be a separate item. If, however, the opinion is authority for the power of the Governor to disapprove

a part of an item (and it is so considered by numerous courts of last resort which have had occasion to refer to it) then it represents a distinct minority view with respect to this matter which the courts of other states have consistently declined to follow. See, for example, the various cases cited above.

In view of the consistent refusal of the various states to follow the reasoning of the Pennsylvania case noted above and in view of our own feeling that the decisions of these other states have a sounder basis in law and reason, it is the opinion of this office that the provisions of Section 17 of Article II of the Maryland Constitution do not permit the Governor to reduce the amount of an item in an appropriation bill but rather require that he either accept it in toto or veto it in toto.

Although it is our opinion that the Governor must either reject or accept within its entirety an item contained within an appropriation bill, he does nevertheless have certain authority with respect to the reduction of that item at a later date. Under the provisions of Section 11 of Article 15A of the Maryland Code, the Governor is given the following power with respect to the reduction of items of appropriation:

“The Governor shall have the power, with the approval of the Board of Public Works, to reduce not more than 25% of any item of appropriation which he may deem unnecessary, except appropriations for the payment of interest and the retirement of the State debt, and appropriations to the legislature, the public schools and the judiciary; provided, however, that the salaries of public officers shall not be reduced during their term of office, and the salaries of merit system employees shall not be reduced except in accordance with the provisions of Article 64A of the Annotated Code of Maryland * * *”.

A reading of Sections 1 through 15 of Article 15A indicates that the term “any item of appropriation” contained

within Section 11 is intended to include items such as those contained within a bond bill such as Senate Bill No. 139. Evidence of this intent can be found in Section 3 of Article 15A which relates to "any unexpended balance of an appropriation . . . whether made through a budget bill, supplementary appropriation bill or bond issue bill . . ." See also Section 8 of Article 15A referring to "The items and amounts making up the appropriation in any budget bill, supplementary appropriation bill or bond issue bill . . ."

That the term appropriation, as contained within Article 15A, refers to more than just a budget bill is further evidenced by subsection (2) of Section 52 of Article III of the Maryland Constitution which defines an appropriation bill as being ". . . either a budget bill, or a supplementary appropriation bill . . ." •

In your letter of April 10, 1963, you further ask what language should be used by the Governor in his approval of Senate Bill No. 139 so that those portions which he would favor can be made effective. Although there appear to be no Maryland cases directly on point, the practice which has been embodied by Governors in this (see for example Chapter 780 of the Acts of 1953) and other states, which practice is set forth in the various cases heretofore cited above, appear to indicate that the following would be an acceptable type of phraseology to appear on the bill itself at the time it is signed:

"I hereby approve Senate Bill No. 139 except for the following enumerated items which I hereby veto in accordance with the power and authority conferred in me by Article II, Section 17, of the Constitution of Maryland.

"Vetoed Items

"1. Section 5(c) (7) relating to an appropriation of \$62,000 for the State's share of the acquisition of land and construction of regional branch bacteriological public health laboratory at

Easton through the matching of federal and local funds.

"2. Section 5(c)(8) relating to an appropriation of \$75,000 for land acquisition and preliminary planning funds for a facility for retarded children's home and center in the Washington Metropolitan area."

If this format is followed in respect to the above and any other items which the Governor may wish to veto, it is our opinion that the form would be sufficient to accomplish the desired purpose. Since this is a bond bill, it is essential that these vetoed items also be specified in the appropriate legislative journals.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

INSURANCE

UNFAIR PRACTICES—SAVINGS AND LOAN ASSOCIATIONS—
INSURANCE COMMISSIONER CANNOT PREVENT FEDERAL
SAVINGS AND LOAN ASSOCIATIONS FROM RESTRICTING
BORROWER'S CHOICE OF INSURANCE ON MORTGAGED
PROPERTY.

May 22, 1963.

Mr. F. Douglass Sears,
State Insurance Commissioner.

In your letter of May 9, 1963, you requested our opinion as to whether the Insurance Commissioner has the authority, pursuant to the Unfair and Deceptive Practices Act, Sections 346-360, Article 48A of the 1957 Code, to investigate and issue a cease and desist order against a federal savings and loan association, where that association restricts the hazard insurance covering property securing mortgage loans to its borrowers to stock insurance companies meeting certain specific qualifications.

Under the present Unfair and Deceptive Practices Act, *supra*, the Insurance Commissioner has no authority to investigate or issue a cease and desist order against a lending institution. The prohibitions of this Act apply only to "persons," defined in Section 347 (a), as any individual, corporation, etc., "engaged in the business of insurance, including agents, brokers, and adjusters." Whether the broker, to whom insurance business of the lending institution is referred, engages in any act violating Section 349 (d) is, of course, a matter of factual determination in each case.

Section 349 (d) prohibits the "Entering into any agreement to commit, or by any concerted action committing any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

Under the new Insurance Code, Senate Bill No. 1 (Chapter 553), 1963 General Session, effective December 31, 1963,

the authority of the Insurance Commissioner to prevent lenders from unreasonably restricting the placement of hazard insurance on property subject to mortgages of the lending institution has been considerably extended. Section 228 of the new insurance law provides as follows:

“No person shall require as a condition precedent to loaning money upon the security of any real or personal property, or to the renewal or extension of any loan or mortgage, or to the selling of any property under contract, that the owner of the property to whom the money is to be loaned, or the vendee of the property being sold, shall place, continue, or renew any policy of insurance covering or to cover such property or covering any liability relating to such property or the use thereof, through a particular insurance agent or agents or in a particular insurer or insurers, type of insurer or types of insurers, broker or brokers; except, that this provision shall not prevent the reasonable exercise by any such lender or vendor of the right to approve or disapprove of the insurer selected to underwrite the insurance on a reasonable nondiscriminatory basis.”

Nevertheless, the situation you have described involves a federally insured savings and loan institution. Federal savings and loan institutions are regulated by the Federal Home Loan Bank Board pursuant to Title 12, U.S.C.A., Section 1464. Under this section the Board has the power to make rules and regulations governing the operation of federal savings and loan associations and these regulations have the force and effect of law. See *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336 (9th Cir.), cert. den. 345 U. S. 952, 73 S. Ct. 863, 97 L. Ed. 1374 and *Community Federal Savings and Loan Association*, 128 F. 2d 705 (8th Cir.).

The Federal Home Loan Bank Board has enacted regulations pertaining to hazard insurance on real estate security for loans of the federal associations. Title 12, Code of

Federal Regulations (Cum. Pkt. Supp.), Section 555.5 provides as follows:

“(a) *Hazard; control over placing of.* The board of directors of each Federal savings and loan association has not only the right but the duty to establish and maintain such requirements over hazard insurance as in the fair and considered judgment of such directors are necessary to protect the association’s interest in the real estate security for its loans. Subject to this limitation, those who borrow from Federal associations on real estate security should have reasonable freedom of choice in the placing of hazard insurance on their property.”

Since the Federal Government has, pursuant to its powers, promulgated rules having the full force and effect of laws directly pertaining to the placement of hazard insurance on properties securing mortgages of federal associations, it is our opinion that the Insurance Commissioner of Maryland has no authority to investigate and issue a cease and desist order to prevent a federal savings and loan institution from unreasonably restricting insurance coverage on properties secured by its loans.

THOMAS B. FINAN, *Attorney General.*

LORING E. HAWES, *Asst. Attorney General.*

INSURANCE—AGREEMENT TO REPLACE OR REPAIR ARTICLE
SOLD IF DESTROYED BY VANDALISM IS A CONTRACT OF
INSURANCE.

July 12, 1963.

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

By your letter of June 10, 1963, you have asked our advice whether a provision in a sales contract of a company in the business of selling memorials, which provides that the company will repair or replace the memorial if it is damaged or destroyed through malicious vandalism, is a contract of insurance. It is our opinion that it is, and accordingly, that the company is subject to the insurance laws of this State.

Section 1 of Article 48A of the Maryland Code (1957 Edition) defines the business of insurance among other things, as "any obligation or undertaking of any kind or nature whatsoever insuring against or undertaking to indemnify any person for loss resulting from any contingency, hazard or casualty. The Court of Appeals of Maryland in the case of *Bonding and Ins. Co. v. Oliner*, 139 Md. 408 (1921) has defined an insurance contract as one whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

The agreement of the company contained in the memorial sales contract to replace or repair memorials which may be damaged or destroyed through malicious vandalism plainly falls within these definitions.

Similar agreements attached to contracts of sale have been the subject of prior opinions of this office. As a reading of these opinions will reveal, the courts in construing such provisions make careful distinctions between agreements which amount to warranties and agreements which are in reality contracts of insurance. In short, if the prom-

ise of the seller is to indemnify the buyer against defects in the article sold, it is considered a warranty and not subject to the insurance laws; if, however, the agreement indemnifies the buyer against loss or damage resulting from perils outside of and unrelated to defects in the article itself, it is considered to be a contract of insurance. See 33 Opinions of the Attorney General, 225 and 42 Opinions of the Attorney General, 254. Certainly, the agreement of indemnity in the contract under discussion attempts to insure against perils existing outside of and unrelated to defects in the article itself and must be considered a contract of insurance.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE — BROKERS AND ADVISORS — FEES PAID BY
BROKER TO ADVISOR—LEGALITY OF.

July 12, 1963.

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

You have asked our opinion as to whether there would be any violation of the insurance law of this State for a licensed insurance broker to pay a fee to a licensed insurance advisor for services rendered by the latter to a policyholder. We have assumed from the manner in which your inquiry was framed that the policyholder is a client of the insurance broker and that the insurance advisor has rendered advice to the policyholder pursuant to the request of the broker.

It is our opinion that in some circumstances the described arrangement could very well violate provisions of the insurance law of Maryland, and whether or not it does would depend entirely upon the nature of the agreement existing between the insurance broker and the insurance advisor and the nature of the advice given by the advisor to the policyholder. If the advisor is engaged by the broker to render objective advice to the policyholder, without special reference or emphasis to the insurance programs the broker has to offer, and the advisor does so, we see no particular legal objection to this arrangement or to the broker paying the advisor's fee. On the other hand, if the advisor is retained by the broker to assist him in influencing prospective policyholders to procure policies of insurance from the broker, it is our opinion that such an arrangement, as well as any fee paid thereunder, is illegal, regardless of whether payment is made to the advisor by way of a share of the broker's commission or a stipulated fee.

If the insurance advisor is engaged by the broker to assist in procuring policies of insurance for him from prospective policyholders and payment is made by the broker

to the advisor by way of a share of the broker's commission, the arrangement runs directly counter to the prohibitions contained in §113 of Article 48A of the Maryland Code, which provides:

"No company and no agent or employee of any company, or other person, whether such person be a licensed broker or otherwise, shall directly or indirectly, pay, except to the lawful agent or solicitor of such company, and to him solely upon the premiums on policies issued by the company for which he may be licensed agent or solicitor, or to an insurance broker licensed by the State of Maryland, any commission, reward, or rebate in consideration of procuring, or influencing others to procure, insurance from such company or person, or collect or agree to collect from any person, whether or not the same may be the owner of the property insured, or his agent, or other person, any amount less than that expressed in the policy or policies as being the premiums therefor."

One can readily see that this statute forbids the foregoing type of transaction.

But even in cases where the advisor is paid a flat fee which is not dependent upon the broker earning commissions, if the licensed insurance advisor is hired by the broker to render advice to the policyholder calculated to sell or influence the prospective policyholder to buy policies offered by the broker, such an arrangement, and any fees paid to the advisor in connection therewith, would violate the insurance law by reason of the fact that the advisor is assuming duties which go beyond the sphere of activity that he, as an insurance advisor, is licensed to undertake. For a person to engage in this kind of work a broker's solicitor's license, issued under §118, would be required.

An insurance advisor is defined in subsection (2), §125 of Article 48A of the Maryland Code (1962 Supp.) in part as:

“* * * any person who, for money, fee, commission or any other thing of value offers to examine, or examines any policy of insurance or any annuity or pure endowment contract for the purpose of giving, or gives or offers to give, any advice, counsel, recommendation or information in respect to the terms, conditions, benefits, coverage or premium of any such policy or contract, or in respect to the expediency or advisability of altering, changing, exchanging, converting, replacing, surrendering, continuing or rejecting any such policy or contract, or of accepting or procuring any such policy or contract from any insurer * * *”

Under subsection (4) of §125 a person may not be an advisor unless he is trustworthy and competent to act in a manner as not to jeopardize the public interest. Under subsection (6) he may not be issued such a license unless your department has determined his trustworthiness and competency, and in this connection he must take a written test given by your department. By subsections (11) and (12) it is provided that no contract between an insurance advisor and a client can be enforced on behalf of the advisor unless it is in writing and duplicate copies have been given to the client, and no fee can be retained by the advisor unless the contract plainly specifies the amount of the fee to be paid. In addition, all forms of statements, receipts, contracts and agreements used in connection with the business of advising must be approved by the commission.

It appears plain from these provisions that an insurance advisor is licensed only to render advice and cannot under this license actively participate in the sale of or solicitation for insurance policies. If the advisor goes further than rendering objective advice and hires himself out to an insurance broker to assist in selling policies that the broker has to offer he not only breaches his obligation of trust to the person he advises but also is engaging in unlicensed and unlawful activity for which he cannot be paid a fee.

Thus, any fee paid by a broker to an advisor must be carefully scrutinized. If the facts indicate that the fee is, in fact, a payment for services rendered in helping to procure policies of insurance for the broker it cannot be condoned. The facts of each case, of course, will differ, but it may be observed that in any case where the insurance advisor is paid out of the broker's commission, whether on a contingency basis or otherwise, the inference is strong that the advice rendered to the policyholder was not intended to be objective, and therefore is in violation of the law.

While, as we have pointed out, payments of fees by brokers to advisors for advice rendered to third persons in some cases may not run contrary to the law, because such an arrangement of necessity places even the most innocent insurance advisor in such a suspect and awkward position, we feel that it is a practice that should be strongly discouraged by your department.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—RETALIATORY TAXES AGAINST FOREIGN INSURANCE COMPANIES—PAYMENTS TO MARYLAND UNSATISFIED CLAIM AND JUDGMENT FUND NOT INCLUDED.

July 19, 1963.

Mr. F. Douglass Sears,
Insurance Commissioner,
State Insurance Department.

You have asked our opinion whether, in arriving at the retaliatory tax to be paid by foreign insurance companies doing business in Maryland, payments made by such companies to our Unsatisfied Claim and Judgment Fund under Section 151 of Article 66½ of the Maryland Code (1957 Edition) can be considered as one of the "taxes, fees, fines, penalties, licenses, deposit requirements, or other obligations" imposed upon foreign insurance companies under the statutes of this State.

The applicable provision governing this question is Section 46 of Article 48A of the Maryland Code (1957 Edition). It reads as follows:

"When by the laws of any other state or foreign country any premium or income or other taxes, or any fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions are imposed upon Maryland insurance companies doing business, or that might seek to do business in such other state or country, or upon the agents of said companies, which in the aggregate are in excess of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon insurance companies of such other state or foreign country under the statutes of this State, so long as such laws continue in force, the same obligations, prohibitions and restrictions of whatever kind shall be imposed upon insurance companies of such other state or foreign country doing

business in Maryland. Any tax, license or other obligation imposed by any city, county or other political subdivision of a state or foreign country on Maryland insurance companies or their agents shall be deemed to be imposed by such state or foreign country within the meaning of this section, and the Insurance Commissioner for the purpose of this section shall compute the burden of any such tax, license or other obligations on an aggregate statewide or foreign-country-wide basis as an addition to the tax and other charges payable by similar Maryland insurance companies or their agents in such state or foreign country. The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes."

You have informed us that certain foreign insurance companies have suggested that, in computing the retaliatory tax due under Section 46, any sums paid by them to the Maryland Unsatisfied Claim and Judgment Fund should be included with the other sums paid to the State of Maryland in the nature of taxes and assessments against which the retaliatory tax is computed. If their view is accepted, it would have the effect of reducing the retaliatory tax due from them *pro tanto* by the amount of such payments to the Fund. We have concluded that such contributions by foreign insurance companies cannot be regarded under Section 46 as being in the category of "taxes, fees, fines, penalties, licenses, deposit requirements or other obligations" imposed on foreign companies by the statutes of this State and therefore, in computing the retaliatory tax due, they cannot be added to the other of such payments made by them to the State of Maryland.

While we have never before considered this precise question, we have rendered an opinion on an analogous situation which, in our judgment, controls the present case. In 44 Opinions of the Attorney General 197 your Department presented the question whether payments made by Mary-

land companies to the New Jersey Unsatisfied Claim and Judgment Fund should be added to the assessments made by New Jersey on Maryland companies which would become subject to retaliation by Maryland in connection with New Jersey insurance companies doing business in Maryland. We concluded that such payments to the Unsatisfied Claim and Judgment Fund of New Jersey were not subject to retaliation since they could not be regarded under the language of Section 46 as "taxes * * * fees, fines, penalties, licenses, deposit requirements or other obligations" imposed by New Jersey on Maryland companies. The primary ground upon which this opinion was based was that such payments to unsatisfied claim and judgment funds are in the nature of trusts and are earmarked for the sole purpose of carrying out the provisions of the unsatisfied claim and judgment law and are not available for the general operation of the State government.

We have no reason to believe that our former opinion, interpreting the meaning of the phrase "taxes * * * fees, fines, penalties, licenses, deposit requirements, or other obligations" as not to include payments to an unsatisfied claim and judgment fund, is incorrect. Though the question under discussion presents the converse situation of that which existed in our earlier opinion, the language under construction is virtually the same, and consistency requires that we be governed by the conclusion that we reached there. If, in computing the assessments against Maryland companies doing business in foreign states against which retaliation may be made, payments made by them to foreign unsatisfied claim and judgment funds are not to be included, we can see no justification for including such payments by foreign companies to the Maryland Unsatisfied Claim and Judgment Fund when computing the basis against which the retaliation tax is to be levied.

The conclusions reached here are based upon the provisions of Section 46 of Article 48A, which is presently in effect. We have, however, also examined the retaliatory tax provision in the new insurance law, Section 61 of Chap-

ter 553 of the Laws of 1963, to become effective December 31, 1963, and find that while there are some differences in language in the statutes, the conclusion reached here is not altered by the new law.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—ESTIMATE OF FUTURE DIVIDENDS NOT PROHIBITED: DEDUCTION OF FUTURE DIVIDENDS FROM PREMIUM A REBATE.

August 16, 1963.

Mr. John H. Coppage,
Deputy Commissioner,
State Insurance Department.

You have asked our opinion whether bids for workmen's compensation insurance submitted by insurance companies pursuant to Notices to Bidders and Specifications sent out by the Talbot County Board of Education, and certain arrangements for the payment of the premiums for such insurance, involve violations of the insurance law of this State. You have enclosed with your letter the Notice to Bidders and the Specifications in question.

Your first inquiry relates to whether a bid proposal prepared and submitted in accordance with the following requirement in the Specifications would violate the provisions of Section 52 of Article 48A of the Maryland Code (1957 Edition) :

"1. ELIGIBILITY OF BIDDER:

A. The bidder must be a representative of stock companies or nonassessable mutual companies registered with an AAA rating in Best's Insurance Guide. Nonassessable mutual insurance companies are required to furnish a record of dividends for the past ten years and the estimated dividend in the proposal by such company must represent the lowest dividend paid throughout this ten year period."

While we do not have the bid proposal form required to be submitted by the insurance company, it is our understanding that in compliance with this part of the specifications the bidding insurance company lists a record of its dividends for the previous 10 years and provides, as an estimate of future dividends, the lowest dividend paid throughout the 10 year period. It is our opinion that in

some circumstances a proposal submitted in this fashion could violate the provisions of Section 52.

Section 52 of Article 48A prohibits an insurance company from issuing or circulating "any statement, estimate, illustration or circular misrepresenting the terms of any policy issued or the benefits or privileges promised under any policy, or the future dividends payable under such policy." As we read this section as it relates to future dividends, it only prohibits an insurance company from issuing or circulating an estimate of future dividends which is misleading or which misrepresents the true estimate of future dividends made by the company. We do not understand this section as forbidding an insurance company from issuing bona fide estimates of future dividends. Therefore, if in preparing the bid proposal the company accurately lists its dividends for the previous ten years and if the lowest dividend over this period is in fact as high as the company's bona fide estimate of future dividends, we see no violation in such a bid proposal. Our concern is the case where the company's estimate for future dividends is *lower* than the lowest dividend over the previous ten years listed in the proposal. If, in compliance with the provisions of Section 1 of the Specifications, such a company lists the lowest dividend over the previous ten years instead of its true lower estimate of future dividends, this, in our opinion, would result in a violation of the provisions of Section 52.

Your second inquiry relates to the question of whether Section 50 of the same Article would be violated if the successful insurance company, in collecting its premiums from the Board of Education, deducted the estimated dividend from the estimated premium to be paid and collected only the net premium. Your concern is that such an arrangement could result in a rebate or discrimination contrary to the provisions of Section 50.

Section 50, *inter alia*, prohibits any insurance company from paying, allowing, or offering to pay or allow to the insured, as an inducement to the purchase of insurance "any inducement or rebate from the premium specified in

the policy or contract of insurance, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatsoever not specified in the policy or contract of insurance, issued or to be issued." Basically, the purpose of this provision is to prevent any company from offering special rates or advantages to insureds which results in the insurer receiving less and the insured paying less than the true premium. 42 Opinions of the Attorney General 240.

In most cases, the described practice would seem to run counter to the prohibitions of this statute. By being entitled to deduct an estimated future dividend from the premium to be paid, the insured has the use of the money represented by the deduction from the time of the payment of the premium to the time of the actual declaration of the dividend, at which time we presume an adjustment is made. This use of money represents an advantage to the insured and if the practice is not in accord with the terms of the policy or is not available to all policyholders alike, it would, in our judgment, result in an unlawful rebate. Moreover, in the event no adjustment is made between the insurer and the insured when the actual dividend for other policyholders is declared, so as to correct the differences between the estimated dividend deducted and the actual dividend declared, a further violation of Section 50 results. Where the estimated dividend is more than the dividend actually declared and paid by the company to other policyholders, if no adjustment is made to reflect this difference at the time the actual dividend is determined, a discrimination results in favor of the insured. Thus, such an arrangement and the policy provisions under which it is made must be carefully examined to insure that neither of the aforementioned abuses are involved.

We have examined Sections 217 and 226 of Chapter 553 of the Laws of 1963, the new insurance code, which seem to be the counterparts of Sections 52 and 50, respectively, and we find nothing there to alter our opinion here.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—BROKERS' BONDS, SEPARATE BOND REQUIRED
EVERY YEAR WITH LICENSE RENEWAL.

September 6, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department.*

You have requested our opinion concerning whether, under Sections 170(d) and 188(4) of the new insurance code (Chapter 553 of the Laws of 1963), persons holding brokers' licenses must file a new bond annually with each renewal of their license, or whether a single continuous bond deposited at the time of the initial issuance of the license would satisfy the requirements of these provisions.

The present insurance law, Section 116 of Article 48A of the Maryland Code (1957 Edition), requires that an insurance broker, before he is granted his annual license to operate in this State, must "file with the Insurance Commissioner, a bond, to be executed by a surety company authorized to do business in this State, to the State of Maryland in the penalty of \$2,500.00 . . .". This provision has been construed by this office as requiring a broker to file a separate bond with your Department every year with his annual application for a license. See 12 Opinions of the Attorney General 145 (1927). It is our understanding that since this opinion was rendered in 1927 your Department has followed a practice with respect to brokers' bonds strictly in accordance therewith.

Consideration of the language of Sections 170(d) and 188(4) of the new code in connection with our prior ruling and your present administrative practice leads us to the conclusion that no change will result in the bond requirements under consideration on the effective date of these provisions.

The relevant sections of the new law read as follows:

"170(d) No broker's license shall be issued, continued, or renewed unless the applicant there-

for has on file with the Commissioner a bond to the State of Maryland in the penalty of \$5,000.00. Such bond must be executed by an authorized surety insurer and conditioned that the broker will account for and pay over to the person entitled to receive the same all money belonging to such person which may come into his hands as an insurance broker in accordance with the contract between the parties. Such bond shall remain in force until the surety is released from liability by the Commissioner or until the bond is cancelled by the surety. The aggregate liability of the surety for any and all claims on any such bond shall in no event exceed the penalty thereof. Without prejudice to any liability accrued prior to such cancellation the surety may cancel such bond upon thirty days written notice filed with the Commissioner."

"188(4) Prior to the issuance of the license or any renewal thereof, the applicant shall file with the Commissioner, a bond, to be approved by the Commissioner and made payable to the State of Maryland, executed by such applicant as principal and by a corporate surety authorized to do business in this State, in the penal sum of five thousand (\$5,000) dollars, conditioned that the broker will conduct the business in accordance with the provisions of this article and that he will remit promptly the taxes provided for in Section 194. The aggregate liability of the surety for any and all claims on any such bond shall in no event exceed the penal sum thereof. No such bond shall be terminated unless prior to such termination thirty (30) days' written notice is filed with the Commissioner."

Section 188(4), relating to brokers' licenses for surplus lines, an innovation in the new code, presents the least difficulty. The bond requirement here is framed in practically the same language as Section 116 of the present

statute and, on the basis of our earlier opinion, must be construed in the same manner as Section 116 so as to require a new bond to be deposited with each renewal of the brokers' license for surplus lines.

The situation concerning Section 170(d), covering ordinary brokers' licenses, is less free from doubt. Under the present law an annual application for a broker's license is required (Section 115 of Article 48A) and in connection with such applications Section 116 requires that before a license is issued, the insurer must "file with the Insurance Commissioner, a bond". The new code, apparently in order to ease the administrative burdens placed upon your Department by Section 115, does away with annual applications for licenses and provides in Section 170(b) that, in the absence of a contrary ruling by your Department, "renewals shall be issued from year to year subject to the payment of the annual fee . . . upon request but without further action on the part of the insurer, agent or broker." The new bond provision in Section 170(d) provides that a "license shall not be issued, continued, or renewed unless the applicant therefor has on file with the Commissioner a bond . . . in the penalty of \$5,000.00". The section goes on to provide that the bond is to remain in force until the surety is released from liability by the Commissioner or until cancelled by the surety.

It is apparently contended by some brokers that these provisions, taken together, will change the existing law and will require only that one continuous bond in the amount of \$5,000.00 be placed by the broker with your Department to cover the broker's liability for as long as his license may continue to be renewed. This argument is seemingly predicated on the theory that since renewals are intended to be fairly automatic in the case of brokers in good standing [the law requiring nothing more than notice and the payment of a fee], it is consistent with this scheme to relieve the broker from filing a new bond at renewal time as long as he has at that time "a bond on file with the Commissioner". While this argument would perhaps have some surface appeal if Sections 170(b) and 170(d) were consid-

ered *de novo*, isolated from the provisions of Section 188(4) of the new code and from the present administrative practice, a reading of these new provisions in connection with these latter factors inevitably brings one to the opposite conclusion.

The Legislature, when it enacted Section 170(d), is presumed to have known of our construction of present Section 116 as requiring a separate bond each year and of your same administrative practice in that regard. *Drug & Chem. Co. v. Claypoole*, 165 Md. 250, 257 (1933). Yet, there is nothing in Section 170(d), fairly considered, which gives any indication that there was an intention on the part of the Legislature to modify this practice in any way. Certainly, the language of the new provision itself does not compel this conclusion. Nothing is said there which explicitly requires the Commission to accept a continuous bond on the issuance of the first license or which prohibits the former policy of requiring an annual bond with each renewal. One would expect, where such a drastic change in practice is to be made, that the Legislature would say so in clear and unmistakable terms. This is especially true here, where the security required to be placed with the State for the proper performance of the broker's duties would be so greatly diminished by the new law.

This construction is reinforced by the fact that, as we have pointed out above, annual bonds are required by the new code in the case of surplus lines brokers' licenses. There appears to be no reason why the ordinary brokers' licenses and surplus lines brokers' licenses would have been accorded different treatment by the legislature.

Although on its face Section 170(d) may be capable of more than one construction, we have concluded that it, as well as Section 188(4), continues in force the present practice and requires brokers to file separate bonds with each renewal of their license.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—NO PROHIBITION IN THE INSURANCE LAW
AGAINST SELLING INSURANCE IN COMBINATION WITH
SECURITIES IN CERTAIN CIRCUMSTANCES.

October 25, 1963.

Mr. Decatur H. Miller,
Securities Commissioner.

We have received your letter of September 23, 1963, in which you request our opinion whether certain programs offered by Equity Funding Corporation of America, Inc. (E.F.C.), under consideration by your office, would violate the insurance law of Maryland. The programs, which are investment contracts and hence securities which must be registered with your department, contemplate the combined purchase by the participants of mutual fund shares and life insurance policies. The mutual fund shares available under the programs are shares in any one of three common law trusts. The life insurance policies available are ordinary life insurance policies issued by either of two life insurance companies for which E.F.C. is a general agent.

In general, the programs involve the continuous purchase by the participants of mutual fund shares in an amount sufficient to collateralize annual loans from E.F.C. to the participants so as to enable them to pay the annual premiums on the life insurance policies purchased under the programs. The programs involve the participants signing an agreement with E.F.C. and a bank, whereby the participant (1) appoints the bank the agent for the participant and the mutual fund; and (2) appoints E.F.C. the attorney in fact for the participant to (a) pay his life insurance premiums, (b) issue promissory notes payable to itself in the participant's name evidencing the participant's obligation to repay E.F.C. the premium loans with interest, (c) pledge the mutual fund shares to secure such notes, and (d) to pledge the notes as collateral security for E.F.C.'s own notes.

The programs will be offered through either (1) independent insurance agencies and their affiliated mutual fund

distributors, or (2) wholly owned subsidiaries of E.F.C. In either case, the individual salesmen offering the programs will be licensed both as securities salesmen and as insurance salesmen.

According to the prospectus of E.F.C., the purchase of the mutual fund shares and the life insurance under the programs is to be at the same price and subject to the same sales charges and commissions as if purchased independently. Since, however, the programs involve insurance premium financing and administrative services, participants will be required to pay interest charges and custodian fees in addition to the usual sales and service charges and commissions involved in the separate purchase of mutual fund shares and insurance.

If the offering or sale of such programs involves a violation of either the present insurance law or the new insurance code, effective December 31, 1963, registration may be denied by your office. Specifically, you request advice as to whether the programs would violate Sections 222 or 224 of the new insurance code, and Section 349 of the present insurance law. In addition, in my conversations with you and Commissioner Sears, the question has also been raised whether the programs would be in violation of Sections 224a or 416 of the new code.

Upon a careful consideration of the above mentioned provisions we have reached the conclusion that the programs, as described above and as set forth in the prospectus, will not run counter to the present insurance law or the new insurance code.

Section 222 of the new insurance code, Chapter 553 of the Laws of 1963, prohibits the issuance or delivery of stock or shares "in any common law corporation, or any advisory board contract or other similar contract of any kind promising returns and profits *as an inducement to insurance.*" Subsection (f) of Section 349 of the present law, Article 48A of the Maryland Code (1957 Edition), contains the same prohibition in practically the same words. We do not

think that the programs in question can be considered as violating either of these sections. Under the described programs the mutual fund shares purchased by the participants are not issued as an inducement to the purchase of insurance any more than the insurance which is purchased by the participants are issued as an inducement to the purchase of mutual fund shares. The shares are not sold at a reduced price so as to encourage the participants to purchase the insurance offered in the program nor are there any advantages granted in the purchase price of the insurance. The fact that the two are sold together in order to make the sale of both more attractive to the participants does not seem to us to bring the arrangement within the prohibition against issuing stock in order to induce the purchase of insurance.

Section 416 (4) of the new code provides that no "life insurer shall deliver in this State, as a part of or in combination with any insurance, endowment or annuity contract, any agreement or plan, additional to the rights, dividends, and benefits" arising out of any such insurance which "provides for the sale * * * of any stock or shares of stock in any company * * * or other contracts or resolutions of similar nature * * * as an inducement to or in connection with the sale or acceptance of such policy." It seems clear that this statute on its face does not prohibit the plans under consideration. Section 416 prohibits the *life insurer* from delivering, in addition to its policy, stock and the like as an inducement to or in connection with the sale of insurance. The programs here do not envisage the life insurance company selling or delivering any of the mutual fund shares in connection with the sale of its policies. As we understand the arrangement, an E.F.C. subsidiary or an independent insurance agency and its affiliated mutual fund distributor will actually sell both the mutual fund shares and the insurance, and the life insurer will in no way participate in the program other than by the issuance, in a normal fashion, of its life insurance policies.

There remains Sections 224 and 224 (a) of the new law. To answer your specific inquiry with respect to Section 224,

we do not regard the premium financing service to be rendered by E.F.C. to the participants under the program as being within the prohibition against the giving or offering of a "valuable consideration or inducement" to the purchase of insurance. The participants will pay interest charges and custodian fees for the financing of their insurance premiums and the fact that the arrangements for the same are to be made by E.F.C. does not seem to be either a "valuable" consideration or an "inducement" to the purchase by the participant of the insurance or the mutual fund shares.

Section 224 does contain some language which, read literally, seems to forbid the programs under review. When considered, however, in the light of Section 224 (a), the opposite conclusion is reached. Section 224 provides, as follows:

"Except as otherwise expressly provided by law, no person shall knowingly permit or offer to make or make any contract of life insurance, life annuity or health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or pay or allow, or give or offer to pay, allow, or give, directly or indirectly as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the contract; or directly or indirectly give, sell, or purchase or offer or agree to give, sell, purchase, or allow as inducement to such insurance or annuity or in connection therewith, and whether or not to be specified in the policy or contract, any agreement of any form or nature promising returns and profits, or any stocks, bonds, or other securities, or interest present or contingent therein or as measured thereby, of any insur-

ance company or other corporation, association, or partnership, or any dividends or profits accrued or to accrue thereon; or offer, promise or give anything of value whatsoever not specified in the contract." (*Italics supplied.*)

Although the essential purpose of this section is to prevent discriminatory rebates, it does contain language forbidding programs, not otherwise expressly provided by law, whereby agreements are made to sell stock, bonds, or other securities in connection with the sale of insurance. The described programs fall under this language since the sale of the mutual funds would unquestionably be made "in connection with" the sale of insurance policies. Section 224 (a), however, provides:

"No insurer shall directly or indirectly, or by any of its agents or representatives, participate in any plan to offer or effect any kind or kinds of life insurance, health insurance, or annuities in this State as an inducement to, or in combination with, the purchase by the public of any goods, securities, commodities, services, or subscriptions to periodicals, *except upon the payment of a bona fide premium by the insured.*" (*Italics supplied.*)

The latter section, while generally prohibiting the sale of insurance in combination with securities, does permit such sales if the insured pays and the insurer received a bona fide premium. In our opinion Section 224 (a) must be regarded as specifically permitting the transaction considered here, where a bona fide premium will be paid, and, therefore, any prohibition contained in Section 224 against selling insurance and securities together, in view of the first sentence of that section, becomes inapplicable.

Our opinion here is predicated on the description of the programs as contained in your letter and in E.F.C.'s prospectus. Inherent in the programs under consideration is the risk that the participants will take in losing or being forced to cancel their insurance if the mutual fund shares, which are pledged to pay the premiums of the policies,

decline in value. It is not unlikely that some participants, in order to be able to afford entering the programs offered, will have been persuaded to cancel insurance that they may have effected with other companies. This opinion should in no way be construed as condoning any activity in connection with the actual sale of these programs which would be prohibited by Section 227 of the new insurance code, or by any provision of the present law or of the new code against individuals misrepresenting or making incomplete comparisons as to the terms, conditions, or benefits contained in policies of insurance in order to induce purchases, lapses, forfeitures, or surrenders of the same.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—LIFE AND HEALTH LICENSE APPLICANTS NOT
ENTITLED TO TAKE MORE THAN SIX EXAMINATIONS.

October 30, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department.*

You have requested our opinion whether an applicant for a license to act as a life insurance agent who has taken your examination and failed it on six occasions is, by virtue of the provisions of Section 122(e) (3) of Article 48A of the Maryland Code (1957 Edition) and Section 178 of the new Insurance Code (Chapter 553 of the Laws of 1963), barred from taking any further examinations.

Section 122(e) (3) provides as follows:

“Any person who shall have taken and failed to pass any such examination shall not be entitled to take any further examination until thirty days after the date of the last examination in which he failed. Any person shall be entitled to take not more than three examinations for the initial fee of \$5.00. Any person requiring more than three examinations shall pay an additional fee of \$5.00 which shall entitle him to take three more examinations but no more.”

Section 178(3) of the new Code contains the same provision in precisely the same language, except that instead of 30-day intervals between examinations, 14-day intervals are required.

A fair reading of the language of this statute brings us to the conclusion that it was the intention of the Legislature to prohibit applicants for life insurance licenses from taking more than six examinations. We do not see how the phrase “Any person requiring more than three examinations shall pay an additional fee of \$5.00 which shall entitle him to take three more examinations *but no more*” can be construed to mean anything but that the applicant is pro-

hibited from taking any further examinations after he has failed six. If the Legislature by the quoted clause merely intended that any series of three examinations following the first three examinations would require an additional fee of \$5.00, without imposing any limitation on the number of examinations that could be taken, we do not believe that it would have employed language which, naturally construed, so strongly supports the opposite conclusion.

Our opinion is reinforced by a consideration of the provisions of Section 121(a) of Article 48A of the Maryland Code (1957 Edition) and Section 177(2) of the new Code. These sections, which concern applicants for licenses for other than life and health insurance, expressly provide for more than six examinations, but place a condition upon such further examinations that the applicant be required to wait one year from the date of his last previous trial. The fact that these sections of the present law and the new Code, in cases of other types of insurance licenses, expressly make provision for further examinations under certain conditions indicates quite clearly, we think, that the Legislature, in employing the language that it did in Sections 122(e) (3) and 178(3), intended that the life insurance applicants be entitled to take six examinations and no more.

While this provision may seem harsh, any change in the requirements of the law would seem to be a matter for legislative action.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—PERSONS NOT PROHIBITED FROM BEING LICENSED AND ACTIVE BOTH AS AN AGENT OR BROKER AND AN ADVISER UNDER CERTAIN CIRCUMSTANCES.

October 31, 1963.

Mr. F. Douglass Sears,
Commissioner of Insurance,
State Insurance Department.

By your letter of October 11, 1963, you request our advice whether, under the new insurance code (Chapter 553 of the Laws of 1963), an individual may be licensed by your department both as an insurance agent or broker and as an insurance adviser, and if so, whether he may, as an agent or broker, sell insurance and collect commissions on a risk to which he previously has rendered advice and collected a fee as an adviser.

We find nothing in the new code which prohibits the licensing of the same individual as both an agent or broker and as an adviser. Nor do we find anything which prevents, under the proper circumstances, an agent or broker from selling insurance to a risk to whom he previously has rendered a service, for a fee, as an adviser. The section of the law mentioned in your letter, 182(b), does not in our view contain such a prohibition. It provides in part:

“A license as insurance adviser shall not authorize adjusting of losses nor receipt of compensation from insurers, brokers or agents for the sale of or placement of insurance.”

This section, while it proscribes the sale of insurance by a person when he is acting under an adviser's license, does not prevent the sale of insurance by one holding an adviser's license but selling under an agent's or broker's license. Specifically, we do not think that it would operate to prevent a dual licensee from selling insurance, in his capacity as an agent or broker, to a client to whom he had previously rendered objective advice as an insurance adviser.

There are limitations, however, on the manner in which a dual licensee may operate, which we believe must be strictly observed. First and foremost, he must make known to his clients the capacity in which he is acting at any given time. He cannot, under the guise of rendering objective expert advice in his capacity as an adviser, actively sell or attempt to persuade a client to purchase insurance, for, if he does, he not only violates the provisions of Section 182(b), set forth above, but also violates his obligation of trustworthiness to the client, for which his license may be suspended under Section 182(1). Any sales of insurance to the client must be made after his services as an adviser have been terminated, and preferably at the request of the client. Moreover, no arrangements are permissible which call for the waiver of the adviser's fee or the crediting of the same against the client's premiums in the event the client thereafter purchases insurance from the licensee. Such an arrangement would amount, in our opinion, to the granting of a discriminatory rebate in violation of Sections 224 and 226.

It may well be that other specific kinds of activity could be cited, which, if carried on by the dual licensee, would be in violation of the insurance law. Suffice it to say at the present time that the dual licensee, in order to stay within the law, must keep the activity conducted under his two licenses separate and distinct, and must at all times deal openly and honestly with his clients so as to prevent any misunderstanding on their part as to the capacity in which he is acting.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—INSURANCE COMMISSIONER MAY REQUIRE
AGENTS' APPOINTMENTS TO BE IN WRITING—INFANTS
MAY BE LICENSED AS AGENTS, BUT NOT AS BROKERS.

November 8, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department.*

You have requested our opinion whether under Section 169 of the new insurance code, Chapter 553 of the Laws of 1963, your department can require an applicant for an agent's license to certify in his application that he has an appointment in writing from the insurer and if he does not, whether your department can refuse to issue a license on that ground. We think that you can require the agent's appointment to be in writing and can require the applicant to certify to the same in his application.

The practice under the present law has been to require agents to have appointments in writing, this requisite being based on subsections (b) and (c) of Section 107 of Article 48A, which specifically defines agents as persons acting under written authority from their principal.

The new code, when originally introduced as Senate Bill No. 1, by subsections (a) and (b) of Section 169, set up certain definite requirements for license application forms and required that the appointment of the agent be evidenced in writing. However, when Sections 165 to 170 were amended so as to remove from the new code the provisions for the separate licensing of insurance solicitors, subsections (a) and (b) of Section 169, pertaining to agents' licenses, were also deleted, and a new provision was enacted in their place as Section 169(a). It reads:

"169(a). The Commissioner shall prescribe and furnish such forms in connection with applications for, issuance, renewal or termination of licenses and appointments as he deems appropriate."

We do not think that by this amendment to Senate Bill No. 1 the Legislature necessarily intended to lessen the formal requirements relating to the appointment and licensing of agents. The effect of this change, which eliminated the specific requirements in that respect, and gave the Commissioner the power to "prescribe . . . such forms in connection with applications for . . . licenses and appointments as he deems appropriate," was to put the entire matter within the discretion of the Commissioner. If, in the exercise of your judgment, you determine that the past policy requiring written appointments of agents should be continued, it is our opinion that it is within your power to do so.

As to your other inquiry, whether persons under 21 can be licensed under the new code as insurance agents or brokers, we have concluded that they may be licensed as agents, but not as brokers.

It is well settled that infancy does not generally disqualify a person from acting as an agent for another or from binding his principal as to third parties. 3 Am. Jur. 2d, *Agency*, Section 14. Since there is nothing in the new code which can be interpreted to prohibit minors from acting as insurance agents, we are of the opinion that this general rule is applicable and, so long as the minor possesses the statutory educational and experience qualifications, passes the necessary examinations, and satisfies your department as to his competency, trustworthiness and good character, Sections 168 (a), 175, 177, and 178, he may be licensed by your department as an agent. The employment by the insurance company of minors as agents will, of course, be subject to the general provisions of Sections 4 to 51 of Article 100 of the Maryland Code, pertaining to the employment of minors.

The situation concerning brokers, however, is different. While the new code contains no age requirement for brokers' licenses, it does provide that a broker, before he may be licensed, must file a bond with your department in the amount of \$5,000 conditioned that he will pay over any sums in his hands to any person entitled thereto. We have

recently ruled that an infant cannot qualify as a guardian because he does not have the contractual capacity to execute the required bond. See Opinion to Mr. J. Asbury Holloway, dated August 30, 1963, page 383 herein. We think that the legal principles supporting that ruling are fully applicable here and operate to prevent an infant, because he cannot execute the required bond, from being licensed as an insurance broker.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—INSURED MAY MAKE CLAIM FOR REFUND OF
OVERPAID TAXES ON PREMIUMS (SURPLUS LINES) DI-
RECT TO STATE.

November 8, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department.*

You have requested our opinion whether, under Section 194(a) of the new insurance code (Chapter 553 of the Laws of 1963), a policyholder who has overpaid taxes on premiums on surplus lines coverages may make a claim for a refund thereof directly against the State under the provisions of Section 215 of Article 81 of the Maryland Code, or whether such a claim must be made by the policyholder to the surplus lines broker, who, as an agent of the policyholder, has the obligation of securing the refund from the State.

Section 194(a) provides as follows:

“The premiums charged for surplus-lines coverages are subject to a premium receipts tax of 3% on all gross premiums less any returned premiums charged for such insurance. The surplus-lines broker shall charge the insured the amount of the tax at the time of delivery of the cover note, certificate of insurance, policy or other initial confirmation of insurance, in addition to the full amount of the gross premium charged by the insurer for the insurance, provided, however, that the tax on any unearned portion of the premium shall be returned to the policyholder by the surplus-lines broker. The surplus-lines broker is prohibited from absorbing such tax, or, as an inducement for insurance or for any other reason, rebating all or any part of such tax or of his commission.”

It appears to us from a reading of this provision that while the surplus lines broker has an obligation to collect

and pay over to the State taxes on surplus lines premiums, and while the broker is obliged to return to the policyholder taxes paid on unearned premiums, nothing contained therein requires him to act as the policyholder's agent in the securing of refunds, and, more important, nothing requires the policyholder to look to and depend upon the broker for the recovery of the same. Accordingly, it is our opinion that the policyholder's claim for a refund may be made by him directly under the provisions of Section 215 of Article 81.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—TEMPORARY LICENSES ISSUED TO COLLECTORS
AUTHORIZE SOLICITATION OF INSURANCE.

November 12, 1963.

*Mr. F. Douglass Sears, Commissioner,
Insurance Department of the State of Maryland.*

You have requested our opinion whether a temporary agent's license, permitting the licensee to solicit applications for insurance, may be issued, under Section 172(a) (6) of the new insurance code (Chapter 553 of the Laws of 1963), to a person employed by an insurance company to collect premiums on weekly premium industrial life and/or health insurance, or whether the temporary license issued to any such person must be restricted so as only to allow him to collect premiums. We have concluded that a person in the aforementioned category may be granted a temporary license by your department permitting him to solicit insurance as well as collect premiums during the period that his temporary license is in effect.

The relevant provisions in Section 172 read as follows :

"172. Temporary Licenses.

(a) *The Commissioner may in his discretion issue temporary licenses as agent or broker to an individual otherwise qualified therefor without regard to educational, experience or examination in the following cases:"* (Emphasis supplied.)

* * * * *

(6) *To an applicant who will actually collect the premiums on weekly premium industrial life and/or health insurance during the period of such temporary license; provided, however, that if such temporary license or notice of refusal thereof is not received from the Commissioner within ten days from the date the application was sent to the Commissioner, the insurer may assume that the temporary license will be issued in due course and*

the applicant may act as if such temporary license had been issued until notice to the contrary is received from the Commissioner." (Emphasis supplied.)

* * * * *

Ascribing to the language of these provisions a natural and ordinary meaning, there can be little doubt that what is contemplated thereby is that persons who collect premiums for life or health insurance, by virtue of that position, are to be among the class of people who are to be considered by your department as eligible for temporary brokers or agents licenses, and once licensed, the collector is to have, during the period his temporary license is in effect, the same rights and obligations as the ordinary broker or agent, including the right to solicit insurance. We find nothing in the statute which in any way can be construed to prevent a person in that particular category of temporary licensee from soliciting for insurance in the same manner as do other temporary or ordinary licensees.

To rule to the contrary, that a collector licensed as a temporary agent or broker can do no more than collect premiums, would not only insert a prohibition in the law which is not expressly provided for, but would also produce an incongruous result. The mere collection of insurance premiums is not an activity requiring a license under the new code, and confining the temporary licensees under consideration to that function would result in their having been licensed to do, on a temporary basis, that which they were free to do, unlicensed, on a permanent basis. This could not have been the intention of the Legislature.

In reaching this conclusion, we are not unmindful of the fact that Section 172(a) (6) was amended in Senate Bill No. 1 before its final passage, and that this amendment is said to give some support to the opposite interpretation. Because the provisions, as finally enacted, are so clear and unambiguous on their face we have not considered it to be necessary or appropriate to refer to the former language, or the amendment, as an aid to construction. It is well settled that statutes are to be interpreted according to the natural

import of their language, *Tax Commission v. Potomac Company*, 182 Md. 111 (1943), and it is only in doubtful cases that justification exists for going beyond the express language of the statute and resorting to its legislative history. *Webb v. City of Baltimore*, 179 Md. 407 (1941); *Bouse v. Hutzler*, 180 Md. 682 (1942); *Welsh v. Kuntz*, 196 Md. 86 (1950); *Pressman v. Barnes*, 209 Md. 544 (1956).

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—WHAT CONSTITUTES PROHIBITED SOLICITATION
IN OTHER STATES BY DOMESTIC INSURERS: “RECIPRO-
CATING STATE” DEFINED.

November 13, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department of Maryland.*

You have asked our opinion whether your department can take action, at the instance of the Ohio Insurance Department, against a domestic insurer for conducting an advertisement program which the Ohio insurance officials consider to be in violation of its insurance laws. Because the new insurance code (Chapter 553 of the Laws of 1963) takes effect on December 31, 1963, we have agreed that our consideration should be limited to the provisions of that law.

From the material that you have sent us the facts seem to be these: The domestic insurer has been qualified to conduct the business of insurance only in this State and in the State of Virginia. It apparently limits its insurance activities to the sale of aircraft policies, and is the official insurer of The Aircraft Owners and Pilots Association. The Association publishes a monthly magazine called “The AOPA Pilot”, which is distributed throughout the country to AOPA members only. It is not sold publicly. The domestic insurer places a full page advertisement in this magazine and includes with it a self-addressed postcard with which an interested member can secure additional information. Such advertisements are also included in a weekly newsletter sent out by AOPA. In the event a prospective purchaser inquires for further information, the domestic insurer corresponds with him by letter and, from the example of the letter we have in the file, vigorously attempts to sell its insurance. The domestic insurer advertises through no other magazine or publication, and, other than described above, conducts no mail solicitation program.

The Insurance Department of Ohio has taken the position that the aforementioned activities, insofar as they are car-

ried on in Ohio, violate the Ohio insurance law. Specifically it is said that by these activities the domestic insurer violates Section 3905.42 of the Ohio Rev. Code, forbidding unauthorized insurers from engaging in the business of insurance in Ohio, and Section 3905.43 forbidding them from distributing advertising matter soliciting insurance in the State. The Ohio Department has asked your department to take some action to require the domestic insurer to cease from conducting the described program in its State.

The extent to which your department can control the activities of domestic insurers in other states, under the new code, is controlled by Section 275, which reads as follows:

“275. Solicitations in Other States.

(a) No domestic insurer shall knowingly solicit insurance business in any reciprocating state in which it is not then licensed as an authorized insurer.

(b) This section shall not prohibit advertising through publication and radio, television and other broadcasts originating outside such reciprocating state, if the insurer is licensed in a majority of the states in which such advertising is disseminated, and if such advertising is not specifically directed to residents of such reciprocating state.

(c) This section shall not prohibit insurance, covering persons or risks located in a reciprocating state, under contracts solicited and issued in states in which the insurer is then licensed. Nor shall it prohibit insurance effectuated by the insurer as an unauthorized insurer in accordance with the laws of the reciprocating state.

(d) A ‘reciprocating’ state, as used herein, is one under the laws of which a similar prohibition is imposed upon and enforced against insurers domiciled in that State.

(e) The Commissioner shall suspend or revoke

the certificate of authority of a domestic insurer found by him, after a hearing, to have violated this section."

Under this section your department can, after a hearing, revoke the certificate of authority of the domestic insurer on the ground of its Ohio activities if: (a) the insurer has violated the prohibitions of this section and (b) Ohio can be regarded as a reciprocating state.

As to the former, we are satisfied that the described program is in violation of Section 275. The insurer is not licensed in Ohio and the solicitations are knowingly made. The exception contained in sub-section (b) is not applicable, even if the magazines and newsletters could be considered as a "publication" originating outside of Ohio but "not specifically directed to residents" thereof, because, according to our information, the domestic insurer is not licensed in a majority of the states in which the advertising is disseminated.

We are not sure, however, that Ohio can be regarded as a reciprocating state. A reciprocating state is defined in subsection (d) as "one under the laws of which a similar prohibition is imposed upon and enforced against insurers domiciled in that state." Search of the Ohio statutes reveals that while that state has a provision prohibiting unlicensed activities by its domestic insurers in other states, the language of that statute is different in important particulars from our Section 275. Section 3905.44 of the Ohio Rev. Code provides that no Ohio insurance company "shall do business" in another state without qualifying to do business there, the statute setting revocation of its license to do business in Ohio as a penalty for a breach thereof.

If the prohibition against Ohio companies "doing business" in other states is construed broadly, so as to forbid the activities proscribed in Section 275 and conducted in this case, we think that it could be considered as a law "similar" to our own and Ohio would qualify as a reciprocating state. If the phrase "doing business" is interpreted strictly, so as to prevent Ohio companies only from execut-

ing and selling policies in other states, we cannot regard the law as being "similar" or Ohio as a reciprocating state.

Indications seem to be that the term "doing business" would be broadly construed. See *Hogan v. Surety Co.*, 8 Ohio App. 172 (1916) and 19 Appelman, *Insurance Law and Practice*, Sections 10350 and 10351. However, because the determination of the scope of this language requires an interpretation of an Ohio law, we think that it would be appropriate for your department to secure, before it takes any action against the domestic insurer, an opinion of the Attorney General of Ohio as to whether the Ohio law, by Section 3905.44 or some other provision, prohibits its domestic insurers from conducting in other states the advertising activities forbidden by our statute. Such an opinion, if it is in the affirmative, would not only give you considerable support as to the proper interpretation of the Ohio law should your action be attacked in court, but it will also provide some assurance that Ohio insurers advertising in this State will be proceeded against by Ohio in the same manner as it suggests you proceed here against the domestic insurer. Of course, if the Ohio Attorney General finds the prohibitions against its domestic insurers not to be as broad in scope as our Section 275, it is apparent that Ohio would not be a reciprocating state and, under those circumstances, we would suggest that your department institute no proceedings against the domestic insurer on the ground of its Ohio activities.

We should like to point out, however, that irrespective of the outcome of the Ohio inquiry, if you find that the domestic insurer disseminates its advertising in a state that does have a law "similar" to Section 275, and is thus a reciprocating state, action could be taken against the domestic insurer on the basis of its activities in that state.

When you receive the opinion of the Ohio Attorney General please contact us and we will advise you further. Enclosed is your original file.

THOMAS B. FINAN, *Attorney General.*

MATHIAS J. DEVITO, *Asst. Attorney General.*

INSURANCE—PERMANENT AND TEMPORARY AGENT'S LICENSES MAY BE LIMITED AS TO KINDS OR CLASSES OF INSURANCE.

December 13, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department.*

You have requested our opinion whether your department may limit weekly premium industrial life and/or health insurance collectors, issued temporary licenses under Section 172 (a) (6) of the new insurance code (Chapter 553 of the Laws of 1963), to the sale or solicitation of weekly premium industrial and/or health insurance. We think that temporary licenses issued under Section 172 (a) (6) can be so limited.

Section 172 (a) of the new code provides that temporary licenses may be issued by the Commissioner "in his discretion" to six categories of individuals, among whom are weekly premium industrial life and/or health insurance collectors. We are of the opinion that, in the exercise of the discretion vested in you by this provision, you may limit the kinds or classes of insurance that all temporary licensees, including those under consideration, may sell or solicit.

This office has ruled that under the present insurance law your department may issue permanent agent's licenses limited to one or more kinds of insurance. See 36 Opinions of the Attorney General 178. The type of statutory provision upon which this conclusion was based is to be found in the new insurance code. See Section 167 (b) which prohibits agents from soliciting "any *kind of insurance* for which he is not then qualified and licensed" and Section 168 (a) (b) (1) which provides that persons may be qualified and licensed as an agent for more than one insured "as to the *kind or kinds of insurance* business for which the person is qualified." See further Section 168 (d) which provides that individuals who conduct their business as a partnership or corporation must nevertheless "be qualified and *licensed*

for the lines for which he is to receive compensation." It was provisions like these that led this office to conclude that the present law permits licensing for limited lines of insurance and we accordingly adopt that conclusion with respect to the new code.

Since your department may restrict permanent licensees to the sale and solicitation of limited classes of insurance, we think that it necessarily follows that you may, in the exercise of the discretion granted under Section 172 (a), do the same with respect to temporary licensees.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

INSURANCE—COUNTERSIGNATURE BY PROXY NOT PERMITTED.

December 13, 1963.

*Mr. F. Douglass Sears, Commissioner,
State Insurance Department
of Maryland.*

You have requested our opinion whether, under the new insurance code (Chapter 553 of the Laws of 1963), effective December 31, 1963, a policy of insurance which must be countersigned prior to the issuance thereof may be countersigned by a proxy holding a power of attorney from a licensed resident agent of the insurer. We have concluded that the new code will not permit a policy to be countersigned in that manner.

A consideration of the legislative history of the present law is of some importance in the determination of this question. The present law, by virtue of Section 114 of Article 48A, permits the practice under consideration by providing specifically for the countersignature of policies by persons "authorized by a general or per policy power of attorney" from a licensed agent of the insurer. This has not always been the case, however. Prior to 1951, the predecessor of Section 114 (Section 87 of Article 48A of the 1939 Code) did not contain specific authority for proxy countersignatures, and for that reason this office, on June 27, 1949, ruled that they were not permissible under that provision. Then Assistant Attorney General Harrison L. Winter said:

"Section 87, as you know, requires that no insurance policy shall be issued until it has been signed or countersigned by an officer or agent resident in this State, authorized by law to sign such policy or contract. The section makes no mention whatsoever about the use of powers of attorney, and we do not believe that the section would be complied with when a policy is countersigned by a proxy under a power of attorney. It seems that if there

is a legitimate need for the use of powers of attorney, it would be necessary first to amend the Maryland statute to permit their use."

The statute was amended in 1951, by Chapter 557 of the Laws of 1951, so as to provide specific authority for proxy countersignatures, and it has remained unchanged since that time.

The provisions of the new code relating to countersignature of policies are contained in subsections (1) and (3) of Section 59 which read as follows:

"(1) No authorized insurer shall issue a policy covering a subject of insurance resident, located, or to be performed in Maryland unless the policy is written through a licensed agent resident in Maryland, nor unless the policy or countersignature endorsement attached thereto is countersigned by such agent; provided that when two or more insurers issue a single policy of insurance the policy may be countersigned on behalf of all insurers appearing thereon by a licensed agent, resident in this State, of any one such insurer."

* * *

"(3) Only a licensed agent resident in Maryland, whose compensation is by commission computed as a percentage of the premium received on each such policy written shall have power to countersign policies or endorsements subject to the requirements of this section; except that in an emergency, in lieu of countersignature by such agent, such policy or endorsement may be countersigned by the insurer's executive officer, general agent, state agent, special agent, or other supervising agent or officer, provided the usual commission on such policy is paid by the insurer to a licensed resident agent."

We think that the enactment of Section 59 in its present form will operate to prohibit the practice of countersigna-

ture by proxy after December 31, 1963, the effective date of the new code.

A reading of Section 59 reveals that it contains no specific authorization for the delegation of the right to countersign policies. This is contrary to the present law, but consistent with the law as it existed before 1951. As we have mentioned above, this office ruled that the law prior to 1951, because it contained no explicit statutory authority therefor, did not permit countersignature by proxy. The Legislature recognized this ruling in 1951 when it amended the present law so as to provide for such authority, and it must be assumed that in 1963, when it enacted Section 59, it was aware not only of our prior ruling but of its own previous action. *Read Drug & Chem. Co. v. Claypoole*, 165 Md. 250 (1933). In view of the foregoing we conclude that the omission of explicit authority for proxy signatures from Section 59 must have been deliberately designed by the Legislature to effect a return to the law as it existed, and was interpreted, prior to 1951, prohibiting countersignatures by proxy.

This conclusion is strengthened by a consideration of the specific language of Section 59(3). That subsection provides that only a licensed resident agent can countersign a policy, except that in an emergency "such policy or endorsement may be countersigned by the insurer's executive officer, general agent, state agent, special agent, or other supervising agent or officer, provided the usual commission on such policy is paid by the insurer to a licensed resident agent." If delegation of authority were to be permissible it would seem that this provision would have been unnecessary.

It is therefore our opinion that any policies of insurance required to be countersigned in this State after December 31, 1963, must be countersigned by a licensed resident agent of the insurer, except in an emergency, where the provisions of Section 59(3) of the new code will govern.

THOMAS B. FINAN, *Attorney General*.

MATHIAS J. DEVITO, *Asst. Attorney General*.

LAND OFFICE, COMMISSION OF

HALL OF RECORDS—LAND OFFICE—LEGISLATURE MAY VEST
RECORD-KEEPING FUNCTIONS OF COMMISSION OF LAND
OFFICE IN HALL OF RECORDS COMMISSION.

January 3, 1963.

Dr. Morris L. Radoff,
Archivist and Records Administrator.

You have requested our opinion as to whether there are constitutional impediments to the merger of the record-keeping functions of the Hall of Records Commission and the Commissioner of the Land Office.

This matter has previously received the attention of this office concerning the custody of the historic records. In 20 Opinions of the Attorney General 271, the then Attorney General, Herbert R. O'Connor, ruled that the Legislature did not exceed its authority in giving the Hall of Records Commission the responsibility for the care of *all* papers and records of the old courts, offices of the proprietary province of Maryland and other *incunabula* and *memorabilia* pertaining to the history of the State. See Article 41, Section 173, Annotated Code of Maryland (1957 Ed.).

The constitutional provisions of Article VII relating to the Land Office are essentially as follows:

Section 4. "There shall be a Commissioner of the Land Office * * *. He shall perform such duties as are now required of the Commissioner of the Land Office, or such as may hereafter be prescribed by Law, * * *."

Section 5. "The Commissioner of the Land Office shall also, without additional compensation, collect, arrange, classify, have charge of, and safely keep all Papers, Records, Relics, and other Memorials connected with the Early History of Maryland, not belonging to any other office."

The provisions of Article VII, Section 5, were intended to constitute the Commissioner a residuary custodian of any and all historical records "not belonging to any other office". This provision, as the Attorney General has previously ruled, does not prevent the creation of another office or commission with more adequate facilities for the preservation of ancient records not in any way related to the general duties of the office. 40 Opinions of the Attorney General, 271, 273.

The duties of the Commissioner of the Land Office are wholly within the power of the Legislature. Niles, *Maryland Constitutional Law*. The general duties of the Land Office prior to the Constitution of 1867 were primarily concerned with surveys, the issuance of patents and sales of public lands. *Smith v. Devecmon*, 30 Md. 473, 479. The office was originally founded during proprietary times for the orderly sale and disposition of parcels of the proprietary estates and settlement of boundary disputes. *Baltimore v. McKim*, 3 Bland 460. It is our opinion, therefore, that all of the record-keeping functions of the Commissioner of the Land Office are entirely subject to legislative control, and that the Legislature could constitutionally effect a merger of his record-keeping functions with those of the Hall of Records Commission.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

LOAN LAWS

INSTALLMENT SALES—REVOLVING CREDIT—SMALL LOANS—
USURY—SMALL LOAN AND USURY LAWS NOT VIOLATED
WHERE BUYER AND SELLER CONTRACT AT TIME OF SALE
FOR ADDITIONAL CONSIDERATION ADDED TO PURCHASE
PRICE FOR PRIVILEGE OF INSTALLMENT PAYMENT OVER
PREDETERMINED PERIOD OF TIME.

March 7, 1963.

Hon. John Clarence North,
State Senator, Talbot County.

You have inquired as to the legality in this State of certain commercial practices involving the extension of credit, either in the form of installment sales or revolving credit. The three examples you have cited are as follows:

Example One. A seller, who has established a cash sales price of \$100 on a sewing machine sells to a buyer under a contract pursuant to which the buyer agrees to pay to the seller \$110 in 12 equal monthly installments, with the seller retaining title for security purposes until the buyer has paid in full. This type of sale is, we believe, covered presently by Article 83, Sections 128 to 153. However, it is our understanding that these sections do not set any maximum rate ceilings.

Example Two. The seller and the buyer enter into the same agreement with no title retention. This type of sale would not appear to be covered by Article 83.

Example Three. The buyer and the seller enter into an agreement, in advance of any purchases, under which the buyer is given the option (with regard to purchases of goods which the buyer may make in the future from the seller) to pay directly to the seller a definite number of monthly installments calculable in relation to the buyer's outstanding balance as of the end of any month, together with an amount equivalent to $1\frac{1}{2}\%$ of the outstanding bal-

ance each month. This third type of installment selling is commonly referred to as a "Revolving Credit" Account.

I.

The first example above is a retail "installment sales agreement", as defined by Section 152(b) of Article 83 of the Annotated Code of Maryland (1957 Ed.). In 1941, after many months of careful study, the Maryland Retail Installment Sales Act, Sections 128-153 of Article 83, was enacted as a classic remedial measure to correct abuses in the installment sales field. The Act provided for full disclosure of terms, refund of finance charges for prepayment and other devices to protect the unwitting purchaser of goods, *title to which has been retained by the seller*. No case has reached the Maryland Court of Appeals testing the applicability of the usury or loan laws to installment sales, as defined by this Act. However, there are many precedents in other jurisdictions and in the standard authorities on the subject clearly indicating the general acceptability of the common law principle that the buyer and seller at the time of a sale may lawfully make an arrangement for delay in time for payment of the purchase price upon payment of an additional consideration which may exceed the lawful interest rate. *Bell v. Idaho Finance Co.*, 255 P. 2d 715 (Idaho); *Jackson v. Commercial Credit Corp.*, 81 S.E. 2d 76 (Ga.); *Robrock v. Ditzler*, 47 N.E. 2d 163 (Indiana); *Black v. Cont. Purch. Corp.*, 42 N.W. 2d 768 (Mich.); *Yeager v. Ainsworthy*, 32 So. 2d 548 (Miss.); *Gen. Cont. Purch. Co. v. Propst*, 239 S.W. 2d 563 (Mo.); *Brown v. Crandall*, 61 S.E. 2d 761; *GMAC v. Weinrich*, 262 S.W. 425 (Mo.). See also cases cited in 91 C.J.S., *Usury*, Sec. 18, p. 589; 2 *Restatement of Contracts*, Sec. 526.

It is our opinion that a *bona fide* retail installment sale as given in your first example violates neither the usury laws nor the small loan laws of this State.

II.

We are of the opinion that the second example you have given is not violative of the usury or loan laws of this State

for the reasons set forth in our discussion of the first example above. The fact that there was no retention of title or security device in connection with the installment sale does not affect the applicability of the small loan or usury laws.

III.

It is our opinion that the revolving charge agreement, set forth in your third example, is a further sophistication of the time-price sales principle. The purchaser enters into an agreement prior to the purchase of goods on credit. This agreement sets forth in detail the credit terms to be extended at the time his purchases are made. At the time of purchase of an item, the buyer and seller, in effect, incorporate the terms of this prior agreement into the terms of the sale; so that the extension of credit on the revolving credit account is a part of the sales transaction and not a loan of money.

The essence of a legal time-price sales transaction is that there be a fixed price payable at a definite time in the future. The terms of the contract at the time of the purchase must be clearly understood by the purchaser and the seller as to the duration and amount of additional consideration added to the purchase price for the forbearance of immediate payment, as well as the mode of payment thereof—e.g., installments.

If the above cited principles are complied with, there is no question that the third example set forth by you would not violate either the usury or small loan laws of this State. While there are no cases in this State or any other state involving the applicability of the usury or small loan laws to the type of revolving credit set forth in your third example, the Attorneys General of Pennsylvania and New Mexico, in ruling on revolving credit account plans of a type similar to that cited by you, have found same to be valid under the laws of their respective states. We wish to point out, however, that there are a variety of retail credit plans in operation today. Each plan necessarily must be judged in light

of its own provisions and the manner in which it is administered. Manifestly, our letter to you does no more than respond specifically to the particular illustrations which you have outlined to us.

As we are sure you will appreciate, the short time allowed to us to respond to your inquiry was such that further or more detailed elaboration was not possible at this time.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

LOAN LAWS—SMALL LOANS—RESTRICTIONS ON MERCHANT
REFERRAL BUSINESS—LOAN APPLICATION—PROCEEDS
OF LOAN—MISLEADING ADVERTISING—DOWN PAYMENT
LOANS—RETAIL INSTALLMENT SALES.

June 17, 1963.

Mr. Carl F. Vohden,
Administrator of Loan Laws.

You have requested our opinion as to the limits placed upon "merchant referral business" by the Maryland Uniform Small Loan Law, Article 58A of the Maryland Code. By "merchant referral business" or "merchant contact business" is meant the referral of prospective borrowers to a licensed lender by a merchant, dealer, or other seller of goods, the patron of which lacks sufficient funds to complete a purchase. The Deputy Administrator of Loan Laws has indicated that there have been abuses in this type of business (see letter opinion of the Attorney General, January 12, 1962), and there appears to be some confusion as to the applicability of the Small Loan Law to this phase of small loan business activity.

Letters and statements from a number of small loan licensees doing business in Maryland indicate that the current practice of merchant referral operates in the following manner. Where a prospective customer of a retail dealer indicates that he lacks sufficient funds to make a desired purchase, the dealer advises him that he may be able to borrow the needed money from a loan company. The dealer then refers the prospective customer to a particular loan company. Often the dealer first calls the lender; and after stating certain preliminary credit information, the dealer asks whether or not the lender is interested in receiving a loan application from the prospective buyer. The prospect then goes to the loan office. The loan application containing the credit information upon which credit is extended and the entire loan transaction including signing of the note and issuance of the funds take place entirely within the place of business of the

licensed lender. The proceeds of the loan are advanced to the borrower directly either in cash or by check payable to the borrower only. Neither the lender nor the dealer nor any of their employees receive any direct material benefit or compensation whatsoever from the other for the referral of this business other than the profit naturally resulting from the increased business to each.

If the above "classic" example of merchant referral business is strictly adhered to, it would appear that there would be no violation of the Maryland small loan laws. However, it has come to our attention that there are many variations of the above example of such business in existing practices by Maryland small loan licensees, and you have requested our opinion as to the legality of some further extensions of the example given.

In an opinion of this office dated January 12, 1962, we ruled that where a merchant receives such credit information as would constitute an application for a loan from a prospective purchaser, and refers this application to a licensed lender, without the latter's ever having seen the prospective buyer, such transaction violates Section 9, Article 58A, Annotated Code of Maryland (1957 Edition). This opinion emphasizes a concept basic to the regulation of merchant referral business; namely, that the small loan licensee is restricted in the transaction of its business to the actual premises designated in the license. This restriction includes the receiving of loan applications, the signing of notes and contracts, and the lending or advancement of money. Under a strict construction of the statute, the licensee may not delegate any of these functions to a merchant or any other person outside of the small loan office; and any loan made where such functions take place outside of the office by a person acting on behalf of the licensee would be in violation of Section 9, Article 58A.

The statute prohibits the receiving of an application for a loan off the premises of the licensee. An application for a loan is a request for a loan accompanied by whatever credit data the lender requires to be furnished to enable

it to decide whether a loan will be granted. A practice has grown up in the industry whereby a merchant receives from a prospective borrower certain credit information, sometimes on forms supplied by small loan licensees; and this information is forwarded to the licensee by telephone or other means, before the prospect either communicates with the lender or goes to the loan office. Ostensibly the purpose of this screening procedure is to eliminate bad credit risks from consideration by the licensee before such persons appear in the loan office. This practice, however, may be subject to abuse.

It would seem unnecessary in preliminary credit screening for the licensee to receive more than the name, address, age, employment and salary, wife's name, employment and salary, number of dependents, amount of rent or mortgage payments and other fixed indebtedness of the borrower.

Whether a representative of the seller transports or accompanies the prospective borrower to the licensee's office does not in and of itself constitute a violation of the loan laws. It is a factor to consider in determining whether there exists a concert of action between the dealer and lender.

Once the borrower has entered the licensee's place of business, his dealings there should be entirely with the personnel of the licensee. All documents, notes, indorsements, applications, and other papers relating to the loan transaction must be signed by the borrower at the licensee's place of business.

We construe Section 9, Article 58A, where such section restricts "loans or advancements" made and "notes or contracts signed" to the place of business of the licensee to include the advancement of the proceeds of the loan in cash or by check to the borrower. This section of the loan law precludes the licensee from advancing the proceeds of the loan directly to the merchant under an agreement with the merchant. It would be in violation of this section for the licensee to deliver to the merchant or his representative accompanying the borrower to the loan office, the cash

or check representing the proceeds of the loan under circumstances whereby the borrower neither receives the cash nor the check at the lender's place of business. Where the merchant receives the check directly from the lender and delivers the same to the borrower at the merchant's place of business for the purpose of having the check endorsed over to the merchant, Section 9 would be violated because the borrower would be receiving the proceeds of the loan at the merchant's place of business rather than at the licensee's office.

A licensee knowingly making a loan to a customer of a merchant whose advertising misrepresents the fact that the purchaser shall be dealing with a small loan licensee, and not with a sales finance company, bank, or other financial institution, may be found to be in violation of the character and fitness provisions of the small loan laws; namely, Section 4(b), Article 58A. Further, if a licensee is found to have aided, abetted, and otherwise encouraged a dealer or other party, to cause to be printed, published, distributed, or broadcasted any statement with regard to rates, terms, or conditions for the lending of money, credit, etc., in amounts of \$300 or less, which is false or calculated to deceive, such licensee may have violated Section 15, Article 58A.

Neither the Uniform Small Loan Law nor the Retail Installment Sales Act, Article 83, Sections 128-153, prohibit a lender from making a small loan to enable a prospective buyer to make a down payment on the purchase of goods bought pursuant to a retail installment sales contract. However, it is our opinion that the small loan law would be violated where the loan and the sales contract are held, directly or indirectly, by the same person, co-partnership, corporation, subsidiary or affiliate. Article 58A, Section 21; Article 83, Section 133.

This opinion is intended merely as a general guide, and further refinements may be necessary from time to time regarding specific fact situations. In determining whether or not a merchant referral transaction violates the Uniform

Small Loan Law, and warrants revocation of a license, as Administrator you might give consideration to the following issues:

1. Does the prospective borrower communicate directly to the licensee his request for the loan?
2. Does the prospective borrower communicate directly to the licensee such credit information as the licensee requires in order that the licensee may decide whether to grant the loan?
3. Does the borrower receive the proceeds of the loan at the licensee's place of business?
4. Does the course of dealings between the merchant and licensee show an agency relationship?
5. Does the borrower know that he is obtaining a loan from the licensee, separate and apart from the terms of the sale?

We trust that the above interpretations of the Uniform Small Loan Law will be of some assistance to you in your administration of merchant referral business in the State of Maryland.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

LOAN LAWS—SALES FINANCE COMPANY—USE OF TERM
“BANKERS CORPORATION” IN CORPORATE NAME PRO-
HIBITED BY SECTION 105, ARTICLE 11 (BANKING LAW).

July 22, 1963.

Mr. Carl F. Vohden,
Administrator of Loan Laws.

In your letter of July 16, 1963, you requested our opinion as to the legality of the use of the word “bankers” in the corporate name of a sales finance company licensed under the Maryland Sales Finance Act.

Section 105 of Article 11 of the Annotated Code of Maryland (1957 Ed.) prohibits the use by any person, firm or corporation “not subject to the supervision and examinations of the Bank Commissioner, and not required to make reports to him by the provisions of this article,” of any word or words “indicating that such business is the business of a banking institution”. This statute prohibits the use of such words in any corporate name, advertising its place of business or on any letterheads, billheads, blank notes, blank receipts, circulars or any other written or printed papers whatsoever.

It is our opinion that the word “bankers”, as used by the corporation referred to in your letter, could mislead the public into believing that the business conducted under the name containing the word “bankers” in its title, as “——— Bankers Corporation”, is engaged in the business of a banking institution.

The prohibition in Section 105 of Article 11 extends to all persons, firms or corporations that are not incorporated banks, savings institutions and trust companies regulated by the Bank Commissioner, subject to the provisions of Article 11. This prohibition on the use of misleading terminology was incorporated in the original banking act—Chapter 219, 1910 Laws of Maryland, Section 74.

The provisions of Article 11, providing for examination of banking institutions by the Bank Commissioner, are contained in Sections 6, 20, 21, 24, 33 and 56. In each of these sections the class of institutions referred to falls within the definition of a banking institution as set forth in Section 63 of Article 11; namely, incorporated banks, savings institutions and trust companies. It is our opinion that no other institutions may use the word "bankers" in their corporate name in the fashion employed by the corporation referred to in your letter. The sales finance company to which you refer, therefore, violates the banking law of this State.

THOMAS B. FINAN, *Attorney General*.

LORING E. HAWES, *Asst. Attorney General*.

LOAN LAWS—SMALL LOANS—LOANS BY MAIL NOT PROHIBITED BY SECTION 9, ARTICLE 58A, ANNOTATED CODE (1957 ED.).

November 29, 1963.

Mr. Carl F. Vohden,
Administrator of Loan Laws.

You have requested an opinion on the legality of small loans by mail in the light of the proscriptions of Section 9, Article 58A, Annotated Code of Maryland (1957 Edition).

Section 9, Article 58A, provides as follows:

"No person, copartnership, or corporation so licensed shall make any loan or transact any business provided for by this article, under any other name, or at any other place of business, than that named in the license. Not more than one place of business shall be maintained under the same license and no loans or advancements shall be made, applications received, notes or contracts signed, at any other place of business than that designated in the license. . . ."

This section of the Uniform Small Loan Law restricts the lender to making loans, receiving applications, making advancements and doing other specified acts necessary to perfect a loan contract, to the licensed place of business, and no other. In the recent opinion of this office, dated June 17, 1963, (page 264 this volume) relating to merchant referral loans, we stated, *inter alia*, that the receiving of an application or the advancement of the loan proceeds at the merchant's place of business, where the merchant had acted as an intermediary between the borrower and lender, would constitute a violation of Section 9. Where, however, the transaction is wholly consummated directly with the borrower by mail, it cannot be said that the various activities specified in Section 9 are performed "at any other place of business" than the loan office.

We conclude, therefore, that loans by mail consummated directly with the lender are not in violation of Section 9, Article 58A.

THOMAS B. FINAN, *Attorney General.*

LORING E. HAWES, *Asst. Attorney General.*

MEDICAL EXAMINERS, BOARD OF

MEDICINE AND SURGERY—MEDICAL ANESTHESIOLOGY—DOCTOR OF MEDICINE AND DOCTOR IN FIELD OTHER THAN MEDICINE MAY NOT PRACTICE ANESTHESIOLOGY AS A SPECIALTY WITHOUT LICENSE TO PRACTICE MEDICINE IN STATE.

January 16, 1963.

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

You have asked our opinion whether a doctor of medicine or a doctor in a field other than medicine may practice in the field of anesthesiology without a license to practice medicine in the State of Maryland.

By "practice", we assume your inquiry to be directed to those specialized phases of the utilization of anesthesiology other than, e.g., that employed normally by a doctor of dentistry in connection with and incidental to the practice of his profession.

Neither the Maryland Court of Appeals nor this office has ruled upon the question raised by you, and the provisions of Code, Article 43, relating to the various areas of professional practice (including practitioners of medicine) and of Article 32, Sections 1, et seq., relating to dentistry, are silent in the matter.

Code, Article 43, Section 139 (1957 Edition), provides, *inter alia*:

"... Any person who practices medicine or the art or science of healing shall be considered as a practitioner of medicine or surgery. As used herein the phrase 'art or science of healing' and the phrase 'practice of medicine' shall be construed to include: Operating on, professing to heal, prescribing for or otherwise diagnosing or treating any physical or mental ailment or supposed ail-

ment of another; or for hire or gratuity or compensation, either directly or indirectly paid, undertaking by appliance operation or treatment of whatever nature, to cure, heal, diagnose or treat any bodily or mental ailment or supposed ailment of another; or for hire, gratuity or compensation, either directly or indirectly paid, by or for any patient, undertaking to treat, heal, cure, drive away or remove any physical or mental ailment, or supposed ailment of another, by mental or other process, exercised or invoked on the part of either the medical practitioner or the patient or both . . .”

In *Order of United Commercial Travelers v. Shane*, 64 F. 2d 55 (1933), death of the insured resulted from the administration of an anesthetic during medical examination. It was contended on behalf of the carrier that the death did not result from “medical treatment”. There, the court said, at page 59:

“The drug butyn was concededly administered to the insured by a physician of good standing. It was administered for the lessening of pain to the patient during a preliminary examination of the posterior urethra. It was a drug commonly used by physicians for such purpose. The usual and proper amount of the drug was used, and it was properly administered. We think the administering of the drug must be placed in the category of medical or surgical treatment.”

* * *

“If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act.”

Accord: *Westmoreland v. Preferred Accident Insurance Company*, 75 Fed. 244; *Provident Life and Accident Insurance Company v. Hutson* (1957), Tex. Civ. App., 305 S.W. 2d 837, 840.

And see annotation at 65 A.L.R. 2d 1449, 1450 (1959):

“What constitutes medical or surgical treatment, or the like, within exclusionary clause of accident policy or accidental death feature of life policy. Administration of anesthetic or sedative.”

In *Flint v. Travelers Insurance Company* (1898), Tex. Civ. App., 43 S.W. 1079, 1081, the court held that the administration of morphine by a physician to the deceased was “medical treatment”. In *International Travelers’ Assn. v. Yates* (1930), Tex. Civ. App., 29 S.W. 2d 980, 981, the insured died as the result of the administration of nitrous oxide gas given to him by his physician as an anesthetic preparatory to an operation for an abscessed tonsil. There the policy contained a clause relieving the company from liability should death result “from disease or medical treatment therefor”.

The court said:

“... the undisputed evidence shows the death of the assured was within the exception contained in the policy, in that it resulted from medical or surgical treatment for disease.

“An operation is, of course, surgical treatment. A necessary part of an operation is the administration of an anesthetic. It is a matter of common knowledge that an operation of any magnitude requires the administration of a local or general anesthetic and that it is usual and customary in such cases to administer the same. The stipulation in the policy by which the parties have agreed that the company shall be relieved from liability where death results to the assured from surgical treatment must be construed in the light of the knowledge on this subject possessed by the parties at the time the policy was issued. We think it true, as said by the Supreme Court of Kentucky, in *Barrett’s Adm’r v. Brand*, 179 Ky. 740, 201 S.W. 331, 334: ‘Any ordinary layman would know that

an operation included everything done from its commencement until it was completely finished. *Every act necessary to its performance* is included within the known meaning of the term.

"It is a well-known fact that in the case of surgical operations an anesthetic is administered for two purposes: First, to relieve the patient from suffering pain while the operation is in progress; and second, to enable the physician to skillfully and effectively perform the operation without interference from the patient. Being used for such purposes the giving of the anesthetic is a necessary and important part of the surgical treatment received by the patient. *Westmoreland v. Preferred Acc. Ins. Co. (C.C.A.)*, 75 F. 244, 246.'

"No competent physician would attempt to perform an operation similar to the one upon the assured without the administration of an anesthetic, either local or general; hence the physician in giving the anesthetic to the assured was carrying out the usual and customary method of performing the surgical treatment required by the patient's condition.

"Again, when we consider the object and purpose of the administration of the anesthetic in this case, the conclusion is compelled that it also constituted 'medical treatment' within the exception contained in the policy. The physician was treating the assured for a disease with which he was suffering. The character of treatment shown to have been required by the patient's condition would inevitably cause pain and suffering to the patient and the use of means to deaden the pain resulting from necessary surgical treatment of such disease in the very nature of things constitutes medical treatment. If the patient in this case had been given an injection of morphine to ease pain caused by the disease from which he was suf-

fering, this would undeniably constitute medical treatment. *Flint v. Travelers Ins. Co.* (Tex. Civ. App.), 43 S.W. 1079. We are unable to see any distinction between medical treatment to relieve pain caused by disease and the giving of an anesthetic to prevent pain resulting from treatment necessary to effect a cure of such disease. Undoubtedly, it would be as much the duty of a physician to use the means known to medical science to prevent the infliction of unnecessary pain upon his patient while engaged in performing an operation to effect a cure of disease with which the patient is suffering as it would be to relieve him of pain necessarily incident to the disease itself. It would seem that one would be as much medical treatment as the other."

In *Wilson v. Business Men's Assurance Company of America* (1950), 181 F. 2d 88, 89, 90, the Court of Appeals affirmed the District Court's findings, among others, that "the opiates and sedatives were administered as medical treatment" following a hernia operation.

In *State v. Catellier*, 63 Wyo. 123, 179 P. 2d 203, wherein a chiroprapist administered certain anesthetics intravenously, from which the patient died, the court ruled that such administration of anesthetics by the said chiroprapist as an independent enterprise "constituted the practice of medicine".

In an opinion dated January 15, 1959, *Florida Opinions of the Attorney General*, Opinion 059-6, the following question was asked: "May a dentist licensed to practice in the State of Florida, who has completed satisfactorily a qualified residence in anesthesiology, including all phases of medical anesthesia in the University Hospital, engage in the private practice of medical anesthesia without being licensed by the State Board of Medical Examiners?" The Attorney General of Florida stated at that time, *inter alia*:

"It is further my opinion that no amount of hospital training or education in anesthesiology

would cure the 'legal disability' of a licensed dentist to administer anesthetics '*as an independent enterprise*'. However, it may be that a qualified dentist, as well as a registered nurse, *might administer anesthetics under the direct supervision, direction and control of a registered and licensed physician* as an employee or assistant to said physician. However, it must be borne in mind that under the rule of respondeat superior, the physician or operating surgeon would be personally responsible for acts of negligence on the part of the dentist who is administering the anesthetic under his direction and supervision.

"In the final analysis I cannot agree that a dentist or anyone not licensed under Chapter 458, Florida Statutes, may engage *in the private practice of medical anesthesia*. This professional designation opens up conjecture that such a practitioner might venture beyond the usual giving of anesthesia under the direction and supervision of a licensed physician and proceed on his own to diagnose and profess to administer pain reducing and relieving anesthetics.

"If on the other hand, a dentist wishes to serve as an employee of a physician to administer anesthesia, similar to that given by a physician's nurse under his supervision and direction, he may do so; provided each physician is willing to accept the legal responsibility for his acts. However, he may not hold himself out as an independent practitioner in a new healing art; viz., medical anesthesia, because he is capable and licensed as a dentist to administer anesthesia only for dental purposes does not *legally* qualify him for administering general anesthesia."

See, also, *Opinion of the Attorney General of Vermont*, dated August 10, 1960.

For authority dealing with the question regarding the

activity, e.g., of a nurse, when acting under the immediate and personal direction and supervision of a physician, where the nurse does not make a diagnosis or exercise medical judgment, see the following: *Frank v. South* (1917) (Ky.), 194 S.W. 375; *Chalmers-Francis v. Nelson* (1936) (Cal.), 57 P. 2d 1312; *Wells v. McGehee* (1949) (La.), 39 So. 2d 196; *Levy v. Vaughn* (1914) 42 App. D. C. 146; *Opinion of the Attorney General of Indiana*, dated October 9, 1959, 1959 *Opinions of the Attorney General* 268, No. 55; *Opinion of the Attorney General of Mississippi*, dated July 26, 1954; *Opinion of the Attorney General of Michigan*, dated November 14, 1939, 1939-1940 *Opinions of the Attorney General* 308.

The American Medical Association recognizes the practice of anesthesiology as the "practice of medicine". (See Minutes of the Annual Session of the House of Delegates of the American Medical Association, Journal of the American Medical Association, 143:1080, July 22, 1950). And it seems clear that in order to gain recognition as a fellow of the American College of Anesthesiologists an applicant must "... be licensed to practice medicine by a national or state board of examiners or its equivalent". *Anesthesiology Handbook* of the American Society of Anesthesiologists, Inc., page 12. See also *Booklet of Information* of the American Board of Anesthesiology, Inc., July 1961, page 4.

On the basis of the cited authority and for the above reasons, we conclude that the "practice of medical anesthesiology" is the "practice of medicine" and that a doctor of medicine or a doctor in a field other than medicine may not practice anesthesiology as a specialty or as an independent enterprise without being licensed to practice medicine and surgery in the State of Maryland, pursuant to Code, Article 43, Section 119, et seq.

THOMAS B. FINAN, *Attorney General*.

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

MEDICAL EXAMINERS—LICENSING OF CANADIAN AND MEXICAN PHYSICIANS FOR PRACTICE IN MARYLAND IN THE EVENT OF A DISASTER WITHIN THIS STATE—EXCEPTIONS TO THE REQUIREMENTS OF LICENSING AND REGISTRATION UNDER THE MEDICAL PRACTICE ACT.

July 17, 1963.

*Mrs. Rose F. Barry, Executive Secretary,
Board of Medical Examiners of Maryland.*

Your letter of June 11, 1963 requests our opinion as to whether the Board of Medical Examiners of Maryland (the Board) could issue a license to Canadian and Mexican physicians to practice medicine in Maryland in time of disaster within this State. We understand that this request is prompted by an inquiry emanating from a meeting by the Canadian and United States health officials who are responsible for planning emergency health services in a national disaster.

The Medical Practice Act of Maryland, Article 43, Sections 119-149 of the Annotated Code of Maryland (1957 Edition) prohibits "the practice of medicine" as defined in § 139 of the Act by any person who has not been licensed to practice by the Board and who has not registered as a physician or surgeon as required by § 133 of the Act. However, certain exceptions to these requirements for licensing and registration are provided for in § 139, *supra*, in the cases of:

1. Gratuitous services
2. Resident and assistant resident physicians and students at hospitals, in the discharge of their hospital or dispensary duties and in the office of physicians
3. Any physician or surgeon from another state when in actual consultation with a practitioner of this State

4. Commissioned surgeons of the United States Army or Navy or United States Public Service Hospitals and Veterans Administration Hospitals

5. Opticians or masseurs or other manual manipulators who use no other means

6. The following which are provided for in other sections of Article 43—midwives, optometrists, osteopaths, chiropodists, chiropractors, physical therapists

7. Any physician or surgeon residing on the border of a neighboring state and authorized to practice medicine or surgery therein whose practice extends into this State provided that the same privileges be accorded to licensed physicians of this State

8. Graduates of dental surgery

9. The sale by druggists and other dealers in medicines in any proprietary or patent medicine or any official or standard drug or medicine.

§ 139 of Article 43, *supra*; *Aitchison v. State*, 204 Md. 538 (1954); *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Md., 1956). "State" as used in the above exceptions, in our opinion, would not include Canada or Mexico. 31 Opinions of the Attorney General 143.

Your correspondence with this office does not disclose in what capacity the Canadian and Mexican physicians under consideration would be brought into this State in the event of the possible disaster, but it may be that they would fall within the exceptions of Nos. 1, 2 or 4 above recited in which case their practice in this State would not require licensing by the Board or registration as physicians or surgeons.

In the event that the foreign physicians would not qualify for any of the exceptions set forth above, the Act would then require that they follow the procedures set forth in

§ 124 thereof to apply to the Board for licensing and if licensed by the Board for registration as practicing physicians or surgeons under § 133 of the Act. The provisions of § 124 of the Act authorizing the Board to license without examination applicants who present proper certificates of proficiency and professional standing at the time of application issued by the National Board of Medical Examiner or Boards of Medical Examiners of the District of Columbia and of other states would not apply to Canadian or Mexican physicians in our opinion inasmuch as "states" as used in § 124 does not include foreign countries within its meaning. 31 Opinions of the Attorney General 143. However, the Board would have discretion to grant licenses to the Canadian and Mexican physicians after a special examination provided the applicants "met all the preliminary and professional qualifications required for obtaining a license by examination in this State if the applicant had been in reputable practice for a period of ten years and had reached a position of conceded eminence and authority in his profession." § 124 of Article 43, *supra*.

If the Board determines that Canadian or Mexican physicians could not qualify under the exceptions to licensing and registration required by the Act in the capacities in which they would enter the State in the event of disaster, and if the Board further concludes that the application requirements for licensing contained in § 124 of the Act would be too time consuming at the time of such a disaster, it would seem desirable to introduce legislation in the General Assembly of Maryland to create a new exception to the licensing and registration requirements of the Act to allow physicians of Canada and Mexico to enter this State in the time of a disaster in order to remove the legal objections to such a procedure now existing.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

BOARD OF MEDICAL EXAMINERS—FITTING OF CORRECTIVE
SHOES NOT WITHIN DEFINITION OF "PRACTICE OF MEDICINE" REQUIRING LICENSING BY BOARD.

July 22, 1963.

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

In your letter of June 6, 1963 you refer us to two complaints made by residents of Montgomery County with regard to the sale of corrective shoes by the proprietor of a shoe store in that county who is not licensed by your Board as a physician or surgeon. These complaints, made originally to the Montgomery County Medical Society, recite similar facts. It appears that the shoe store proprietor in question prescribed a corrective shoe in each instance for a young child after informing the parent of the child who accompanied him to the store that the child needed a special type shoe. Thereupon a corrective shoe was fitted for each child and purchased by the parent. In both cases the shoe sold was unsatisfactory and each child experienced difficulty in walking properly while wearing the corrective shoe supplied.

You request our opinion as to whether the acts of the shoe store proprietor above outlined constitute unlicensed practice of medicine.

The "practice of medicine" requiring licensing by the Board of Medical Examiners of Maryland is defined by the Legislature in § 139 of Article 43 of the Annotated Code of Maryland (1957 Edition)—The Medical Practice Act—as the:

*** Operating on, professing to heal, prescribing for or otherwise diagnosing or treating any physical or mental ailment or supposed ailment of another; or for hire or gratuity or compensation, either directly or indirectly paid, undertaking by appliance operation or treatment of whatever nature, to cure, heal, diagnose or treat any bodily or mental ailment or supposed ailment of another; or

for hire, gratuity or compensation, either directly or indirectly paid, by or for any patient, undertaking to treat, heal, cure, drive away or remove any physical or mental ailment, or supposed ailment of another, by mental or other process, exercised or invoked on the part of either the medical practitioner or the patient or both * * *".

The Court of Appeals of Maryland has recognized that "it is absolutely clear from the definite language of the statute that the Legislature intended 'practice of medicine' to include not only the application of medicine to patients, but any practice of the art of healing disease and preserving the health other than those special branches of the art that were expressly excepted." *Aitchison v. State*, 204 Md. 538 (1954) and *Hitchcock v. State*, 213 Md. 273 (1957).

The exceptions provided from the broad definition given in § 139 include "the following which are provided for in other sections of this article hereinafter indicated: * * * chiropodists, §§ 481-494." Reference to the sections governing the practice of chiropody and specifically to § 489 of Article 43, *supra* provides: "nothing in this subtitle, however, shall be construed to * * * prevent or restrict the commercial sale or *fitting of shoes or foot appliances*." (Emphasis supplied.)

Inasmuch as the definition of "the practice of medicine" expressly excludes the practice of chiropody and inasmuch as practice of "chiropody" expressly excludes the fitting of shoes or foot appliances we are of the opinion that these sections of Article 43 must be read together, and that when this statutory construction is followed, by inference the fitting of shoes or foot appliances is expressly excluded from the definition of "practice of medicine." *Crider v. Cullen*, 191 Md. 723 (1949). In adopting this construction of these sections we refer to cases decided by courts outside of the State of Maryland which have construed similar statutory provisions in like manner when dealing with problems similar to the situation presented by the complaints of Montgomery County residents now before us. *People v. Dr.*

Scholl's Foot Comfort Shops, 13 N.E. 2d 750 (N.Y., 1938) ; *State Board of Medical Examiners v. Urchin*, 156 A. 285 (D.C. N.J., 1931) ; *Connecticut Chiropody Society, Inc. v. Murray*, 153 A. 2d 412 (Conn., 1959) ; *Staley v. Board of Medical Examiners*, 240 Pac. 2d 61 (Cal. App., 1952).

Inasmuch as the provisions with regard to licensing are in derogation of the common law and penal in nature, they must be construed strictly. *Dvorine v. Castleberg Corp.*, 170 Md. 661 (1936).

For the foregoing reasons it is our opinion that the shoe store proprietor in question is not practicing medicine in the fitting and sale of corrective shoes under existing law controlling the situation.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

MEDICAL EXAMINERS—MEDICAL PRACTICE ACT—UNLAWFUL
ADVERTISING BY LICENSED PHYSICIAN—INCLUSION OF
NAME IN MEDICAL DIRECTORY PUBLISHED FOR USE OF
FELLOW PRACTITIONERS AND NOT FOR DISTRIBUTION TO
PUBLIC DOES NOT CONSTITUTE ADVERTISING IN VIOLA-
TION OF ACT.

December 9, 1963.

Mrs. Rose F. Barry,
Executive Secretary,
Board of Medical Examiners
of Maryland.

You have advised us that a printing company proposes to publish a directory of physicians who are engaged in practice in the Baltimore Metropolitan area. The format of the directory will be substantially in the form of one recently published by the same company for the Washington, D. C., area, a copy of which has been submitted to us for review. This directory, prepared for the use of the medical profession and not intended for distribution to the public, lists therein the name and address of the physician together with his telephone number. No information is given as to his specialty nor is any information furnished as to his qualifications. No charge is made to the physician for the inclusion of his name in the directory.

The directory will also contain the names and addresses of hospitals, laboratories, clinics, medical societies, and health authorities in the area and is obviously intended to compile in one booklet most of the information necessary to enable a practicing physician to communicate with his fellow practitioners and those agencies with which he is required to deal in his day to day practice.

You have raised the question of whether inclusion of a physician's name in this directory might constitute a violation on his part of the prohibition contained in Article 43, Sections 146-148, Annotated Code of Maryland (1957 Edition, as amended), against advertising by physicians licensed by your Board.

Section 146 of Article 43 provides :

"All advertising by all persons practicing medicine and surgery in this State is prohibited except the following:

"(a) A physician or surgeon may use a personal professional card of not more than $3\frac{1}{2}$ " x 2", upon which may be printed only his name, title, address, specialty, telephone number and office hours.

"(b) Removal notices may be mailed by any physician or surgeon notifying any bona fide patient of said physician or surgeon that he is removing his offices from his present address to the address set forth on said notice. Said notice shall be not more than 5" x 7" and may only contain the name, title, specialty, telephone number, office hours and new address and old address.

"(c) Each physician or surgeon may exhibit on the door or wall of the building wherein he practices not more than two signs on which may be placed the name and title or degree of such person, and his specialty, the letters of which shall not exceed three inches square. In addition he may exhibit such sign on the door of his office in addition to those on the door or wall of such building."

Section 147 of the same Article states :

"Any person practicing medicine or surgery who shall solicit or advertise by mail, card, newspaper, pamphlet, radio or otherwise to the general public, except as set out in §146, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$50.00 nor more than \$300.00 for each offense. Provided, however, that notices by mail to bona fide patients of times for periodic examinations shall not be construed as soliciting or advertising."

Section 148 provides that a violation of the two foregoing sections shall constitute unprofessional conduct and subject the violator to revocation of his license.

In upholding the validity of this prohibition as a valid exercise of the police power of the State, the Court of Appeals of Maryland in *Davis v. State*, 183 Md. 385 (1944), went on to construe the intention of the Legislature in promulgating the prohibition against advertising. The Court there stated at p. 393:

"The right to carry on any lawful business, trade or calling is subject to regulation by the Legislature under the police power of the State whenever necessary to promote in some degree the public health, morals or welfare. *Dasch v. Jackson*, 170 Md. 251, 183 A. 534. The Legislature, in enacting the statute now before the Court, aimed to aid in maintaining the high standard of ethics of physicians and surgeons. The State has the power to see that only persons with special training and skill shall undertake the difficult and responsible duties of dealing with the health and lives of the people. The State is vitally concerned in attracting young people of ability to this learned profession, and also in making it possible for those who are engaged in practice to survive without facing unseemly competition, thus leaving them free to improve their qualifications without the necessity of devoting a large part of their time and effort to ruthless competitive pursuit for patients. The Maryland Legislature determined that physicians of mediocre ability are likely to make up for lack of genuine merit by knowledge of mass psychology and skill in appealing to the emotions and hopes of the uninformed and credulous. Under the traditional method of professional advancement as a result of the recommendations of satisfied patients, the progress of a practitioner may be slow, but it bears more relation to merit; whereas mediocre

practitioners who advertise extensively can obtain new patients by clever publicity as fast as the discovery of their mediocrity causes the loss of patients. It is well established that the State may lawfully forbid any advertising by medical practitioners that solicit patronage for the advertisers. *Laughney v. Maybury*, 145 Wash. 146, 259 P. 17, 54 A.L.R. 393."

See also *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Md. 1956).

We find nothing in the proposal before you which would run afoul of the Legislature's desire to prohibit advertising by licensed physicians as above construed by our Court of Appeals. The directory in question is not aimed at the general public and, even if it were, does no more than collect the names and addresses of physicians together with their telephone numbers which, of course, is now being done by the telephone company in much the same form in its published "yellow pages". The fears of the Legislature, as expressed by the Court of Appeals in *Davis v. State*, *supra*, against the public being misled by unethical practitioners is not directed, in our opinion, at the type of directory in question. The same type of directory has for many years been published by a local bank covering members of the legal profession and we find a complete analogy between this directory for lawyers and the proposed one for physicians.

In conclusion, we do not think that inclusion of a physician's name in such a directory constitutes "advertising" and therefore we find therein no violation of Article 43, Sections 146-148.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

MEDICAL EXAMINERS—PHYSICIAN COMPETENT TO EXECUTE BIRTH OR DEATH CERTIFICATES—INTERN OR RESIDENT IN A HOSPITAL IN THIS STATE MAY EXECUTE CERTIFICATES IF HE IS IN ATTENDANCE AT THE TIME OF EVENT—PHYSICIAN LICENSED BY BOARD, EVEN THOUGH HE HAS FAILED TO COMPLY WITH THE TRIENNIAL REGISTRATION LAW, IS COMPETENT TO EXECUTE CERTIFICATES.

December 19, 1963.

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

You have asked our opinion as to whether an intern or resident in a hospital within this State, who is not a licensed physician or surgeon of your Board, may sign a birth or death certificate. You raise the same question as to whether a physician who is licensed by your Board, but who is not currently registered as required by Article 43, Section 129A of the Annotated Code of Maryland (1957 Edition, as amended) is competent to do so.

Article 43, Section 17, provides for the proper execution of birth certificates as follows:

“(a) *Birth registration.*—(1) When a birth occurs in an institution, the person in charge of the institution or his designated representative shall prepare the certificate of birth and secure signature required on the certificate and shall file it with the State Board of Health and Mental Hygiene within seventy-two (72) hours after the birth. The physician in attendance shall verify or provide the date of birth and medical information required by the certificate.

“(2) When a birth occurs outside an institution, the certificate of birth shall be prepared and filed within seventy-two (72) hours after the birth by one of the following in the indicated order of priority:

“(i) The physician or midwife in attendance at or immediately after the birth, or in the absence of such a person,

“(ii) Any other person in attendance at or immediately after the birth, or in the absence of such a person,

“(iii) The father, the mother, or, in the absence of the father and the inability of the mother, the person in charge of the premises where the birth occurred.”

Proper execution of a death certificate is provided by Section 20 of the same Article as follows:

“(a) *By whom and time filling out.*—The certificate of death shall be filled out and signed within twenty-four (24) hours after death by the physician last in attendance upon the deceased, except in such cases where the medical examiner takes charge of the corpse, in which case the certificate shall be executed by him.”

Thus it is seen that in the case of both birth and death certificates under certain circumstances the physician in attendance is required to file the certificate. We do not think that “physician” as used in these Sections requires that the person described be a licensee of your Board if, as in the case of interns or residents of hospitals in this State, this form of practicing medicine is excluded from the requirements of licensing by virtue of Article 43, Section 139.

We, therefore, are of the opinion that an intern or resident of a hospital in this State is competent to execute both a birth and a death certificate if he is the physician in attendance at the time of the event.

As to a licensed physician of your Board who had not complied with the triennial registration required by Section 129A but whose license is still in full force and effect, we also feel that he is competent to execute the certificate if he is the person in attendance at the time of the birth or death. Section 129A of Article 43 provides:

"Every person holding a license to practice medicine and surgery in the State of Maryland is required to register as in this section provided. The first registration is required before October 1, 1960, and succeeding registrations are required at three-year intervals thereafter. Each registration shall include the person's name, license number, school of medicine of which he is a graduate, year of graduation, office address, telephone number, and whether or not he is in active practice. The registration shall be made on a form to be prescribed by the Board, and must be accompanied by a fee of five dollars (\$5.00). The Board shall issue a certificate of registration to each person who registers as herein required. Failure to register as in this section provided is a misdemeanor, to be punished upon conviction by a fine not to exceed twenty-five dollars (\$25.00)."

We construe this Section as requiring, under criminal penalty, all physicians and surgeons licensed by the Board, to register every three years accounting from October 1, 1960. Failure to so register, although it would subject the physician or surgeon to the criminal penalty therein provided, would not in our view, affect his license to practice medicine, nor would it be one of the causes listed in Section 145 of Article 43 of the Code for revocation of his license. Section 145 provides that licenses issued by your Board for the practice of medicine may only be revoked for the following causes:

"... The use of fraud or deception in obtaining the license provided in this subtitle, habitual drunkenness, insanity as determined in accordance with the provisions of Article 59, addiction to narcotics, criminal abortion, conviction of crime involving moral turpitude or unprofessional or dishonorable conduct;"

We do not feel that failure to register under Section 129A *supra*, falls within the causes listed and, consequently, even

though a physician has not complied with Section 129A, we feel that he is still a physician within the meaning of Sections 17 and 20 *supra*, and competent to execute both certificates, if he is in attendance at the time of the birth or death.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

MEDICAL EXAMINERS—REVOCATION OF LICENSE ON GROUND
THAT LICENTATE HAS BEEN CONVICTED OF CRIME
INVOLVING MORAL TURPITUDE OR UNPROFESSIONAL OR
DISHONORABLE CONDUCT—JUDGMENT AND SENTENCE
ON DEFENDANT'S PLEA OF NOLO CONTENDERE UNDER
FEDERAL PRACTICE CONSTITUTES CONVICTION.

December 30, 1963.

Mrs. Rose F. Barry,
Executive Secretary,
Board of Medical Examiners
of Maryland.

In your letter of December 18, 1963, you have requested our opinion as to whether a judgment and sentence of the United States District Court for the District of Maryland, entered against a physician who is presently licensed by your Board, may constitute a ground for revocation of his license to practice medicine under the terms of Section 145 of Article 43 of the Annotated Code of Maryland (1957 Edition, as amended), the pertinent part of which provides:

“The Board of Medical Examiners of this State may, by a vote of five members, revoke any license which has been issued, and may cause the name of any physician so licensed to be removed from the register of the licentiates of the city or county where it may be recorded for any of the following causes, to wit: The use of fraud or deception in obtaining the license provided in this subtitle, habitual drunkenness, insanity as determined in accordance with the provisions of Article 59, addiction to narcotics, criminal abortion, *conviction of crime involving moral turpitude or unprofessional or dishonorable conduct; . . .*” (Emphasis supplied.)

The criminal action in question was instituted in the District Court on information of the United States Attorney who charged 19 violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. §331(k) which prohibits:

"The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

21 U.S.C.A. §333(a) provides:

"Any person who violates any of the provisions of Section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; . . ."

As a basis for these charges the United States Attorney alleged in the information that the physician in question, during the months of April and May in the year 1962, misbranded certain amphetamine compounds which he had received in interstate commerce and dispensed them in such misbranded form to various named individuals. At arraignment on these charges a plea of "not guilty" was entered as to all counts of the indictment. However, on December 4, 1963, the "not guilty" plea was withdrawn and the defendant's plea of "nolo contendere" was accepted by the District Court. On the same day judgment was entered, the order of the District Court providing:

"It is adjudged that the defendant has been convicted upon his plea of 'Nolo Contendere' which was accepted by the Court, of the offense of (Counts Nos. 1 through 19, inclusive) Violation of Federal Food, Drug, and Cosmetic Act,

"Judgment: That the Defendant pay a fine of One Thousand Dollars (\$1,000.00) as to each of Counts Nos. 1, 2, 3, 4 and 5; said fines to be cumulative, and that he pay a fine of One Thousand Dollars (\$1,000.00) as to each of Counts Nos. 6

through 19, inclusive; said fines to be non-cumulative, making a total fine of Five Thousand Dollars (\$5,000.00) and to pay costs of case; imposition of sentence, as to imprisonment, suspended, and Defendant released on Probation for the period of Two (2) Years, upon condition that the fine and costs be paid as determined by the Probation Officer, Order (Watkins, J.) filed."

This order was in conformity with the practice of the District Court as explained by Chief Judge Thomsen in *United States v. Reisfeld*, 188 F. Supp. 631 (D. Md. 1960).

In considering whether the said judgment and sentence constitute a "conviction of a crime involving moral turpitude or unprofessional or dishonorable conduct" within Article 43, Section 145, *supra*, we think that the effect to be given a judgment on this type of plea must be controlled by the effect ascribed to it under the federal practice under which it was rendered. *State v. Rappaport*, 211 Md. 523, 528 (1957). In the *Rappaport* case the Court of Appeals of Maryland construed the prohibition contained in Article I, Section 2, of the Constitution of Maryland and in Article 33 of the Maryland Code against voting by a person who had been "convicted" of an infamous crime under the laws of this State or any other state. The record before the Court of Appeals in that case showed that the defendant had been indicted in New York State for grand larceny in 1944 and that he subsequently pleaded guilty to the charge in the Court of General Sessions in New York. Following his guilty plea, the New York Court "suspended sentence upon the said Max Rappaport and placed him on probation, and ordered restitution to be made . . ." He later moved to Maryland and voted in several elections for which he was indicted by the Grand Jury of Howard County which charged a violation of the prohibition contained in Article 33 of the Code, *supra*. In holding that a motion to dismiss the indictment was properly granted, the Court of Appeals reasoned that since under New York law suspension of sentence following a plea of guilty does not amount to a

conviction that "we think the question of his previous 'conviction' should be controlled by the law of New York, the state where it is alleged to have occurred".

In *United States v. Reisfeld*, *supra*, it was held that a plea of *nolo contendere* followed by judgment amounts to a conviction of the defendant under the federal practice. The view of the federal courts is well summarized in *Tseung Chu v. Cornell*, 247 F. 2d 929 (C.A. 9th Cir. 1957), cert. den. 355 U.S. 872, 2 L. Ed. 2d 190, where validity of a deportation order was upheld. This order was based on (1) the fact that the alien in question had been convicted of a crime involving moral turpitude and (2) the fact that he failed to reveal this conviction on an application for re-entry into this country. The alien resisted the order on the ground *inter alia* that when he was indicted for filing fraudulent income tax returns his plea of *nolo contendere* to the indictment was accepted and he was not therefore "convicted" of the crime. In disposing of this contention the court stated: (p. 937)

"The Second Circuit court in the Bruno case, in rejecting the alien's plea that a *nolo contendere* plea is not a conviction, had this to say by per curiam opinion (pages 92-93):

"* * * It is true that the plea is not treated as a confession, which can be used against the accused elsewhere; but it gives the judge as complete power to sentence as a plea of guilty. *Hudson v. United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L. Ed. 347. And it is as conclusive of guilt for all purposes of prosecution under the indictment, (citations). Moreover, a sentence upon it is a conviction within the terms of a local statute applying to second offenders. (citation) The relator might succeed, therefore, if deportation depended upon his admission of *the commission of a crime*, as it may in the case of crimes committed before entry; but *since it depends upon conviction and sentence, conviction and sentence are the only*

relevant facts, and the accused may be deported whenever these have been procured by any lawful procedure, as in this case they were.' (Emphasis added.)

"The Hudson case, in which Chief Justice Stone takes the opportunity to prove his extraordinary knowledge of the English Common Law, does not stand alone for the rule, as appellant maintains, that a plea of *nolo contendere* 'does not create an estoppel to deny conviction'. Mr. Justice Stone points out that in Hawkins, Pleas to the Crown, 8th Ed., Book 2, Chap. 31, 466, the author treats rather inadequately of Confessions; Express or Implied; and that under early English practice an 'implied confession, as contrasted to the express confession, does not estop the defendant to plead and prove his innocence in a civil action'. [272 U.S. 451, 47 S.Ct. 129.] Thus far the Chief Justice has been describing the contents of the early English text. He then states:

'But even if we regard the implied confession as a petition (for the mercy of the King) which in Hawkins' time had to be accepted as tendered, in modern practice it has been transformed into a formal plea of *nolo contendere*. Like the implied confession; this plea does not create an estoppel, but like the plea of guilty, *it is an admission of guilt for the purposes of the case*'. (Emphasis and portion in parenthesis added.) Cf. also, *United States v. Norris*, 1930, 281 U.S. 619, 622, 50 S.Ct. 424, 74 L. Ed. 1076.

"Appellant was not asked on his application for visa if he was or was not guilty of any crime; nor if he had or had not plead guilty to a crime. He was asked if he had ever been convicted. It was to this that his answer was 'none'. It was this that was false.

"While all jurisdictions do not agree, it is the majority rule that a plea of nolo contendere is an implied confession of guilt, and has the same effect as a plea of guilty, so far as the proceedings on an indictment are concerned. Hence a defendant who has been sentenced on such a plea is to be deemed convicted of the offense for which he was indicted. *Commonwealth v. Ingersoll*, 145 Mass. 381, 14 N.E. 449.

"The plea of nolo contendere admits matters alleged in the information when the plea is entered. *Ellsworth v. State*, 258 Wis. 636, 46 N.W. 2d 746, 748.

"Except under extraordinary circumstances, the plea of nolo contendere leaves open for review but one thing—the sufficiency of an indictment. *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 412, 67 S.Ct. 775, 91 L. Ed. 973.

"The plea of nolo contendere when accepted by the court, becomes for all practical purposes, 'the full equivalent of a plea of guilty', *Farrington v. King*, 8 Cir., 128 F. 2d 785, 786, but distinguishable from that plea 'in that it cannot be used against the defendant as an admission *in any civil suit for the same act*'. (Emphasis added.) *Tucker v. United States*, 7 Cir., 1912, 196 F. 260, 262.

"If plaintiff were sued civilly for his income tax deficiency, he could with propriety have objected to the introduction of the plea of nolo contendere as any admission on his part that he did defraud the government. The plea cannot be used to prove he did defraud the government. It can be used to prove he did not answer the question truthfully, when, asked if he had ever been convicted, he replied that he had not. The question went to, and his answer included, conviction in *any case*, includ-

ing the one to which he had entered a nolo plea, 'the equivalent of a guilty plea in that case, for all practical purposes'. Cf. *Twin Ports Oil Co. v. Pure Oil Co.*, D.C. 1939, 26 F. Supp. 366, 376, and cases cited and discussed; *United States v. Jones*, D.C., 1954, 119 F. Supp. 288, 290."

Following this rationale of a judgment and sentence on a plea of *nolo contendere*, as amounting to a conviction, the majority of the courts which have considered the question presented by your inquiry have concluded that where a statute makes conviction of a crime the basis for revocation of license, as distinguished from guilt of a crime, a conviction based on a *nolo contendere* plea meets such a statutory requirement of "conviction". Annotation, *Plea of Nolo Contendere or non vult contendere*, 89 A.L.R. 2d 540, supplementing 152 A.L.R. 253. An example of the reasoning of the courts adopting this view is found in *In re Eaton*, 152 N.E. 2d 850, 852 (Ill. 1958) :

"As above noted it has been established by decision in this State that conviction of a crime involving moral turpitude is ground for disbarment. (See: *In re Needham*, 364 Ill. 65, 4 N.E. 2d 19; *In re Pontarelli*, 393 Ill. 310, 66 N.E. 2d 83; *In re Teitelbaum*, 13 Ill. 2d 586, 150 N.E. 2d 873; and Cf. *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 150 N.E. 2d 168.) This well-established rule is based upon *conviction* of an attorney rather than any admission implied in his plea. *People ex rel. Johnson v. George*, 186 Ill. 122, 57 N.E. 804; *People ex rel. Deneen v. John*, 212 Ill. 615, 72 N.E. 789; *People ex rel. Chicago Bar Ass'n v. Meyerovitz*, 278 Ill. 356, 116 N.E. 189. Section 2.06 of the American Bar Association Model Rules of Court for Disciplinary Proceedings, approved February, 1956, reads in part: 'Conviction of a crime involving moral turpitude shall be conclusive proof of the guilt of the respondent, and a plea or verdict of guilty or a plea of *nolo contendere*, where

followed by a judgment of conviction, shall be deemed to be a conviction within the meaning of this rule.' Undoubtedly the framers of this rule considered the problem and concluded that the record of a conviction following a plea of *nolo contendere* is admissible.

"In our opinion there is no logical distinction in a disciplinary proceeding between a conviction under a plea of *nolo contendere*, on the one hand, and a conviction under a plea of guilty or an adjudication of guilt after a plea of not guilty, on the other. The issue here is whether the respondent has been convicted of a crime involving moral turpitude. The record shows that he has been so convicted and is admissible."

Inasmuch as the cause for revocation under discussion is "conviction of crime", Article 43, Section 145, *supra*, rather than "guilt of crime (cf. Article 10, Sections 11-16, of the Code with regard to grounds for disbarment of attorneys), it is our opinion that the judgment and sentence of the United States District Court on December 4, 1963, was a conviction of the physician in question within the meaning of Article 43, Section 145, *supra*, and although there is a question as to whether violation of 21 U.S.C.A. §331(k) constitutes a crime involving moral turpitude, *Bruns v. Lazzell*, 172 Md. 314 (1937), *Rheb v. Bar Ass'n of Baltimore*, 186 Md. 200 (1946), *Braverman v. Bar Ass'n of Baltimore*, 209 Md. 328 (1956), we think that the dispensing of misbranded drugs is clearly a "crime involving unprofessional or dishonorable conduct" on the part of a physician which would give the Board jurisdiction to proceed under Article 43, Section 145, *supra*.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

MERIT SYSTEM

STATE EMPLOYEES' PERSONNEL RULES—EXTENDED SICK
LEAVE WITH PAY.

December 3, 1963.

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

You have requested our interpretation of the phrase "continuously in the State Service" contained in Article 64A, Section 37(e) of the Annotated Code of Maryland (1957 Edition) and in Rule 42C8 of the State Employees' Personnel Rules.

The statute and the rule provide that an employee who has been continuously in the State Service for not less than ten years may request from the Board of Public Works an extension of leave, with pay. You presently have before you three cases involving requests for extended sick leave.

The factual situations of each of the three cases are as follows:

1. The employee began her employment with the State on August 1, 1947. On August 23, 1954 she was granted leave of absence without pay for traveling purposes and was reinstated on September 30, 1954. Her employment has been continuous since September 30, 1954.

2. The employee was first employed by the State on March 31, 1947. On May 30, 1954 he was granted a leave of absence without pay for a period of five months because of personal illness. He was reinstated on October 18, 1954 and his employment has been continuous after that date.

3. The employee was first permanently employed by the State on October 16, 1944. He remained continuously in the employ of the State until on March 21, 1957 he was granted extended leave with pay because of illness and he remained in this status until August 24, 1957 when all of the extended leave with pay available to him expired. The employee was then granted a leave of absence without pay on August 25,

1957 for the maximum period available of one year. At the end of this extended leave without pay, on August 25, 1958 the employee was still unable to return to work because of his illness and because of a decision by the State Medical Director that he could not be considered for State employment until one year had elapsed from the date of his discharge from the hospital. The employee never officially resigned but a notation of resignation was placed on his record as of August of 1958. On December 8, 1960 the employee was finally able to return to work and was reinstated in the State Service with full credit for all prior service, including pension rights and the notation of resignation on his record was removed.

It is our opinion that where a leave of absence is granted in accordance with the provisions of the statute and the rules thereunder, whether the leave be with pay or without pay, there is no termination of employment and the service would be considered to be continuous. The State Retirement System does not consider a leave of absence to be a break in the continuous service.

Therefore, with regard to the first and second cases mentioned above, each of the employees involved has been continuously in the State Service for not less than ten years and the Board of Public Works may consider the request of each of them for an extension of leave with pay.

The third case mentioned above presents a slightly more involved problem. Because of the extended period of the employee's illness, the employee used up all of the extended leave with pay and all of the extended leave without pay that was available to him. However, when the employee finally recovered from his illness, he returned to State Service and he was "reinstated" with full credit for all prior service, including pension rights, and the designation of resignation on his record was stricken.

In a letter dated December 27, 1961 addressed to you by Thomas W. Jamison, III, Assistant Attorney General, involving an employee who was employed by the State on March 14, 1951, resigned on March 12, 1957 and was rein-

stated on July 2, 1957, and requested extended leave with pay as of May 18, 1961, this office indicated that the resignation terminated the State Service and that the employee had not been continuously in the State Service for not less than ten years and was not entitled to petition the Board of Public Works for an extension of leave with pay. It is important to note that that employee did not obtain a leave of absence because of illness or for any other reason and had actually resigned. Though the employee was "reinstated", the designation of resignation remained on her record.

In view of the factual differences between Case No. 3 mentioned above and the case involved in the decision by Mr. Jamison, it is our opinion that the Board of Public Works may consider that the service of the employee involved in Case No. 3 has been continuous and may grant him additional extended leave with pay if the Board of Public Works in its discretion determines that this is desirable.

A previous opinion to you dated May 28, 1959 by Joseph S. Kaufman, Assistant Attorney General, indicated that the Legislature intended to grant to State employees who have been continuously in the State Service for not less than ten years liberal benefits in the event of extended or disabling illness and that the liberal policy should be followed where possible. Since the Board of Public Works has discretion in determining whether or not additional extended sick leave is merited, we do not believe that the Legislature intended to limit the ability of the Board of Public Works to exercise that discretion in a factual situation such as the one presented by Case No. 3.

We also enclose for your consideration and your records, a copy of an opinion dated July 20, 1949, addressed to Mr. Joseph O'C. McCusker, Secretary, Board of Public Works, by Harrison L. Winter, Assistant Attorney General. That opinion indicates that even where an employee has once been granted the maximum period of extended leave with pay and then returns to work, the Board of Public Works may, in its discretion, grant an additional period of extended leave with pay.

In summation, it is our opinion that in each of the three cases you presented, the Board of Public Works may in its discretion, grant an extended leave with pay.

THOMAS B. FINAN, *Attorney General*.

FRANKLIN GOLDSTEIN, *Asst. Attorney General*.

MILITIA

EMPLOYEES — PROBATIONARY EMPLOYEES OF FIRE AND POLICE DEPARTMENTS OF CUMBERLAND ARE EMPLOYEES FOR PURPOSES OF STATE MILITIA LAW ALLOWING FIFTEEN DAY LEAVE OF ABSENCE TO "EMPLOYEES" ON INACTIVE DUTY TRAINING.

November 21, 1963.

*Hugh A. McMullen, Esq.,
City Solicitor,
City of Cumberland.*

On August 20, 1963, you wrote to this office inquiring whether or not a person serving with the Police and Fire Departments of the City of Cumberland, in the first year probationary period, is an employee within the meaning of the term as used in Section 42 of Article 65 of the Annotated Code of Maryland (1957 Edition) and, therefore, qualified for benefits provided in that section. You further informed me that this question arose over the payment of wages to a member of the Fire Department who, during his probationary period, was required to take a two weeks' training period with the Maryland National Guard.

The pertinent section of the law which is Article 65, Section 42, provides generally that:

"All officers and *employees* of the State, county or political subdivisions thereof who shall be members of the organized militia or of the Army, Navy, Air or Marine Reserve shall be entitled to leave of absence from their respective duties, without loss of pay . . . during such time as they are on inactive duty training, for not to exceed fifteen days annually; . . ." (Emphasis supplied.)

It is my opinion that persons serving during a probationary period are entitled to the benefits under the above referred to section of Article 65, because they qualify as "employ-

ees" as that term is used in the statute and I arrive at that conclusion for the following reasons:

1. Even though the persons in question are serving a probationary period, they are receiving a regular salary and although they can be discharged within that year without cause, they are, unless removed, employees of the City, in the general sense of the term.

2. Section 5, subsection (c) of Rule VI of the Civil Service Commission Rules and Regulations speaks of such a person as an "employee" when describing qualifications that must be met before permanent status is attained. This can be interpreted as an indication that these persons are intended to be classified as employees even though not classified as permanent employees due to the fact that they have not completed their one year probationary period and met the other standards required by the subsection.

3. Section 2 of Rule VI states that all appointments to any of the positions in the Fire and Police Departments shall be classified (a) regular, (b) temporary, (c) seasonal, or (d) part-time.

Clearly, the persons serving a probationary period can only be classified as a regular appointment under the definition given for each class. Furthermore, Section 3 of Rule VI specifically says that:

"No temporary or seasonal employee appointed under (b), (c), and (d) above shall acquire any seniority rights nor shall their employment be construed in any manner as a probationary period, nor is it renewable until after a lapse of thirty days. No temporary, seasonal or part-time employment shall ever become full-time regular employment."

Section 5(a) of Rule VI, Probationary Period, says that a vacancy or new position shall be filled by the appointing authority from a list certified to him by the Commission. (This is the requirement as defined in the definition of a regular appointment, Rule VI, Section 2, subsection (a).)

4. It is further significant that the benefits in Rule VIII, Section 4, Military Service, apply to all types of employees *except those in the temporary category or those holding a temporary position with the city*. On the basis of this, it must have been the intent of the Commission to include all others.

Accordingly, a probationary type employee is similar to a regular employee and no exception can be found in the **Rules and Regulations** wherein an intent can be found to treat these probationers otherwise; (except that they can be discharged within the year without cause) it must be assumed that the Commission intended that these persons be considered employees within the meaning of the term as used in Section 42 of Article 65 of the Code.

THOMAS B. FINAN, *Attorney General*.

MILITIA—NATIONAL GUARD—ACTIVE SERVICE UPON CALL
OF GOVERNOR—MAINTENANCE OF PEACE AND ORDER IN
CAMBRIDGE—AUTHORITY AND POWERS TO ENFORCE
CRIMINAL LAWS, SUBJECT TO CIVIL DETENTION, AND
MAKE REASONABLE RULES AND REGULATIONS RELATING
TO CONDUCT OF CIVIL AFFAIRS WITHIN MUNICIPALITY.

July 16, 1963.

*General Milton A. Reckord,
Fifth Regiment Armory.*

In view of the continuing violence occasioned by racial disturbances within the City of Cambridge, it is incumbent upon me, as chief legal officer of the State, to more specifically define the power and authority vested in the Maryland National Guard, its officers and men, who are charged by the Governor's proclamation with the maintenance of civil order, so that there will be no misunderstanding on the part of either the National Guard personnel or the civilian population as to rights and privileges regarding assembly, demonstrations and the conducting of businesses within the City.

First, I should like to clearly establish the fact that the National Guard is vested with broad and plenary authority to enforce the criminal laws of this State. Pursuant to Section 8 of Article 65 of the Annotated Code of Maryland, the National Guard is vested with all the authority of peace officers in and for the City of Cambridge and may, in pursuance of this authority, establish itself and operate solely as a civilian police force, or may operate in cooperation with other State police authorities and police officials of Cambridge; and may, should the exigencies of the occasion require, take entire charge of the situation. The National Guard is, therefore, fully authorized to make any and all arrests for violations of the general police laws and regulations of the State and of the City of Cambridge.

It must be clearly understood, in light of conditions now prevailing in Cambridge, that an otherwise lawful act may

be done in such a manner as to constitute the crime of inciting to riot. No body of men is justified in asserting or seeking to assert legal rights by violence, and what ordinarily may be a lawful assembly may become unlawful whenever the members resort to violent and tumultuous measures, or participate in acts done with the intent to provoke a riot, or with a reckless and wilful disregard of their probable outcome in that respect, even though the ultimate object may be to achieve a lawful end. See *Cohen v. State*, 173 Md. 217; 77 C.J.S., *Riot*, Sections 1-6; Wharton's *Criminal Law*, 12th Edition, Section 1863.

Under existing conditions in Cambridge, it is my opinion that there can be no such thing as a peaceful street or public demonstration and that any such demonstration, or attempt so to demonstrate, may be treated as an overt act constituting riot or inciting to riot and punishable under the criminal laws of the State or cause the offenders to be subject to civilian detention, as hereinafter set forth.

Secondly, the National Guard is clothed with full powers regarding civil arrest or detention, as distinguished from criminal arrest, in that by Section 55 of Article 65 of the Annotated Code of Maryland the National Guard is authorized to place under arrest any persons who "shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms". You are hereby advised, therefore, that the National Guard may, under this Section, hold under civil arrest or in civil detention, preferably in an armory, or in a jail, if the facilities of the armory are inadequate, any person who, by his actions, prevents or attempts to prevent the National Guard from maintaining peace and order; and such person may be held for such period of time as may be necessary until the danger occasioning such civil arrest has abated. Such a detention has been regarded by the Supreme Court of the United States as precautionary rather than punitive and not in violation of individual constitutional rights. *Moyer v. Peabody*, 212 U.S. 78. See also *Ela v. Smith*, 5 Gray (Mass.) 121, 66 Am. D. 356. It is not the purpose of civil detention to interfere with

the constitutional rights of any affected person, and persons so detained must be afforded the opportunity to petition the State or Federal courts, by way of habeas corpus, for a determination of the validity of that detention, if they so desire.

Third, by virtue of Section 8 of Article II of the Constitution of Maryland, and Sections 8 and 55 of Article 65 of the Annotated Code of Maryland, the National Guard is fully authorized and may make reasonable rules and regulations relating to the conduct of civil affairs in the City of Cambridge for the purpose of preventing any activities which would tend to disturb or disrupt law and order, including the establishment of reasonable curfew hours, restrictions circumscribing the operating hours of businesses, or in closing said businesses in their entirety, and proscribing the right of any individual to carry on or about his person, or in an automobile under his control, whether concealed or otherwise, any weapon, firearms of any character or live ammunition. See *Franks v. Smith*, 134 S.W. 484 (Ky.); *In re Smith*, 14 Ohio N.P., N.S. 497; 57 C.J.S., *Militia*, Section 21.

In the latter instance, above cited, concerning firearms and ammunition, you are advised that the ammunition and weapons should be taken into custody and properly tagged, designating the ownership of the item, and should be retained in the custody of the militia for the duration of the crisis; thereafter to be returned to the owner.

THOMAS B. FINAN, *Attorney General*.

MUNICIPAL COURT OF BALTIMORE CITY

INCREASED COURT COSTS—SHOULD BE LEVIED ONLY IN THOSE CASES WHERE VIOLATION OCCURS AFTER EFFECTIVE DATE OF INCREASE.

WARRANTS—MUST BE SIGNED BY JUDGE—USE OF RUBBER STAMP OR SIGNATURE OF JUDGE APPENDED BY CLERK NOT TO BE PERMITTED.

May 10, 1963.

*The Honorable T. Barton Harrington,
Chief Judge, Municipal Court
of Baltimore City.*

We have your recent letter in which you make inquiry concerning the increased costs provided for by House Bill 644 which was signed by the Governor on May 6th and which will become effective on June 1st.

You have asked us whether these costs should be assessed in all cases tried on or after June 1st, or whether those costs should apply only to those offenses committed on or after June 1st.

Please be advised that it is our view that these increased costs should be applied only to offenses which occur on or after the 1st day of June. "Costs," of course, are not part of the fine levied for violation of the law, but as "costs" are paid only by those persons who have not been found innocent, then the practical effect is the same as if the penalty itself had been increased. We believe that the application of the increased costs to cases arising wherein the violation occurred before June 1st would be in the nature of a *ex post facto* penalty—long abhorred in this country and at common law.

May we also take this occasion to reply to your inquiry of some weeks ago wherein you asked our opinion as to whether it would be permissible for a rubber stamp to be used in lieu of the actual signature of a judge of your court,

in issuing warrants for traffic violators. In your letter you also asked if it would be legally permissible, in the event that a rubber stamp may not be used, for a judge of your court to sign a list of names of persons failing to respond to a summons and have the actual warrant issued by a clerk for the persons whose names are set out on the list.

We have carefully reviewed the provisions of our law and our previous opinion on this subject contained at 40 Opinions of the Attorney General 282. Despite the inconvenience and hardship that is imposed on your already overtaxed court by the requirement that every warrant bear the signature of a judge, we are of the opinion that the practice that you suggest would be contrary to the provisions of our law and to the intent of Article 26 of the Declaration of Rights.

It is our opinion that until such time as the Legislature sees fit to authorize some person other than a judge of your court to sign a warrant that the use of a rubber stamp or the use of a list of names cannot be permitted.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

MUNICIPALITIES

CONFLICT OF INTEREST LAW—APPLICABILITY OF ARTICLE 19A OF MARYLAND CODE TO MEMBERS OF ANNE ARUNDEL SANITARY COMMISSION—DISTINCTION BETWEEN AN AGENCY “OF THE STATE OF MARYLAND” AND OF A COUNTY OR MUNICIPALITY.

May 28, 1963.

*Hon. Joseph W. Alton, Jr.,
State Senator,
Anne Arundel County.*

As you will recall last Thursday you spoke with this office concerning the question of whether or not a member of the Anne Arundel County Sanitary Commission, who is appointed pursuant to Senate Bill No. 544 (Chapter 899, Acts of 1963) recently enacted by the Legislature, would be considered to be a “member, agent or employee of any department, board, commission, authority or other public agency of the State of Maryland” and thus subject to the provisions of Article 19A of the Maryland Code, (the Conflict of Interest Law). During the course of this conversation you requested our opinion on this issue as soon as possible in view of the fact that appointments to the Commission are contemplated within the very near future. For the reasons expressed below it is our view that members of the Anne Arundel County Sanitary Commission are not members of a commission “of the State of Maryland” and hence are not subject to the provisions of Article 19A.

In an Opinion reported at 35 Opinions of the Attorney General 192, this office described the composition and functions of the Anne Arundel County Sanitary Commission as follows:

“The Anne Arundel County Sanitary Commission is created by Section 487 of the Code of Public Local Laws of Anne Arundel County (1947 Ed.),

as amended by Chapter 87 of the Acts of 1950. That Section provides that the Sanitary District in Anne Arundel County, as defined by other Sections of the law, shall be under the jurisdiction of a Commission of three adequate persons. The three Commissioners are appointed by the Board of County Commissioners of Anne Arundel County. Section 489 of the Code of Public Local Laws of Anne Arundel County (1947 Ed.) states that the members of the Commission shall be a body corporate with the right to use a common seal, to sue and to be sued and to do any and all other corporate acts necessary for the purpose of carrying out the duties of the Commission. Inter alia the Commission may take and acquire land, structures and buildings by purchase or condemnation; it may purchase land at a tax sale; it may borrow money; it may cause surveys, plans, specifications and estimates made for water supply, sewerage and drainage systems in the Sanitary District; it may issue bonds to provide funds for the design, construction, establishment, purchase or condemnation of the water supply, sewerage and drainage systems in the Sanitary District, and it may levy taxes against property in the Sanitary District for the purpose of paying interest on and the principal of bonds which the Commission issues. There is no statement in the law that the members of the Commission must take any oath to qualify as a member of the Commission; nor is there any requirement that the members of the Commission must file a bond for the faithful performance of their duties, although the law does require that the Secretary-Treasurer give a bond for the performance of his duties and the accounting for monies which he shall receive for the account of the Commission."

Since the above referred to opinion which was written in 1950, the most significant change with respect to the Com-

mission has been the passage of Senate Bill 544. The most important aspect of this Bill has been to change the method of the selection of the Commission members. Whereas heretofore they have been appointed by the Board of County Commissioners of Anne Arundel County now they are to be appointed by the Governor of the State of Maryland from a list of five names recommended to him by a nominating committee composed of the State Senator from Anne Arundel County, the chairman of the delegation to the Maryland House of Delegates from Anne Arundel County, the President of the Anne Arundel County Trade Council, and the member of the Maryland Port Authority residing in Anne Arundel County.

The question of who is and who is not a "member, agent or employee of any department, board, commission, authority of the State of Maryland," and thus subject to the provisions of Article 19A, has to our knowledge, been before the courts of the State of Maryland only once. Last year Judge Bowie Duckett of the Circuit Court for Anne Arundel County, in the case of *State v. Jenkins*, determined that the County Superintendent of Schools for Anne Arundel County was not an employee "of the State of Maryland" and was thus not subject to the provisions of Article 19A. That this decision was reached despite the rather broad interest and control which the State exercises within the area of county education (See Article 77 of the Maryland Code) is of some significance insofar as it reflects upon the scope which the court of your county might accord to Article 19A.

Since the above referred to lower court case is the only Maryland case which has a direct bearing upon the subject it is necessary to look to analogous Maryland law and cases from foreign jurisdictions for aid in determining the proper construction to be accorded Article 19A. Some help may be found in the practice which has arisen with respect to the various state and local employees coming within the coverage of Article 73B of the Maryland Code which establishes the Employees' Retirement System of the State of Mary-

land. Section 3 of the statute declares that membership within the system shall, in most instances, be mandatory for "employees" who, in Section 1 of the statute are defined as "any regular classified or unclassified officer or employee of the State." (Emphasis supplied.) In contrast, Section 21 et seq. of the statute provides for optional coverage for "any officer or employee of any municipal corporation." Thus the conditions of membership are different depending upon whether one is an employee of the State or of a municipal corporation. In 1948 members of the Anne Arundel County Sanitary Commission became members of the Employees' Retirement System pursuant to the provisions relating to employees of municipal corporations thus indicating a disposition of that agency to regard them as county rather than State employees (the definition of "municipal corporation" in Section 21 of Article 73B includes counties). For a discussion thereof see 35 Opinions of the Attorney General 192.

Similarly, the State Merit System law by Section 1 of Article 64A defines the classified service as including "all offices of profit or trust * * * in the service of any State officer, department, commission, board or institution * * *." Mr. Wayne Ransom, Deputy State Commissioner of Personnel, who is charged with the administration of the act, has advised us that to his knowledge his office has never considered that employees of the Anne Arundel County Sanitary Commission would, in the absence of special legislation, be covered by the Merit System. The nature of the Anne Arundel County Sanitary Commission was specifically brought to the attention of both Mr. Ransom and Mr. Davis, State Commissioner of Personnel, last year when the chairman of the Commission asked their advice with respect to a proposed salary program, which the Sanitary Commission itself was establishing. Mr. Ransom reviewed their program in detail and offered suggestions with respect thereto and at no time was of the opinion that his agency, rather than the Sanitary Commission, should be the one establishing the salary program.

In addition to the judicial and administrative decisions referred to above there are a number of court decisions from other states which indicate that the Anne Arundel County Sanitary Commission would be considered to be a county as opposed to a State agency. In *Grobbe v. Water Commissioners of Detroit*, 181 Mich. 364, 149 N.W. 675, the question was whether the employees of the Board of Water Commissioners of the City of Detroit were subject to the newly enacted City Merit System Law which applied to "all officers, clerks and subordinates of all officers, departments, and commissions of said city." The Board was created pursuant to a State statute. The court, in holding that the Board's employees were subject to the Merit System, stated as follows:

"One of the chief 'municipal concerns' is the procurement of a water supply. And one of the essentials of urban life is the proper administration of that supply when procured. Thus the right of the voters of the city to legislate upon the administrative methods of the respondent, one of the mere agencies of the city for carrying on its municipal affairs is obvious."

A similar result was reached by the New York Court of Appeals in the case of *Horn v. Gillespie*, 267 N.Y. 333, 196 N.E. 205, where the court was concerned with whether or not service with the Public Transit Commission, a creature of State law, constituted "city service" within the Civil Service law. The court determined that since the employee's duties were concerned exclusively with a rapid transit system constructed for a city purpose, owned by a city, and his salary was paid from city funds, his service would be considered to be "city service" within the Civil Service law. So too in *State Dept. of Civil Service v. Clark*, 27 N.J. Super. 290, 99 A. 2d 386, the Superior Court of New Jersey determined that employees of the Boulevard Commissioners of the County of Hudson were subject to the Civil Service law. The court determined that the commission was an agency of the county despite the fact that it was an inde-

pendent political corporation created by the State law. The court particularly noted that the commission was established for the benefit of the county and that its support was a burden upon the taxpayers thereof. Accord, *Parks v. Union County Parks Commission*, 7 N.J. Super. 5, 71 A. 2d 651 and *Glick v. Trustees of Free Public Library*, 2 N.J. 579, 67 A. 2d 463.

Although none of the cases referred to above involve commissions whose members are appointed by the State Governor, in most other respects they are similar to the Anne Arundel County Sanitary Commission. The Anne Arundel Commission, like those referred to above, is concerned with providing services to the residents of the county and the costs of its acquisitions are, under the provisions of § 22-56 of the Anne Arundel County Code, a burden on the taxpayers of the county. The operations of the Commission are confined to the county and are calculated to provide sewerage and drainage systems for the benefit and enhancement of Anne Arundel County. Although the Commission has a considerable degree of independence it nevertheless must, under the provisions of § 22-56 work with the Board of County Commissioners of the county whose taxing power provides the revenues to be used by the Commission. Thus the orientation of the Anne Arundel County Sewer Commission is toward county rather than State activities.

Nor, in our opinion, does the fact that the Commissioners, after June 1, 1963, will be appointed by the Governor necessarily make the Commission a State as opposed to a county agent. An examination of Senate Bill 544 discloses that the actual selection of the new Commissioners will in very large part be that of various county officials rather than that of the Governor. The role of the Governor is merely the limited one of choosing three Commissioners out of a panel of five names submitted to him. It is obvious that the crucial power in the selection process is exercised by the five designated Anne Arundel Countians who are charged with the responsibility of selecting the persons to

comprise the panel of five. Thus, unlike the typical situation involving a State Commission where the Governor makes the entire selection himself, we have here a Commission whose composition is for all practical purposes determined by the nominating committee.

One final factor to be considered in determining the scope of the meaning of the term "Commission * * * of the State of Maryland" as used within Article 19A of the Maryland Code is that the Article is essentially penal in the method of enforcement (see Section 4 making a violation of the Article a misdemeanor). In view of this it is not unreasonable to assume that a court, when called upon to construe Article 19A would apply the time honored doctrine requiring that criminal statutes be strictly construed in favor of the accused.

For the reasons expressed above it is our opinion that a member of the Anne Arundel County Sanitary Commission, appointed pursuant to the provisions of Senate Bill 544, would not be considered to be a member of a commission of the State of Maryland and would thus not be subject to the provisions of Article 19A of the Maryland Code.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

MUNICIPALITIES — WASHINGTON COUNTY — BOONSBORO —
ELECTED OR APPOINTED TOWN OFFICIALS INELIGIBLE
TO BE EMPLOYED AS SUPERVISOR OF WATER AND SANI-
TARY SEWERAGE UTILITIES.

July 17, 1963.

*Mr. G. M. Angle, Town Clerk,
Boonsboro, Maryland.*

In your recent letter you advise us that the Town of Boonsboro has installed a sanitary sewer system and that the sewer system, together with the municipal water system, will require the services of a full time supervisor. You further advise us that the hiring of a utility commission supervisor at a fixed salary is contemplated and you ask whether an elected official, the Mayor or a Councilman, may be employed in that capacity while holding public office.

The management and operation of the water system of Boonsboro is delegated by law to the Board of Water Commissioners (Public Local Law, Article 22, Section 110) and jurisdiction over the operation and maintenance of the sanitary sewer system is conferred upon the Mayor and Council (Public Local Law, Article 22, Section 84). We pass no opinion on the propriety of a situation in municipal affairs where the employing authority and the employee are the same individual or closely identified with each other, as we believe your question is fully answered by the clear language of Public Local Law, Article 22, Section 35, which provides in part as follows:

“No person elected and qualified as Mayor, Assistant Mayor, or Councilman, or any person holding any office by election, appointment, or otherwise, under the provisions of the subtitle of this Article, or by virtue thereof, shall, during the term of his office, be interested, directly or indirectly, in any contract in which the town is a party or is interested; nor shall any such person, while holding such office, be directly or indirectly engaged

in furnishing work, labor, or materials for said town; . . .”

We have no doubt that the phrase “any contract,” includes a contract of employment, whether the same may be oral or written. We believe that the prohibition of the statute is so broad as to bar any elected or appointed official of Boonsboro from entering into or having an interest in a contract of employment with the town or in any employment contract in which the town is interested.

Additionally, it has been held that the terms “work” and “labor” include both mental and physical effort and is the general term for exertion and effort directed to an end. The term “labor” refers to personal service and work of an individual but is not limited to mere nominal acts and occupations. The services of a superintendent have been held to be “labor.” (Words and Phrases, Volume 24, page 6.) Accordingly, the services of a supervisor of systems of water and sanitary sewerage must be determined to fall within the statutory prohibition against the furnishing of work or labor by any elected or appointed town official.

It is our conclusion that no elected or appointed official of Boonsboro may be employed as a supervisor of the water and sanitary sewerage utilities during his term of office, and that such employment is barred by Public Local Law, Article 22, Section 35.

THOMAS B. FINAN, *Attorney General.*

FRED OKEN, *Asst. Attorney General.*

OFFICE OF PROFIT

ART. 35, DECLARATION OF RIGHTS—POSITIONS OF COUNTY COMMRs., STATE'S ATTY., SUPERVISORS OF ELECTIONS, JUDGE OF ORPHANS' COURT, COMMITTING MAGISTRATE, DEPUTY CLERK OF CIRCUIT COURT, DEP. REG. OF WILLS, ZONING COMMR., MEMBER, REAL ESTATE COMMISSION, MEMBER, WASH. SUBURBAN SANITARY COMMISSION, MEMBER, A. A. COUNTY SANITARY COMMISSION, MEMBER, CITY COUNCIL OF SALISBURY, AND MEMBER, CITY COUNCIL OF CRISFIELD ARE OFFICES OF PROFIT WITHIN THE MEANING OF ART. 35, DECLARATION OF RIGHTS. SINCE A NOTARY PUBLIC IS ALSO SUCH AN OFFICE OF PROFIT, NO PERSON MAY SIMULTANEOUSLY HOLD ANY OF ABOVE OFFICES AND BE NOTARY PUBLIC.

November 15, 1963.

Hon. Lloyd L. Simpkins,
Secretary of State.

By letter of October 31, 1963, you have asked our opinion as to whether or not certain positions of employment are offices of profit within the meaning of Article 35 of the Declaration of Rights.

This article provides:

"Article 35. Holding more than one office prohibited; persons in public trust not to receive presents from other states, etc.

That no person shall hold, at the same time more than one office of profit, created by the Constitution or Laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State."

You have submitted to us a list of eighteen categories of employment and you have asked us if a person might simul-

taneously hold the offices designated and also hold the office of notary public.

You have advised us that the records of your office indicate that each of the persons holding the listed positions took the oath as a notary public after acceptance of the designated offices, although some of these persons have subsequently submitted their resignations as notaries public.

Although we will treat each such position separately in this opinion, you are hereby advised that if the office held is an office of profit within the meaning of Article 35, that office is in fact abandoned by its holder on the acceptance of the notary public commission. The Court of Appeals of Maryland has held in the case of *Truitt v. Collins*, 122 Md. 526, that when a person holding one office of profit accepts another such office, the first office is vacated, and a subsequent resignation from the second office does not serve to reinstate the individual in the first office held. It is necessary, therefore, that the proper appointing officer fill the vacancy created by the de jure resignation.

We also point out, however, that under the doctrine of de facto officers, as set out by the Maryland Court of Appeals in the case of *Kimble v. Bender*, 173 Md. 608, the official acts performed by a person holding title to a public office are deemed to be valid, and it is generally held that such de facto officers are entitled to the compensation provided by law for the offices they occupy under color of title.

We now come to the several offices about which you make inquiry:

1. *County Commissioner for Anne Arundel County*

County Commissioners are constitutional officers by virtue of the provisions of Article 7, §1 of the Constitution of Maryland. There is no question but that a County Commissioner holds an office of profit; he takes an oath of office, is compensated for his service, and exercises a portion of the sovereignty of the State.

A vacancy existing in the office of County Commissioner is, by the provisions of Article 25, §16 of the Annotated Code, filled by the Governor, by and with the advice and consent of the Senate.

2. *State's Attorney*

A State's Attorney is a constitutional officer by virtue of the provisions of §7 of Article 4 of the Constitution. That officer takes an oath of office, receives compensation for his duties, and exercises some portion of the sovereignty of the State. He holds an office of profit within the meaning of Article 35 of the Declaration of Rights and may not be a notary public.

Vacancies in the office of the State's Attorney are filled (§11 of Article 5 of the Constitution) by the Judge, or Judges, resident in the county, for the residue of the term vacant.

3. *Assistant State's Attorney*

Although a constitutional provision is made for the office of Assistant State's Attorney for Baltimore City (Constitution, Article 5, §9,) no oath of office is required.

No constitutional provision is made for Assistant State's Attorney other than in Baltimore City. The statute authorizing such positions in the several counties, however, (Article 10, §40, Annotated Code) likewise does not require an oath of office and we do not believe that Assistant State's Attorneys in the several counties hold offices of profit within the meaning of Article 35 of the Declaration or Rights.

In an opinion reported at 44 Opinions of the Attorney General 110 this office held that the position of Deputy State's Attorney for Frederick County was not a public office and we believe the

rationale of that opinion binding in the instant case.

It is our opinion, therefore, that an Assistant State's Attorney may validly serve as a notary public.

4. *Supervisors of Elections*

This office has, on several previous occasions, held that members of the board of supervisors of elections of any county or Baltimore City are persons holding an office of profit. (See 6 Opinions of the Attorney General 427.) Such members are appointed by the Governor, according to the provisions of Article 33, §1 of the Code. They take an oath of office, are compensated for their service, and exercise some portion of the sovereignty of the State.

No person may serve as a member of the board of supervisors of elections and simultaneously hold the office of notary public.

Vacancies on a board of supervisors of elections are filled by the Governor by and with the advice and consent of the Senate, provided, however, that if the office was vacated by a person appointed as a representative of a political party, then only a person belonging to the same political party shall be eligible as his successor.

5. *A Judge of the Orphans' Court*

A judge of the Orphans' Court holds a constitutional office created by §40 of Article 4 of the Constitution. Such a judge takes an oath of office, is compensated for his service, and exercises some portion of the sovereignty of the State. A judge of the Orphans' Court may not simultaneously hold the office of notary public.

By virtue of §40 of Article 4 of the Constitution, vacancies in the office of Judge of the Orphans' Court are filled by the Governor for the residue of the term, subject to confirmation or rejection by the Senate.

6. *Committing Magistrates*

A committing magistrate is a justice of the peace designated by the Governor for the purpose of assisting the trial magistrates in the several counties. Such appointments are made by the Governor pursuant to the authority vested in him by Article 52, §97 of the Annotated Code of Maryland (1957 Edition). A committing magistrate, as a justice of the peace, takes an oath of office, and because of the duties vested in him as a committing magistrate exercises some portion of the sovereignty of the State. Committing magistrates are compensated for their services according to the provisions of §110 of Article 52. It is the opinion of this office that no person may simultaneously serve as a committing magistrate and as a notary public.

Article 4, §43 of the Constitution of Maryland provides that in the event of a vacancy in the office of a justice of the peace, the Governor shall appoint a person to serve as such for the residue of the term. We have no doubt that this section is equally applicable to committing magistrates.

7. *Deputy Clerks of the Court*

In 1928, the Hon. Thomas H. Robinson, then Attorney General, in an opinion reported at 13 Opinions of the Attorney General 209, held that deputy clerks of the various Circuit Courts were officers within the meaning of Article 35 of the Declaration of Rights, and therefore ineligible to serve as notaries public. The position of deputy clerk is

created by §26 of Article 4 of the State Constitution. Such deputy clerks are, of course, compensated for their services and they are required to take an oath by virtue of the provisions of Article 70, §13 of the Annotated Code of Maryland (1957 Ed.). We concur in Attorney General Robinson's opinion that the deputy clerks of the various Circuit Courts hold offices of profit within the meaning of Article 35 and are ineligible for the office of notary public.

By virtue of the provisions of Article 4, §26 of the Constitution it would appear that vacancies in the office of deputy clerk are required to be filled by the Clerk, subject to the confirmation of the Judges of the respective Courts.

8. *Employee in the Clerk of the Court's Office*

This office has held, at 27 Opinions of the Attorney General 287, and in numerous other opinions, that persons holding positions that are merely clerical do not hold an office within the meaning of Article 35. It is, therefore, our opinion that an employee, who is not a deputy clerk in the office of the Clerk of the Court is not debarred from simultaneously serving as a notary public.

9. *Deputy Registers of Wills*

Attorney General Thomas H. Robinson, in an opinion reported at 15 Opinions of the Attorney General 235, has also held that a deputy register of wills holds an office of profit within the meaning of Article 35 and is not eligible for the office of notary public. The statutory authority for the appointment of deputy registers of wills is contained in Article 93, §306, which also provides for such compensation as shall be set by the Comptroller. A deputy register of wills is also required to take an oath of office by the provisions of

Article 70, §13 of the Annotated Code. We concur in Attorney General Robinson's opinion that such deputies hold offices of profit within the meaning of Article 35 and are ineligible for the office of notary public.

It would appear from the provisions of §306 of Article 93 that vacancies in the office of deputy register of wills shall be filled by the duly elected Register of Wills.

10. *Deputy Comptroller of the Treasury*

The position of deputy comptroller of the treasury is created by Article 19, §8, Annotated Code (1957 Edition). Although a deputy comptroller performs certain duties in assistance to or instead of the Comptroller, he is not required to take an oath of office; his position is not one of constitutional creation, and it is our opinion that he should not be considered a person holding an office of profit within the meaning of Article 35.

We, therefore, find no legal objection to a deputy comptroller of the treasury serving simultaneously as a notary public. See *Howard County Commissioners v. Westphal*, 232 Md. 334.

11. *Chief of Right of Way Division—State Roads Commission*

The Maryland Court of Appeals in the recent case of *Howard County Commissioners v. Westphal*, 232 Md. 334, specifically held that the position of Chief of the Right of Way Division of the State Roads Commission was not an office of profit within the meaning of Article 35. Such individual, therefore, may validly serve as a notary public.

12. *Zoning Commissioner for Howard County*

The position of Zoning Commissioner for Howard County is created by §235 (a) of the Public Local

Laws of Howard County. Even though an oath of office is not required, we have little doubt but that the duties, powers and authority vested in a Zoning Commissioner are such as call for the exercise by him of some portion of the sovereignty of the State. The Zoning Commissioner is compensated for his duties. It is, therefore, our opinion that the Zoning Commissioner of Howard County may not validly serve simultaneously as a notary public.

It is our opinion that a vacancy in the office of the Zoning Commissioner of Howard County shall be filled by the County Commissioners, under the provisions of §235 (b) of the Public Local Laws of Howard County.

13. Member of the Real Estate Commission

The Real Estate Commission was created by §213 of Article 56 of the Annotated Code of Maryland. Compensation for members of the Commission is provided in the State budget. The members are appointed for a term of years, until their successors are appointed and qualified. §214 (c) of the Code refers to the position of chairman as an "office." This Commission is charged with the licensing of real estate brokers and salesmen within this State, and performs duties of a quasi-judicial nature. In 1957 this office held that the Chairman of this Commission was not a public officer but that the members of the Commission are. We concur in that opinion. 42 Opinions of the Attorney General 130. It is our opinion that a member of this Commission holds an office within the meaning of Article 35 and may not simultaneously serve as a notary public.

Vacancies on the said Commission shall be filled by the Governor, for the unexpired term, by the provisions of §213 (c).

14. *Tax Assessors—Allegany County—Baltimore City*

The question of whether or not a tax assessor holds an office of profit within the meaning of Article 35 presents a difficult problem. These employees are required by §243 of Article 81 to take an oath of office, and their duties in some sense involve the sovereignty of the State. Obviously they are compensated for their services. These officials, however, do not serve a stated term of office and are, for the most part, career employees under the Merit System. We think it significant that §237 of Article 81 of the Annotated Code, creating these positions states: "There shall be the following classes of positions to assist the several supervisors of assessments in Baltimore City and the Counties:" We cannot find a legislative intent that such employees be considered holders of an office of profit within the meaning of Article 35, and it is, therefore, our opinion that a tax assessor for Baltimore City or any of the Counties of this State, may validly serve, simultaneously, as a notary public.

15. *Washington Suburban Sanitary Commission*

This Commission was created by §1552 of the Public Local Laws of Prince George's County. That statute provides for the salaries of the Commission and states that the Commission shall have condemnation and other powers belonging to the sovereign. Although no oath of office is required by the statute, the positions are described, in the statute, as "offices." We have no doubt that a member of this Commission occupies an office of profit within the meaning of Article 35, and may not, therefore, simultaneously serve as a notary public.

§ 1562 provides that any vacancy occurring at any time in the personnel of the Commission shall be filled by the Governor for the unexpired term.

16. *Real Estate Assessors—Baltimore City and Washington County*

We find no distinction in the Maryland law between a real estate assessor and a tax assessor. It is our opinion, therefore, that real estate assessors, like tax assessors, are not persons holding an office of profit within the meaning of Article 35, and may simultaneously serve as notaries public.

17. *Member of City Council of Salisbury, Maryland*

The City Council of Salisbury was created by §285 of the Public Local Laws of Wicomico County.

§286 of that code provides that all legislative powers of the city shall be vested in a council of five members, who shall hold office for a term of four years. §288 sets the councilmanic salary at \$75.00 per month. There can be no doubt that a city councilman exercises some of the duties of the sovereign, and this office has held on many occasions that a city councilman, who is compensated for his services, holds an office of profit within the meaning of Article 35. It is, therefore, our opinion that a City Councilman of Salisbury may not validly serve as a notary public.

Vacancies in the office of City Council of Salisbury are required to be filled by the remaining members of the Council by §233 of the Wicomico County Code.

18. *City Councilman of Crisfield*

This office was created by the provisions of §27 of the Public Local Laws of Somerset County.

That section provides that each such councilman shall serve a stated term and shall be compensated for his duties in an amount to be set by ordinance. The current salary, by ordinance, is \$500.00 per year. In view of our many previous holdings that a city councilman who is compensated for his services is a public officer within the meaning of Article 35, it is our opinion that such an official may not simultaneously serve as a notary public. See *Truitt v. Collins*, *supra*.

Vacancies in the office of City Council of Crisfield are required to be filled by the remaining members of the Council under the provisions of the Somerset County Code.

19. *Anne Arundel County Sanitary Commission*

This Commission was created by the provisions of §22-33 of the Public Local Laws of Anne Arundel County. That section provides that the members of such Commission shall serve a stated term of three years. §22-44 authorized the Commission to initiate and conduct investigations, studies and surveys. We have no doubt that the members of this Commission exercise some of the sovereignty of the State, and hold offices of profit within the meaning of Article 35. A member of this Commission may not be a notary public.

Vacancies occurring on this Commission are filled by the Board of County Commissioners according to the provisions of §22-33.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

ORPHANS' COURT

TESTAMENTARY LAW—JURISDICTION OF ORPHANS' COURTS
TO GRANT LETTERS IN ABSENCE OF DECEDENT LEAVING
PERSONAL ESTATE—ESCHEAT OF LAND OWNED BY
DECEDENT LEAVING NO HEIRS—REQUIREMENT OF
JUDICIAL DETERMINATION OF INTESTACY WITHOUT
HEIRS SURVIVING AS CONDITION TO ESCHEATMENT.

November 4, 1963.

Robert H. Archer, Esq.,
Counsel for County Commissioners
of Harford County.

We have your letter of October 24, 1963 in which you ask our opinion as to the proper construction of Article 46, Section 47 of the Annotated Code of Maryland (1957 Edition, as amended) under the following factual situation:

A, a resident of Trenton, New Jersey died intestate on December 27, 1949 leaving a personal estate in New Jersey as well as certain improved real property located in Havre de Grace, Maryland. B, a member of the New Jersey Bar qualified as Administrator of her estate and after many years of searching for any surviving heirs of A concluded that she had died without heirs. Thereupon, at the request of B, C, a member of the Maryland Bar applied for and was granted Letters of Administration on the Estate of A by the Orphans' Court of Harford County on April 17, 1963. It appears from the information which you have forwarded to us, however, that the decedent was not possessed of any personal estate subject to the jurisdiction of the Orphans' Court of Harford County, her only property having a situs in Maryland being the aforesaid improved real property located in Havre de Grace, Maryland. Article 46, Section 47 provides:

"Any lands, whether improved or unimproved,
that have escheated by reason of the last owner in
fee simple dying intestate and without heirs, shall

become the property in fee simple of the mayor and city council of Baltimore City or the board of county commissioners of the city or county where such lands lie for the use of the board of school commissioners or the board of education of the city or county, as the case may be; and whenever it shall have been determined by any court of the State of Maryland of competent jurisdiction that any such lands have escheated before or after June 1, 1939, the title thereto shall be vested in the mayor and city council of Baltimore City or board of county commissioners for the use of the board of education of the city or county, as the case may be; subject, however, to a lien for any costs and expenses of the proceeding in which such determination was made, including such attorneys' fees, as might be allowed by such court for the conduct of such proceedings. In case the mayor and city council of Baltimore City or board of county commissioners should prefer not to pay such lien so as to vest the property in it free and clear thereof, then and in that event, the chancery court having jurisdiction over such lands may, on petition, appoint a trustee or trustees to sell said lands either at public sale after advertisement in accordance with the rules of said court, or at private sale and upon report and ratification of such sale and the payment of costs, expenses, and commissions, such as are usually allowed in similar sales, under the rules of said court, said court shall order the lien, above mentioned, to be paid out of said proceeds and the balance to be paid over to the mayor and city council of Baltimore City or the board of county commissioners for the use of the public schools of said city or county; provided that the provisions of this section shall not affect the title to any lands for which escheat warrants have been issued by the Land Commissioner of this State prior to June 1, 1939."

This statute was enacted as Chapter 290 of the Acts of 1939 and was in substitution for the former procedures applicable to disposition of land which had escheated to the State by virtue of the death of the owner without heirs. 26 Opinions of the Attorney General 234 (1941). Under Section 47, before the lands of an intestate dying without heirs become the property of the Mayor and City Council of Baltimore or the County Commissioners of the county where the lands lie for the use of the Board of School Commissioners or the Board of Education as the case may be there must be a determination by a "court of the State of Maryland of competent jurisdiction" that the decedent in fact died intestate without heirs.

We therefore believe that the first question which must be answered is whether the ancillary administration opened in the Orphans' Court of Harford County and any determination by that court of the question of whether A died intestate without heirs qualifies as such a **determination by** a "Court of the State of Maryland of competent jurisdiction" of whether intestacy without heirs on the part of A has occurred. Considering this question, it is clear that inasmuch as the decedent left no personal estate in Maryland subject to the jurisdiction of the Orphans' Court of Harford County that any jurisdiction which that court might have to grant letters on the estate of A would have to be found in Section 124 of Article 93, which provides:

"Whenever any person, resident or nonresident of the State of Maryland, shall have been dead less than twelve (12) years, testate or intestate, leaving one or more parcels of real estate in this State, but not leaving personal estate therein as far as may be known, it shall be lawful for the orphans' court of the county or city in which such real estate, or any part or parcel thereof, may be situate, to grant letters testamentary or of administration on the estate of such decedent, * * *"

This jurisdiction of the Orphans' Court has been conferred, under the construction given this Section by the

Court of Appeals of Maryland, for the sole purpose of providing a forum in which an estate consisting solely of real estate might be administered and claims against it adjudicated without the necessity of a creditor's suit under the jurisdiction of an equity court. *Waxter v. Mindel*, 200 Md. 367 (1952). Before the enactment of this section in 1912 the Orphans' courts had no jurisdiction to grant letters of administration in the absence of a personal estate left by the decedent. *Seaman v. Seaman*, 141 Md. 1 (1922). It is our opinion that this enlargement of jurisdiction of the Orphans' Court is to be construed strictly in accordance with the terms of Section 124, and that the Orphans' Court only has jurisdiction to entertain such administration and is only authorized to issue letters under Section 124 where the decedent in question has been dead for less than twelve years. In the present case the letters were not applied for before the Orphans' Court of Harford County within twelve years of the date of the death of A, and accordingly we are of the opinion that the proceedings conducted by the Orphans' Court of Harford County were a nullity inasmuch as that court was without jurisdiction to grant letters of administration under Section 124.

As we noted previously escheatment of the lands of A in favor of the County Commissioners of Harford County requires a determination by a court of competent jurisdiction that A died intestate without heirs. We believe the only forum available at this time for a proper determination of this question in order to satisfy the requirements of Section 47 would be the Circuit Court for Harford County, and we suggest that appropriate proceedings be instituted there by the County Commissioners against the unknown heirs of A asking for a judicial determination which will enable the County Commissioners to appropriate the lands of A for the use of its Board of School Commissioners or its Board of Education as the case may be as provided for in Section 47.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

ORPHANS' COURT—GUARDIAN AND WARD—TESTAMENTARY
LAW—RULE MAKING POWER OF THE ORPHANS' COURTS
—THE ACCEPTABILITY OF INDIVIDUAL SURETIES ON THE
BOND OF A GUARDIAN.

October 3, 1963.

Hon. Bertram B. Coale,

Hon. J. Rush Baldwin, Jr.

Hon. Harry L. W. Hopkins,

Orphans' Court of Harford County

You have requested our opinion as to the validity of a proposed rule to be adopted by you requiring that all bonds of guardians qualifying before the Orphans' Court of Harford County be supported by a corporate surety.

The rule making power of the Orphans' Courts of this State is defined by Article 26, Section 27 of the Annotated Code of Maryland (1957 Edition), which provides:

“ * * * The judges * * * of the Orphans' Courts of Baltimore City and of the counties shall have power to establish rules governing the practice and procedure in their respective courts, provided that such rules shall not be inconsistent with any general rules adopted by the Court of Appeals, or with any statute then or thereafter in force.”

Article 93, Section 175 of the Code requires that every guardian file bond as a condition to his qualification before the Orphans' Court “with sureties to be approved by the Orphans' Court, as directed in Section 176 of this article.” Section 176 provides:

“Every guardian appointed by the court, and every guardian by will, or natural guardian, before he proceeds to act as such, shall enter into bond to the State of Maryland in such penalty and with such sureties as the court shall approve, but whenever the surety upon such bond is a corpora-

tion so authorized to qualify as such, the amount of the penalty of such bond shall be fixed by the court in an amount not exceeding the probable value of the estate for which said guardian should account for and be liable according to law, and to be recorded and be subject to be put in suit, and to be in all respects on a footing with an administration bond, * * *

We think that this section recognizes the right to use individual sureties on a bond of a guardian qualifying before the Orphans' Courts and their use has been generally accepted since the original enactment of this statute by the Acts of 1798, Chapter 101, Sub-chapter 12, Section 4. *State v. Miller*, 3 Gill 335 (1845); *Clarke v. State*, 8 G. & J. 111 (1836); *Griffith v. Parks*, 32 Md. 1 (1870); *State v. Henderson*, 54 Md. 332 (1880); *Parr v. State*, 71 Md. 220 (1889). Cf. Article 90, Section 6 of the Code, which allows the *personal representative* of a surety on a guardian's bond to seek relief from his decedent's suretyship. The individual surety, like the corporate surety, is, of course, subject to examination by the court as to his fitness and ability to assume the undertaking of the bond offered by the guardian, and he may be rejected by the court if it is unsatisfied as to his character or financial standing. The guardian's bond and the bond of an executor or administrator in this respect are to be treated on equal footing under express provision of Section 176, *supra*. Cf. Opinion of the Attorney General to E. Clyde Walls, Register of Wills for Queen Anne's County, dated August 19, 1963, and on Page 377 herein; 20 Opinions of the Attorney General 348 (1935).

Although the use of individual sureties has been largely discontinued since the commercialization of the function of sureties and the resultant emergence of active corporate surety companies, M. L. E. *Probate Forms*, Section 161, f.n. 1, the Legislature has not seen fit to withdraw its authority extended in Section 176 for use of individual sureties on guardian's bonds, and in our opinion, any rule of the

Orphans' Court prohibiting the use of individual sureties would necessarily be inconsistent with this legislative policy and, consequently, in excess of its rule making power set forth in Article 26, Section 27, *supra*.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

PAROLE AND PROBATION—DEPARTMENT OF
PAROLE AND PROBATION—COMMUTATION OF DEATH SEN-
TENCE TO LIFE IMPRISONMENT BY CHIEF EXECUTIVE—
ELIGIBILITY FOR PAROLE CONSIDERATION—TIME OF.

October 31, 1963.

*Mr. Paul C. Wolman, Director,
Department of Parole and Probation.*

We have your recent letter inquiring as to when Joseph E. Johnson, Jr., and James V. and John G. Giles, each convicted of the crime of rape alleged to have occurred on July 20, 1961, will become eligible for consideration for parole. You advise us that the Giles brothers were convicted and sentenced in the Circuit Court for Montgomery County on December 11, 1961, and that Johnson was convicted and sentenced in the Circuit Court for Anne Arundel County on November 20, 1962. Each was sentenced to death. On October 24, 1963, Governor J. Millard Tawes commuted the sentences of all three to life imprisonment.

Section 124 of Article 41 of the Annotated Code of Maryland (1957 Ed.), entitled "Release on Parole", provides as follows:

"(a) *Investigations*—It shall be the duty of the Board of Parole and Probation of its own initiative to cause to be made such investigation as may enable it to determine the advisability of granting parole to persons sentenced under the laws of this State, to any penal institution therein whenever such prisoner shall have served in confinement one fourth of such term or consecutive terms.

"(b) *Granting of parole; when Governor must approve*—Whenever, upon having completed such investigation the said Board of Parole and Probation shall be of the opinion that both the interests of the State and of any prisoner would be best subserved by the release of said prisoner on parole,

and that there is reasonable probability that, if such prisoner is released, he will remain at liberty without violating the law, it shall be the duty of the Board of Parole and Probation which is hereby vested with the authority and power to issue and grant paroles when in its judgment deemed advisable, grant a parole to such prisoner upon such terms and condition as may be reasonable and proper. No person who has been sentenced to life imprisonment shall be eligible for parole consideration until he shall have served in confinement fifteen years. Prisoners serving terms of life imprisonment shall only be paroled with the approval of the Governor."

Specifically, you have inquired whether the date to be used in computing eligibility for parole consideration is to be predicated upon (1) the date of arrest and pre-trial confinement, namely, July 20, 1961, or (2) the date when the death sentences were imposed, viz., December 11, 1961, for the Giles brothers, and November 20, 1962, for Johnson, or (3) the date of commutation of the death sentences by Governor Tawes, namely, October 24, 1963.

Section 107 of Article 41 of the Maryland Code defines a "commutation of sentence" as an act of clemency ordering that the grantee shall suffer a lesser penalty for his offense than that imposed upon him by the court in which he was convicted. It is a well-settled principle that after commutation the sentence has the same legal effect and the status of the prisoner is the same as though the sentence had originally been for the commuted term. *Jones v. Morrow*, 121 P. 2d 219 (Kans., 1942); *Pittman v. Richardson*, 23 S.E. 2d 17 (S.C., 1942); *Murphy v. Wolfer*, 148 N.W. 896 (Minn., 1914); and 39 Am. Jur., *Pardon, Reprieve and Amnesty*, Section 63. In other words, the effect of the commutation by the Chief Executive in this instance was to change the judgment of the court, and the commutation abrogated the sentences of death imposed by the court and substituted instead life imprisonment in the penitentiary. The judg-

ment, after commutation, had the same identical legal effect as if the jury, by their verdict, had declared that the accused, as punishment for the said offense, should suffer imprisonment in the penitentiary for the term of their natural lives, and there had followed the verdict a judgment of the court sentencing the defendants to life imprisonment in the penitentiary. See *Johnson v. State*, 63 So. 163 (Ala., 1913), a case involving, as here, commutation by the Chief Executive of a death sentence to life imprisonment.

It being clear, therefore, that the legal effect of commuting the instant death sentences to life imprisonment is as if Joseph Johnson and the Giles brothers had originally been sentenced to life imprisonment, it follows that in computing eligibility for parole under Section 124 that the date of the commutation itself is without legal significance. In our view, the fifteen-year parole eligibility period is to be measured from the date of the original sentences, namely, as to John and James Giles—December 11, 1961, and as to Joseph Johnson—November 20, 1962. No other construction of Section 124 is, in our opinion, plausible, since the phrase contained in said Section, i.e., “served in confinement”, is referable solely to such time served in confinement following conviction and sentence by the court.

THOMAS B. FINAN, *Attorney General*.

ROBERT C. MURPHY, *Deputy Attorney General*.

DEPARTMENT OF PAROLE AND PROBATION—COMMUTATION
OF SENTENCE—PROCEDURE TO BE FOLLOWED UPON
REVOCATION OF SAME BY THE GOVERNOR.

October 4, 1963.

*Mr. Paul C. Wolman, Director,
Department of Parole and Probation.*

You have asked to be advised of the procedure to be followed for the revocation of a commutation of sentence granted by the Governor.

Under Section 107 of Article 41 of the Annotated Code of Maryland (1957 Edition, 1962 Supp.) entitled "Definitions," subsection (d) states:

"A commutation of sentence is an act of clemency, evidenced by a written executive order signed by the Governor under the great seal, ordering that the grantee shall suffer a lesser penalty for his offense than that imposed upon him by the court in which he was convicted. A commutation may be absolute or made to depend for its effectiveness upon the compliance with such conditions, precedent or subsequent, as the Governor may provide in the written order."

Under Section 120, Article 41, *supra*, the Governor is given the specific power to commute sentences; and under Section 121 of Article 41, *supra*, the Governor is the sole judge of compliance with conditional pardons granted by him. Although Section 121 only mentions "conditional pardon," the textwriters have analogized "commutations" to "conditional pardons." In addition to being the sole judge of compliance with these conditional releases, the Governor's determination, that the conditions of the same have been violated, is final and not subject to review by any courts of this State.

In cases where executive clemency is less than absolute, there are terms and conditions that are to be complied with

in consideration of the conditional release. Among these conditions in the case particularly referred to is that the commuttee be supervised by the Department of Parole and Probation until the maximum expiration of his sentence. Also, that he shall agree that upon violation of any of the terms and conditions of his release, he will be returned to the institution from which he was released.

The next question that would arise would be whether upon his return to the institution and before revocation by the Governor, the grantee of the conditional release must be given a hearing.

In the case of *Murray v. Swenson*, 196 Md. 222, 76 A. 2d 150, and affirmed in dictum in *Edwardsen v. State*, 220 Md. 82 at page 88, 151 A. 2d 132, it is indicated that a hearing is required. This is interpreted to mean that due process is satisfied if the grantee of a conditional release is extended a reasonable opportunity to defend himself against the charge that he has violated the conditions upon which his release was granted and that a trial in a strict or formal sense is not required.

It is provided in Section 112 of Article 41, *supra*:

“It shall be the duty of the Board of Parole and Probation:

(5) To make such investigations and prepare such reports and recommendations as may be required by the Governor concerning persons * * * who have been granted such pardon, commutation of sentence, clemency or conditional pardon.”

It would appear, then, that the Department could, upon direction from the Governor, provide for a hearing in the same manner as it does in cases of parole revocations, and forward the results of the hearing, along with recommendations, to him for his consideration and ultimate determinations.

Finally, Section 122 of Article 41, *supra*, provides that upon breach of any of the conditions of a conditional

release, and upon revocation, the person in question “* * * shall be required, unless otherwise ordered by the Governor, to serve the unserved portion of the sentence originally imposed upon him; and said person, unless otherwise ordered by the Governor, shall not be considered as serving any portion of his original sentence during the time he is released by virtue of such conditional pardon.”

THOMAS B. FINAN, *Attorney General*.

JACQUES E. LEEDS, *Asst. Attorney General*.

PLANNING AND ZONING

TRANSFER OF ZONING POWERS—EXTRATERRITORIAL SUBDIVISION CONTROL—COUNTIES AND MUNICIPALITIES.

February 25, 1963.

*Mr. James J. O'Donnell,
Director, Planning Department.*

This will acknowledge receipt of your recent letter requesting interpretation of certain provisions of Article 66B of the Maryland Code (the zoning and planning act).

Your first question deals with the procedures to be employed by the City of Cambridge in transferring authority from its existing zoning commission to a planning commission established under the authority granted in Sections 10 through 37 of Article 66B. Your second question, which deals with the Cities of Cambridge and Cumberland, asks for an interpretation of Section 24 of Article 66B relating to extraterritorial subdivision control. We shall deal with these questions which you have raised in the above order.

Transfer of Zoning Powers

Your letter indicates that at the present time the zoning powers of the City of Cambridge are vested in a Zoning Commission which was set up pursuant to Sections 1 through 9 of Article 66B. We understand that the City's planning powers, however, are vested in a planning commission established under Sections 10 through 37 of Article 66B and that the City is interested in knowing the procedures and requirements for transferring the zoning authority from Sections 1 through 9 to the planning commission established under Sections 10 through 37. In particular, they wish to know what is meant by the term "zoning plan" which is used in Section 23 of the Act and the procedures to be followed in reducing their five man zoning board of appeals established under Section 7 of the

Act to a three man board of appeals as is required by Section 22 of the Act.

Section 23 of Article 66B which concerns itself with the transfer of zoning authority from a previously established zoning commission to a planning commission set up under Sections 10 through 37 reads as follows:

“The commission appointed under this subtitle shall have all powers granted by law heretofore to any planning or zoning commission of the municipality, and from and after the creation of a planning commission hereunder in such municipality, all powers and records of the then planning and zoning commission shall be transferred to this planning commission, provided, however, that in the event that any existing planning and zoning commission shall be nearing the completion of its zoning plan, council may, by resolution, postpone the said transfer of the zoning commission’s powers until the completion of such zoning plan; but such postponement shall not exceed a period of six months.”

The repeated use of the word “shall” in this Section indicates the legislative intent that the planning commission, established under Sections 10 through 37, is to immediately be vested with all power and authority previously held by a zoning commission established under Sections 1 through 9. This vesting may, however, be deferred for a six-month period, provided that the old zoning commission is nearing the completion of its “zoning plan”. Thus, unless the old zoning commission of the City of Cambridge is in the process of completing its “zoning plan”, and unless the new planning commission is not yet six months old, the powers of the old zoning commission are to be vested in the planning commission.

In order to determine what is meant by the theme “zoning plan” (which entitles a municipality to a six-month delay in the vesting of its zoning powers in the planning com-

mission), it is necessary to refer to a number of the other sections appearing within Sections 10 to 37 of Article 66B. Section 15A, which contains the general grant of powers and duties to the planning commission, states that it shall be the duty of the planning commission to adopt a "zoning plan for the control of the height, area, bulk, location, and use of buildings and premises." Similarly, Section 21(f), which deals with the duty of the planning commission to make recommendations with respect to the zoning map, states as follows:

"* * * It shall be the duty of the planning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein * * *".

These two sections indicate that the term "zoning plan" is to encompass not only a location of the boundaries of the various districts within the municipality but also to include regulations with respect to the particular uses which may be made within these various districts. A zoning plan would, therefore, include not only a map but a set of regulations as well.

With respect to the question of the creation of a new three man Appeals Board, which is required by Section 22 of Article 66B, this will obviously have to be done by local ordinance, which should repeal the ordinance creating and maintaining the five man Board of Zoning Appeals established under Section 7 of Article 66B, and enact a new ordinance establishing the Board of Appeals as required by Section 22 of Article 66B. Once the old ordinance is repealed, the terms of the existing board members would come to an end and new appointments would have to be made to the new three member Board of Appeals.

Extraterritorial Subdivision Regulation

The second question posed by your letter concerns the extraterritorial subdivision jurisdiction of municipal planning commissions. In particular, you ask if an incor-

porated town within a county can exercise subdivision control within an area one mile into its surrounding county.

Section 24 reads as follows:

“The territorial jurisdiction of any municipal planning commission over the subdivision of land shall include all land located in the municipality and all land lying within one mile of the corporate limits of the municipality and not located in any other municipality, except that, in the case of any such nonmunicipal land lying within one mile of more than one municipality having a planning commission under this subtitle, the jurisdiction of each such municipal planning commission shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities.”

The term “municipality” is defined by Section 10 of Article 66B to include or relate, where appropriate, to counties as well as incorporated towns and villages. If the term “municipality” as used in that part of Section 24 relating to extraterritorial subdivision jurisdiction includes counties, then a portion of the section is rendered meaningless for, as indicated from the above quotation, the one mile extraterritorial jurisdiction extends only to areas which are “nonmunicipal” in nature. Thus, if the term “municipal” includes counties, there can never be extraterritorial jurisdiction within the State of Maryland since except for Baltimore City every incorporated town is located within a county. In order to give any meaning at all to the extraterritorial jurisdiction portions of Section 24, therefore, it is necessary to construe the term “municipality”, in that limited instance, as not including counties. It should be noted, however, that the term “municipality” does include counties in all other portions of Section 24. Thus, although an incorporated town or village has extraterritorial subdivision jurisdiction for one mile into the surrounding county, the county itself has subdivision jurisdiction over all other portions of the county. Also, should the incorporated town or village decline to exercise

subdivision control within its one mile extraterritorial jurisdiction, then a reasonable construction of Section 24 dictates the conclusion that the county may exercise subdivision control within this one mile area until the incorporated town or village does so act. As noted in the case of *Smith v. Higinbotham*, 187 Md. 115, when a statute is susceptible of two possible constructions the construction to be resorted to is the one which will render effective all of the terms of the statute in the context of the over-all legislative scheme.

We are aware that this opinion may in some respects be in conflict with the portion of the opinion of this office, dated September 15, 1960, addressed to Mr. Gucker of your Department, and insofar as that opinion is in conflict with this, please consider the earlier opinion to be modified.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

PLANNING—REGIONAL COUNCIL

REGIONAL PLANNING COUNCIL—CERTIFICATION OF BUDGET
—“PRECEDING TAXABLE YEAR”, AS USED IN SEC. 18,
ARTICLE 78D, ANNOTATED CODE OF MARYLAND (1963
SUPP.), MEANS THAT CONCLUDED TAXABLE YEAR IM-
MEDIATELY PRECEDING THE DUE DATE FOR CERTIFICA-
TION.

July 22, 1963.

*Mr. J. Jefferson Miller, Chairman,
Regional Planning Council,
Planning Department.*

Your recent letter asks us to define the phrase “pre-
ceding taxable year” as it appears in § 18 of Article 78D
of the Annotated Code of Maryland (1963 Supp.), enacted
as Chapter 753 of the Acts of 1963 and pertaining to the
preparation and certification of the operating budget for
the Regional Planning Council thereby created. In its perti-
nent portions, § 18 provides as follows:

“On or before October 1, 1963, and on or before
October 1 of each year thereafter, The Council
shall certify to each of the several budget officers
or governing bodies of the City and the several
Counties comprising the Area, the portion of the
budget of The Council, approved as aforesaid,
payable respectively by each, which portion shall
be in the same ratio to two-thirds ($\frac{2}{3}$) of the
budget that the assessed value of all real property
in the respective City or County, as the case may
be, for the *preceding taxable year*, bears to the
assessed value of all such real property in the
Area; * * * ” (Emphasis supplied.)

We are of the opinion that “preceding taxable year” re-
fers to *the most recently concluded taxable year as of the
1st day of October of the year in which the Council's budget
is prepared and certified.*

There are possibly two alternative interpretations that might be forced upon this language, neither of which do we consider meritorious.

First, it might be argued that, by "preceding taxable year", is meant that concluded taxable year immediately preceding the taxable year in which the Council's budget will be funded, rather than that in which that budget is prepared and certified. The Act does not support such an interpretation. "Preceding taxable year" is a relative term, and, as used in § 18, it can be given meaning only by reference to some specific point in time. So, as there is no direct mention in the Act of the taxable year in which the certified budget is to be funded, "preceding taxable year" cannot reasonably be said to relate to such period. The only point in time mentioned is the due date for certification, i.e., "October 1 of each year." Furthermore, § 18 deals primarily with the preparation and the certification of the Council's budget and the duties imposed upon the Council with respect thereto. In relation to the time as of which these duties are to be performed, the taxable year immediately preceding that in which this budget is to be funded would be, not the *preceding* taxable year, but the *current* taxable year.

Second, it might be argued that, by "preceding taxable year," is meant that immediately preceding concluded taxable year as of the actual date of budget certification, rather than October 1, the due date for such certification. Under this interpretation, if the Council certified its budget considerably in advance of October 1 of the year in which it is due, this conceivably could require the use of an earlier taxable year than that immediately preceding the due date (October 1) to determine the participation of the various subdivisions in funding said budget. In other words, if the taxable year for a given county within the Area were that period from July 1 through June 30 next following and the Council's budget were certified on June 1, 1964, the "preceding taxable year" would be 1962-63, rather than 1963-64. The occurrence of this event is unlikely. But, even if it would occur, we nonetheless are of the opinion that the

controlling taxable year would still be that immediately preceding the due date for the budget's certification and not some earlier date. We do not think it reasonable to infer that the General Assembly intended that the Council exercise this sort of control in determining the participation of the political subdivisions of the Area in the funding of the Council's budget. Nor do we think it reasonable to infer that the General Assembly intended that any political subdivision in the Area be penalized or benefited by the Council's attending to its budgetary responsibilities with admirable promptness. On the other hand, it is reasonable to infer that the Legislature intended that liability for the funding of the Council's budget be distributed on the basis of the most recent and readily available tax information. Finally, additional support for the proposition that the controlling date is the due date (October 1), rather than the actual date, of certification is to be found in the case of *Sherman v. J. S. Brown Mercantile Co.*, 78 Colo. 355, 241 Pac. 724 (1925).

Thus, because of the implausibility of any alternative interpretation, we are of the opinion that "preceding taxable year" refers to that concluded taxable year immediately preceding the date, October 1, by which the Council is required to certify its budget.

In conclusion, it might be helpful to point out that presently, the taxable year for all of the political subdivisions in the Area coincides with the calendar year—not the fiscal year. However, pursuant to the provisions of Chapter 825 of the Acts of 1963, these subdivisions are required to convert to a taxable year that coincides with the fiscal year by June 30, 1966.

THOMAS B. FINAN, *Attorney General.*

STUART H. ROME, *Asst. Attorney General.*

POST-MORTEM EXAMINERS

DEAD BODIES—ORDER OF PRIORITY OF CLAIMS FOR PURPOSE
OF BURIAL AFTER POST-MORTEM EXAMINATION.

October 10, 1963.

Dr. Russell S. Fisher,
Chief Medical Examiner.

Your recent letter states that after your office has completed the post-mortem examination of dead bodies as required by law, problems sometimes arise in connection with claims to such bodies for purposes of burial. You ask us to advise you generally regarding the order of priority of such claims. You state that problems arise where claim to a body is made by a person under twenty-one years of age and also in cases where claim is made by both the estranged surviving spouse and a blood relative of the deceased. You also ask our advice regarding the propriety of a practice of releasing bodies to undertakers on the order of persons under twenty-one years of age. Finally, you raise the question of the right of a person under twenty-one years of age to sign an authorization for an autopsy in a nonmedical examiners case.

The broad question presented is who is entitled to assert the right of burial? There is no property right in the body of a deceased person. Maryland has followed the general holding of the courts that, in the absence of testamentary disposition of the remains, the surviving spouse or next of kin has a quasi-property right in the body which is the right of sepulture. *Unterstützung Verein v. Posner*, 176 Md. 332. Under the law, the deceased himself has a prior right to direct the disposition of his remains. Failing any indication, by Will or by other direction prior to death, the order of priority for claims upon the body for the purpose of burial is, first, the surviving spouse, and then the next of kin. *Unterstützung Verein v. Posner, supra; Painter v. U. S. F. & G. Co.*, 123 Md. 301.

Relating these legal principles to the disposition of dead bodies which come into your custody in the course of your official duties of post-mortem examination, the first consideration is to determine whether there has been any expression on the part of the deceased prior to his death regarding the disposition of his remains. Where it is ascertained that burial instructions were left by the deceased prior to his death, whether by Will or otherwise, his instructions are to be executed, if practicable. In suicide cases, directions for burial may be contained in a suicide note. In other cases, the intentions of the deceased however expressed, if known or definitely ascertainable, are favored in the law and ought to be respected. In the absence of some form of instruction by the deceased for the disposition of his remains, it is our opinion that the order of distribution set forth in Article 93 of the Maryland Code is determinative of the order of priority of persons claiming a dead body for the purposes of burial. The stated order of priority is surviving spouse, children, parents, grandchildren, brothers and sisters. Your office should be guided accordingly where claims are made for the custody of bodies for purposes of burial after your post-mortem examination.

The rights of the surviving spouse to claim the body of a deceased spouse are not lost by reason of separation of the parties prior to death in the absence of an agreement to the contrary. Where husband and wife were living separately and apart when death made the separation final, the survivor is entitled to claim the remains unless the deceased has instructed otherwise or the surviving spouse has waived burial rights. We note that a situation may exist where the surviving spouse has waived the right to arrange for the burial of the deceased spouse under the terms of an existing separation agreement which provides for the relinquishment of such right, either expressly or by implication, and which separation agreement is in effect at the time of the death of the deceased.

A surviving spouse, though under twenty-one years of age, has the right of sepulture of the deceased spouse in the

absence of testamentary disposition of the remains. The law is not clear as to whether a minor child claiming custody of the remains of the deceased is entitled to exercise such right. Where there is no surviving spouse the Maryland cases assign priority to children without reference to whether or not majority has been attained. The law in other jurisdictions tends to hold that a minor child has such an interest in the remains of the deceased as to be entitled to participate in the burial arrangements. 17 C.J. 1139, Note 23. In our view, your office should honor the claim of a minor child of the deceased who otherwise is entitled to priority in accordance with the order of distribution set forth herein.

It is our opinion that a contract between a minor and funeral director designated by said minor to accept a body from your custody does not involve your office. You are not the agent of either party to such transaction and your only connection with the matter is the discharge of certain duties imposed by law. Your office takes custody of the body for the performance of post-mortem examination required by law and your release of the body after you have fulfilled your duty has no connection with any contract for burial of the remains. Accordingly, whether there is any person of age to enter into a burial contract is a matter to be resolved by the contracting parties. You need only be concerned with whether the person making claim for the body has a prior right thereto over any other claimants. In any case where your office has reason to believe that an impending controversy over custody of a body threatens to involve you in litigation, it is suggested that, after your post-mortem examination, you return the remains to the source from which you took custody.

We do not reach your final question with respect to whether a minor may sign an authorization for an autopsy in a nonmedical examiners case in view of the fact that any such case is outside the area of your official responsibility. For informational purposes, however, your attention is invited to Article 43, Section 149 of the Maryland Code.

Subsection (a) provides that any person who assumes custody of a body for the purposes of burial is entitled to authorize an autopsy, including a child of the deceased. This section makes no distinction between minor children and those who have attained majority. On the other hand, subsection (b) which provides *inter alia*, for a person to permit an autopsy upon his own remains, specifies that such permission may be given in writing only by a person who is twenty-one years of age or older.

THOMAS B. FINAN, *Attorney General*.

FRED OKEN, *Asst. Attorney General*.

POTOMAC RIVER FISHERIES COMMISSION

POTOMAC RIVER COMPACT OF 1958 DID NOT GRANT AUTHORITY OVER MARKETING OF SEAFOOD TAKEN FROM THE POTOMAC RIVER TO THE COMMISSION—AUTHORITY GRANTED TO COMMISSION TO PROMULGATE REGULATIONS GOVERNING SPORT FISHING ON POTOMAC RIVER.

December 11, 1963.

*Mr. H. C. Byrd, Chairman,
Tidewater Fisheries Commission.*

This is to acknowledge your communication requesting that this office render the Tidewater Fisheries Commission an opinion on two questions with reference to whether the jurisdiction of the marketing of seafood, and the regulation of sport fishing, were ceded to the Potomac River Commission by the Compact of 1958.

The first question :

“Whether, under Article 66C, § 261A (Compact of 1958), Article 3, Commission Powers and Duties, Subsections (2) and (4) of the 1963 Cumulative Supplement of the Annotated Code of Maryland, limits the Potomac River Fisheries Commission to promulgate regulations and issue licenses for *taking* of seafood as distinguished from marketing?”

To interpret the enumerated sections of the Compact of 1958, we first look to the Compact's preamble where it is stated that “Maryland and Virginia are both vitally interested in conserving and improving the valuable fishery resources of the tidewater portion of the Potomac River” and “* * * each recognizing that Maryland is the owner of the Potomac River bed and waters * * *”, and “that the citizens of Virginia have certain riparian rights * * * in common with the citizens of Maryland, the right of fishing in said river * * *.”

The words "fishery resources" would cover the natural resources within the jurisdictional boundaries as set forth in Article 2, such as, fish, crabs, terrapins, oysters, clams, and other shellfish.

The Compact recognizes that Maryland is the owner of the river and the citizens of Maryland and Virginia have, in common, the right of *fishing* (Emphasis added). The last two words, "of fishing," denote the privilege of removing the fishery resources. With specific reference to the language of §2, the words "to be taken," and in §4, "for the taking," denote the privilege of the removal of the resources; "taking" meaning to lay hold of, to gain or receive into possession; ("market" meaning the purchase and sale.) Upon examination of the statutes of both Maryland and Virginia, a clear distinction is made in the laws between the taking or catching, and buying or purchasing of seafood.

The initial right of Virginians to equal enjoyment of the fishery resources of the Potomac was granted by the Compact of 1785, which provided:

"the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states."

In reading the entire text of the Compact of 1958, it appears that it was not the intent to enlarge the rights of Virginians which they obtained by the aforesaid Compact of 1785, but to set up the mechanics whereby rules and regulations could be promulgated by a bi-state commission controlling the taking and conserving of the valuable fishery resources.

For the above reasons, it is our opinion that the Compact of 1958 limits the Potomac River Commission to the promulgating of regulations for the taking of seafood, as distinguished from the marketing of seafood.

The second question:

"Whether, under the aforesaid Compact, has Maryland ceded to the Potomac River Fisheries

Commission the right to promulgate regulations with reference to sport fishing as distinguished from commercial fishing?"

Referring to Article III of the Compact (Titled "Commissions, Powers and Duties"), §2, Fish and Seafood:

"The Commission may by regulation prescribe the type, size and description of all species of finfish, crabs, oysters, clams and other shellfish which may be taken or caught within its jurisdiction, the places where they may be taken or caught, and the manner of taking or catching."

This section makes no distinction between commercial fishing and sports fishing.

Article III of the Compact, §4, Licenses (a), provides that the Commission (Potomac River) shall issue such licenses as it may prescribe, without distinction between commercial fishing and sports fishing, and Subsection (b) provides that only certain citizens of the two states are entitled to licenses for taking of oysters and clams and the commercial taking of finfish and crabs, and further making it mandatory that the Commission, within six months, adopt a schedule of licenses and privileges granted thereby, etc.

From the above sections, it is our opinion that Maryland has ceded to the Potomac River Commission the right to promulgate regulations for the taking of the fishery resources, whether for commercial fishermen or sports fishermen.

THOMAS B. FINAN, *Attorney General*.

EDWARD S. DIGGES, *Asst. Attorney General*.

RACING COMMISSION

IF CHAPTER 365 OF ACTS OF 1963 IS PROPERLY REFERRED TO THE ELECTORATE, COMMISSION MAY NOT AWARD MORE THAN 12 RACING DAYS TO ANY HALF-MILE TRACK—COMMISSION MAY AWARD NUMBER OF DAYS IT DEEMS FIT TO HARNESS TRACK, AS LEGISLATIVE REQUIREMENT IS ONLY THAT EACH SUCH TRACK HAVE NOT LESS THAN 24 DAYS.

May 24, 1963.

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

We have your letter of May 21, 1963 in which you ask certain questions pertaining to Senate Bill 89, now Chapter 365 of the Acts of 1963.

You advise us that Referendum Petitions are now being circulated in Baltimore City and the counties of this State, and you ask us what effect the filing of the requisite number of Petitions will have on the schedule of dates for racing in this State.

Article XVI, Section 2 of the Constitution of Maryland provides in pertinent part:

“* * * If before said first day of June there shall be filed with the Secretary of the State a petition to refer to a vote of the people any law or part of a law capable of referendum, as in this Article provided, the same shall be referred by the Secretary of State to such vote, and shall not become a law or take effect until thirty days after its approval by a majority of the electors voting thereon at the next ensuing election held throughout the State for Members of the House of Representatives of the United States * * *”.

Section 3(b) of that same Article of the Constitution provides that if more than one-half, but less than the full

number of signatures required to complete any referendum petition shall be filed with the Secretary of State before the 1st day of June, the time for the law to take effect and for filing the remainder of the signatures shall be extended to the 30th day of the same month.

It would appear, therefore, that if one-half of the requisite number of signatures are filed with the Secretary of State by June 1st the measure will not take effect on June 1st, assuming that it is a referable enactment. If the Bill is properly referred, your Commission cannot on the basis of the terms of that measure award additional racing dates until the electorate shall have approved of same at the election of 1964.

We point out, however, that the referral of this measure to the electorate, and the suspension of its terms, does not preclude your Commission from granting additional racing dates to certain racing associations in this State.

You advise us that on June 3rd the Laurel Raceway will open its meeting, and continue for thirty-two (32) racing days. Normally, the meeting would have been for twenty-four (24) days, but the additional eight (8) days were added because of the anticipated provisions of Senate Bill 89. You ask, in the event that this measure is referred, whether the Commission will be required to cancel the eight additional racing days. In response to this inquiry, please be advised that the Commission may if it so chooses award the additional eight days of racing to Laurel Raceway, despite the referral of Senate Bill 89, as the provisions of Section 17 of Article 78B, Annotated Code of Maryland (1962 amendment), only require, "that the Racing Commission shall authorize not less than twenty-four days at any one track." As we have previously advised you, we believe that this language is sufficient to grant to the Commission authority to award to any track licensed under this section a number of days in excess of twenty-four.

Your second question pertains to Marlboro Race Track which you advise us will open on July 6th and run through

July 27th, for a total of eighteen (18) racing days. This track previously had been licensed for twelve (12) racing days, and the additional six (6) racing days were granted under the provisions of Senate Bill 94. Marlboro Race Track is licensed under the provisions of Section 15 of Article 78B, and in the event that Senate Bill 89 is properly referred, your Commission does not have the authority to authorize more than twelve days racing at that track, as Section 15 (a) of Article 78B says, in pertinent part, "such licenses shall permit the holders to conduct a race meeting or meetings with betting privileges, not to exceed twelve days for any one organization in any calendar year * * *." If Senate Bill 89 is properly referred, the provisions of this section are binding on your Commission and no days of racing in excess of twelve may be awarded to the Marlboro Race Track.

In summation, you ask us what position the Commission should take regarding the possibility of the referral of Senate Bill 89. We can only suggest that the Commission take no action until such time as you are notified by the Secretary of State that this measure has been properly referred to him. In that event, the Commission will be required to make a determination as to the number of days of racing it wishes to award to the harness tracks, and the Commission will be required to reduce the number of racing days awarded to the half mile and mile tracks.

THOMAS B. FINAN, *Attorney General.*

ROBERT F. SWEENEY, *Asst. Attorney General.*

RACING COMMISSION—DOES NOT HAVE AUTHORITY TO COMPEL A LICENSED RACING ASSOCIATION TO JOIN PRIVATE ORGANIZATION KNOWN AS "THOROUGHBRED RACING ASSOCIATION"—COMMISSION DOES HAVE RIGHT TO REQUIRE ANY TRACK TO MAINTAIN SECURITY FORCE SUFFICIENT IN SIZE TO ENFORCE LAWS AND RULES OF RACING.

May 28, 1963.

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

By letter of May 9th you advise us that the Marlboro Race Track is not a member of the Thoroughbred Racing Association and therefore does not have the use of the subsidiary of that association, The Thoroughbred Racing Protective Bureau. You ask us whether your office has the authority to require Marlboro Race Track to become a member of this association, as your Commission feels that their present security force is inadequate and Marlboro is not in a position under their present setup to handle the proper security and investigations pertaining to the conduct of racing.

We have examined the laws and Rules of Racing with a great deal of interest and it is our opinion that your Commission does not have the authority to require that Marlboro or any other track be a member of the private organization known as the Thoroughbred Racing Association. We do believe, however, that your Commission has the right to require that Marlboro or any other association maintain a sufficient security force to enforce the laws and Rules of Racing in this State. Rule of Racing No. 36, for example, requires that "each Racing Association shall police its grounds at all times in such a manner as to preclude the admission of any person in and around the stables, excepting those being duly licensed by the Commission, or authorized by the Association". Rule No. 44 provides "each Racing Association shall exclude from the paddock, in the interest of the public safety, all persons

who have no immediate business with the horses entered, * * *". Rules 49 and 50 provide that no Racing Association shall permit a foreign book or gambling device on their grounds or the making of a handbook on its grounds.

We point out to you that Rule No. 52 stipulates that "it shall be the duty of each licensee to observe and enforce the rules of racing". If in the opinion of the Commission any association is not conducting a meet in compliance with the Rules and Laws of Racing, the Commission has the clear right under Section 10 of Article 78B to suspend or revoke the license for the holding of the meeting.

In summation, it is our opinion that the Commission does not have the right to require membership in any particular private security organization, but that the Commission does have the right to require that the security and investigation staff of any licensed racing association be sufficient in numbers and diligence to properly enforce the Rules and Laws of Racing regarding the conduct of a racing meet. If, in the opinion of the Commission, any licensed racing association is derelict in its duty to maintain a sufficient security force the Commission may take such action as it deems appropriate under the provisions of Section 10 of Article 78B.

THOMAS B. FINAN, *Attorney General*.

ROBERT F. SWEENEY, *Asst. Attorney General*.

RACING COMMISSION—POWER TO PROMULGATE RULES AND REGULATIONS—RULE GOVERNING, RESTRICTING OR REGULATING BETTING AT LICENSED RACE TRACKS—RULE PROHIBITING BETTING BY PERSONS UNDER THE AGE OF 21 YEARS—RULE PROHIBITING ATTENDANCE AT RACES BY PERSONS UNDER THE AGE OF 21 YEARS—PRIVATE PROPERTY RIGHTS OF LICENSEES OF THE COMMISSION—UNAUTHORIZED FORMS OF GAMBLING AT LICENSED RACE TRACKS.

October 11, 1963.

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

Your recent letter poses three questions:

1. Does the Commission possess the power to promulgate a rule prohibiting its licensed race track operators from allowing the purchase or redemption of pari-mutuel tickets by persons below the age of twenty-one years?
2. Does it possess the power to prohibit its licensees from admitting persons below the age of twenty-one years to the race track premises?
3. Is the practice of auctioning pari-mutuel tickets sold in connection with "Twin Double" type of betting by patrons at race tracks operated by licensees of the Commission a violation of the criminal law of Maryland?

We will answer these questions in the order presented.

I.

The powers of the Commission are prescribed by Article 78B, Section 11 of the Annotated Code of Maryland (1957 Edition, as amended). Section 11 (a) provides:

"Sec. 11. Powers of Commission; amounts retained by licensees.

- (a) Rules and regulations.—Said Racing Commission shall have full power to prescribe rules, regulations and conditions under which all horse races shall be conducted within the State of Maryland. Said Commission may make rules governing, restricting or regulating betting on such races and may fix, regulate and condition the rate of charge by the licensee for admission, or for the performance of any service, or for the sale of any article on the premises of such licensee, and may regulate the size of the purse, stake or reward to be offered for the conduct of such races.”

Commenting on the Commission’s power to regulate betting as therein delegated by the Legislature, the Court of Appeals of Maryland in *So. Md. Agri. Ass’n. v. Magruder*, 198 Md. 274, 279 (1951), stated:

“A perusal of the relevant Maryland statutes will demonstrate that the General Assembly has established a broad policy of prohibiting the commercial exploitation of the public’s gambling instinct. Article 27, Sections 288 to 301, inclusive. *Gaither v. Cate*, 156 Md. 254, 144 A. 239. The Legislature has deviated from this policy by the exception in favor of betting at race tracks provided in Section 292, and by the enactment of Article 78B. This statute permits the operation of race tracks at which horse racing, with attendant betting, is allowed under very close regulation and supervision. The Maryland Racing Commission is given exceedingly wide and comprehensive regulatory powers. * * * It is apparent that the Legislature deliberately imposed grave responsibility upon the Racing Commission in order that this exception to the anti-gambling laws of the State be kept within proper limits.”

In light of these broad powers possessed by the Commis-

sion to regulate betting on races conducted at licensed race tracks, we are of the opinion that it would be acting within the limits of its administrative discretion in promulgating a rule restricting betting at licensed race tracks to persons who have reached the age of twenty-one years. This age, with certain statutory exceptions, is the age at which the legal disabilities attendant to infancy are removed, *Sprecher v. Sprecher*, 206 Md. 108 (1955) and would meet the standard of reasonableness in regulation required of the Commission when exercising its rule-making powers granted by the Legislature. *Mahoney v. Byers*, 187 Md. 81 (1946), *Brann v. Mahoney*, 187 Md. 89 (1946).

II.

In *Greenfeld v. Md. Jockey Club*, 190 Md. 96 (1948), the Court of Appeals negated any duty on the part of a licensee of the Commission to admit all persons who desired to attend races conducted by said licensee under the jurisdiction of the Commission and held that the licensee was not prohibited under Article 78B or by any other existing rule promulgated by the Commission from refusing admittance to its race track premises to anyone. The Court did not have to decide there, and expressly declined to decide, whether the Commission could require licensees "to admit all comers as spectators and bettors." Although the licensees conducting racing under the authority granted to them by the Commission are minutely regulated and heavily taxed, their rights as private property owners have not been wholly extinguished. *Greenfeld v. Md. Jockey Club*, *supra*.

Clearly the Commission has the power, and has exercised it, to prohibit attendance at the tracks operated by the licensees of persons known to be conducting unauthorized gambling on the grounds of a licensee, Rules of Racing promulgated by the Maryland Racing Commission effective October, 1962, Rules 49 and 50, under its power of "governing, restricting or regulating betting" on the premises operated by its licensees. Article 78B, Section 11 (a), *supra*.

However, in the absence of clear evidence that the licensees of the Commission are unable to properly enforce a rule prohibiting betting by persons under the age of twenty-one years, so that barring them from the race tracks would be shown to be the only method of enforcing the Commission's expressed policy against their betting, we do not think that the Commission has the power to invade the recognized property right of the licensee to choose its customers.

III.

This year the Commission has, for the first time, authorized a form of pari-mutuel betting at tracks operated by its licensees known as the "Twin Double." This novation allows patrons of the licensee to make a selection of a winning combination in the fifth and sixth races. The bettor who has been successful in selecting the winner of both of these races then redeems his winning "Twin Double" ticket for a ticket which allows him to make a selection of a winning combination in the seventh and eighth races. A winning combination in the seventh and eighth races entitles the bettor to share in the pool contributed by the participants in the "Twin Double."

The Commission has become aware of a practice whereby bettors who have selected a winning combination in the fifth and sixth races on a "Twin Double" pari-mutuel ticket have, instead of using the ticket issued them to make a selection in the seventh and eighth races, auctioned their ticket to the highest bidder on the race track premises. You question the legality of this practice. The object and purpose of the enactment of Chapter 273 of the Laws of 1920, which with amendments is now codified as Article 78B, was "to create, in substitution for the court, a board or body authorized to issue the licenses issued under the Act, and to supervise and regulate the licensees in their management and conduct of the races, and to permit betting thereat, under the conditions imposed." *Nolan v. State*, 157 Md. 332, 336 (1929); *Greenfeld v. Md. Jockey Club*, *supra*. The Commission has accordingly adopted pari-mutuel betting con-

ducted by the licensee and supervised by the Commission as the sole form of betting on races conducted under its jurisdiction, and has at the same time prohibited its licensees from allowing any other form of gambling to be engaged in by their patrons on their premises—Rules 49 and 50, Rules of Racing, 1962 Edition, *supra*.

The Legislature, in providing for a legalized form of gambling under the supervision of the Commission, did not repeal its prohibition against betting on horse races, Article 27, Section 240, or against the selling of a "ticket * * * which the vendor or other person promises * * * shall * * * on the happening of any contingency entitle the purchaser or holder to receive money * * *," Article 27, Section 356, except to the extent that such conduct is carried on by licensees of the Commission under the approved form of betting allowed on races prescribed by the Commission.

We, therefore, conclude that the practice described is violative of Article 27, Sections 240 and 356, and constitutes misdemeanors punishable by imprisonment and/or fine as therein provided. Furthermore, the licensees of the Commission have a clear duty imposed upon them under Rules 49 and 50, Rules of Racing, 1962 Edition, *supra*, to prohibit such a practice at any racing meet conducted by them.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

RACING COMMISSION — MARYLAND-BRED RACE FUND —
LEGISLATIVE INTENT TO RESTRICT USE OF FUND TO
PURSES TO BE OFFERED IN MARYLAND-BRED RACE FUND
PROGRAM—NO AUTHORITY DELEGATED TO COMMISSION
FOR EXPENDITURE FROM THIS FUND TO PAY SALARY
AND EXPENSES OF EXPERT TO PROMOTE THE PROGRAM.

November 4, 1963.

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

In your letter of October 22 you have asked our opinion as to whether the Commission is empowered to authorize an expenditure from the Maryland-Bred Race Fund for the purpose of paying the salary and expenses of a person who would assist the Maryland-Bred Race Fund Advisory Committee in promoting the Maryland-Bred Race Program. Although the promotional activity of this proposed employee which you have outlined would undoubtedly do much to implement the program, we are of the opinion that no authority can be found for the expenditure.

The Maryland-Bred Race Fund was created by Chapter 137 of the Acts of 1962 and is now codified as Section 18A of Article 78B of the Annotated Code of Maryland (1957 Edition, as amended). It is therein provided:

“(b) On and after June 1, 1962, each thoroughbred track licensee under this article shall allocate a sum equal to .34% of the mutuel pool on all races conducted by it during the year to the Maryland-Bred Race Fund. Any monies allocated under this article and not disbursed during any current meeting in Maryland-Bred Fund races, within five (5) days after the close of each meeting shall be paid to the Maryland Racing Commission. The Commission shall hold all moneys so allocated and received in a fund to be known as the ‘Maryland-Bred Racing Fund’, which Fund shall be deposited by the Commission in one or more banks

or trust companies in the State. The members of the Commission shall have no personal liability for loss to the Fund by reason of the failure or insolvency or other fault of any depository if they shall use ordinary care in the selection of the depository. The Commission shall require any depository to secure by collateral any deposit therein comprising a part of [or] all of the Fund."

No payment from this Fund may be made except upon the order of the Commission. However, the act provides for the establishment of "The Maryland-Bred Race Fund Advisory Committee" whose five members shall be appointed by the Commission and who shall "assist and advise the Commission in administering the Maryland-Bred Race Program". It is expressly provided that members of this Committee shall serve without compensation.

Subsection (d) of the act states:

"(d) On and after June 1, 1962, each thoroughbred track licensee shall provide for the running of races, to be known as 'The Maryland-Bred Fund Races' for horses foaled in Maryland according to the Maryland Breeder's Association registration certificate. The number of Maryland-Bred Fund races, amounts of the purses, dates of running such races, distance provisions of such races, breeders' awards and any other conditions necessary to carry out the intent of the Maryland-Bred Fund races shall be determined by the Commission upon recommendation of the Committee. The amounts of the purses and the conditions for each race shall be determined in sufficient advance time to permit track licensees to include the purses and the conditions in their stake and condition books. If any Maryland-Bred Fund race fails to attract at least five separate qualified entries, then the Commission shall cancel the race and the purse shall not be paid out of the Fund. In the event the Commission cancels any race, it shall notify the track licensee

in time to permit the licensee to schedule a substitute race."

We think the intention of the Legislature has been clearly expressed to restrict the use of the "Maryland-Bred Race Fund" for purses offered in Maryland-Bred Fund races scheduled by the licensees of the Commission at its direction and that no other expenditures therefrom should be authorized by the Commission.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

REGISTER OF WILLS

ACKNOWLEDGMENTS—OATHS—AFFIDAVITS—REGISTERS OF WILLS AND THEIR DEPUTIES ARE AUTHORIZED TO TAKE ACKNOWLEDGMENTS ON ANY DOCUMENT EXECUTED WITHIN THIS STATE—REGISTERS OF WILLS AND THEIR DEPUTIES ARE NOT AUTHORIZED TO ADMINISTER OATHS GENERALLY AND THEREFORE NOT AUTHORIZED TO TAKE AFFIDAVITS EXCEPT IF EXECUTORS AND ADMINISTRATORS TENDERED TOGETHER WITH DOCUMENTS TO BE FILED IN COURSE OF THE ADMINISTRATION OF AN ESTATE IN THE OFFICE OF THE REGISTER.

September 3, 1963.

*Mr. George M. Nutwell,
Register of Wills,
Anne Arundel County.*

In your letter of August 15, 1963, you asked whether you and your deputies are authorized to administer an oath on affidavits other than those filed by executors and administrators with documents tendered for filing in your office in the course of the administration of an estate; and secondly, you inquire whether you and your deputies have the power to take acknowledgments on any instrument whether or not related to the administration of an estate.

By virtue of Article 93, Section 306, your deputies are empowered "to act in your place and stead", so your authority to perform the acts in question determines their authority.

This office has expressed the opinion that a Register of Wills and his deputies have the power to take acknowledgments of any instrument in the State of Maryland by virtue of the Uniform Acknowledgments Act adopted in Maryland in 1941; Article 18, Sections 1-14, 32 Opinions of the Attorney General 96 (1947).

On the other hand, an affidavit which may be defined as a written statement of facts sworn to by the party making

it, *Black's Law Dictionary*, 4th Edition, page 80, may only be validly made before an officer having authority to administer oaths; *Stanhope v. Dodge*, 52 Md. 482 (1879); 1 *M.L.E.*, *Affidavits*, Sections 1 and 2. The office of Register of Wills is created by the Constitution of Maryland, Article IV, Section 41 and the powers of the office are solely those conferred by statute; *Banking and Trust Co. v. Mitchell*, 175 Md. 68 (1938); *Sykes Probate Law and Practice*, Section 262, et seq. We are unable to find any statutory grant of power upon the Registers of Wills by the Legislature which would confer upon them the authority to administer oaths generally; that is, in addition to the power expressly conferred to administer oaths to executors and administrators in the course of the administration of an estate. For this reason, it is our opinion that you and your deputies have no authority to take oaths on affidavits other than those submitted by executors or administrators on documents filed in your office in the course of the administration of an estate.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

REGISTER OF WILLS—EXECUTOR AND ADMINISTRATOR—
BENEFICIARY OF ESTATE BEING ADMINISTERED NOT
DISQUALIFIED FROM ACCEPTANCE AS SURETIES ON THE
BOND OF THE ADMINISTRATOR OF THE ESTATE.

August 19, 1963.

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

In your letter of August 8th you advise us that an applicant for Letters of Administration in your office has tendered his Administrator's Bond executed by two individuals as Sureties thereon which individuals are also beneficiaries of the estate of the decedent. You request our opinion as to whether the fact that these individuals are beneficiaries of the estate would disqualify them from approval as Sureties on the Administrator's Bond. Article 93, Section 43 of the Code (1957 Edition) requires that:

"Every administrator shall, before administration shall be granted to him, execute a bond to the State of Maryland, with at least two sureties approved by the court or register, in a penalty prescribed by them or him, or with a surety corporation authorized by the laws of this State to qualify upon such bonds, and whenever the surety upon such bond is a corporation so authorized to qualify as such, the amount of the penalty of such bond shall be fixed by the court or register in an amount not exceeding the probable value of the property and assets of the estate for which the said administrator should account and be liable for, according to law, and nothing herein shall prevent the court or register from increasing the penalty of any bond to such an amount as they or he may see proper, for sufficient cause shown; * * *"

The approval of the individual Sureties and the penalty of the Administrator's Bond are matters committed to the

sound discretion of the Orphans' Court and the Register. *Pratt v. Hill*, 124 Md. 252 (1914); *Alexander v. Stewart*, 8 G. & J. 266 (1936); Sykes, *Probate Law and Practice*, Section 318; 20 Opinions of the Attorney General 348 (1935). This being the case there is no reason why the beneficiaries of an estate, if otherwise acceptable as Sureties by virtue of their character and financial standing, should be unacceptable as Sureties on the Bond of the Administrator of the estate.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

REGISTER OF WILLS—EXECUTOR AND ADMINISTRATOR—TESTAMENTARY LAW—COMMISSIONS DUE ON ESTATES WHERE EXECUTOR HAS SOLD REAL ESTATE UNDER POWER IN WILL—REALTOR'S COMMISSION ON SALE UNDER CONTRACT WITH EXECUTOR SHOULD BE PAID BY EXECUTOR OUT OF COMMISSIONS AWARDED HIM BY ORPHANS' COURT.

August 22, 1963.

*Mr. George M. Nutwell,
Register of Wills
for Anne Arundel County.*

You have recently requested our opinion as to the proper procedure to be followed in computing executor's commissions on the proceeds of the sale of real estate which the executor is authorized or directed to sell under the will; you have also asked our advice as to whether any brokerage fee due by the executor for services of a real estate broker in making the sale should be paid by the executor from commissions awarded him or whether the brokerage fee may be claimed as an administration expense in addition to the commissions awarded to the executor.

Article 93, Section 316, provides:

"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; and the orphans' court may allow such executor a commission on the proceeds of such sale, not less than two nor more than ten per cent; . . ."

It is clear that the executor conducting a sale of real estate under this section is charged with both the duty of conducting the sale and distributing the proceeds thereof

and it is for these services that a commission may be awarded by the orphans' court. Having been fully compensated for his services in connection with the sale of the real estate and the distribution of the proceeds, it follows that the executor is not entitled to include the proceeds of the sale of the real estate with the personal estate as a basis for commissions under Article 93, Section 6, when he states his account. *Sanderson v. Pearson*, 45 Md. 483 (1877); *Gephart v. Strong*, 20 Md. 522 (1864); Sykes, *Probate Law and Practice*, Section 484; 40 Opinions of the Attorney General 240 (1955).

In the *Sanderson* case the Court of Appeals in refuting an attempt by a party who was named executor and trustee by the testator and given power of sale over certain real estate owned by the testator to collect commissions on the proceeds of the sale in the orphans' court on report of the sale and to also claim commissions in the Circuit Court in a proceeding instituted in equity to confirm the sale commented:

At page 485 "... When the appellant received the commissions in her account in the Orphans' Court, or were allowed them by the Circuit Court, it must be treated as compensation for the sale, accounting for, and distribution of, the proceeds thereof."

* * * * *

"Having been compensated for the service rendered by her in the discharge of her duty, both as executrix and trustee, from the fund for distribution, there is no legal or equitable foundation for the allowance of additional compensation."

In accord with the opinion herein expressed, this office has previously ruled that the limitations contained in Article 93, Section 6, with regard to the percentage of commissions to be allowed for the administration of a personal estate in excess of \$20,000 have no effect on the commissions allowable to an executor for the sale of real estate under a power conferred on him by the testator.

25 Opinions of the Attorney General 641 (1940). Thus, the range of 2% to 10% provided for in Article 93, Section 316, applies when setting the commission of an executor on the sale of real estate notwithstanding its value. From a procedural standpoint the account filed by the executor should state the commissions allowed on a sale of real estate separately from the commissions allowed for administration of the personalty. 40 Opinions of the Attorney General 240 (1955).

Where a real estate broker has been employed by an executor to assist in the sale of real estate and has earned a commission under his contract with the executor, unless there is a contrary provision of the testator in the will, we do not believe that realtor's commission is properly treated as an expense of administration but, to the contrary, must be paid by the executor from the commissions awarded him by the orphans' court pursuant to Article 93, Section 316. In *Parker v. Leighton*, 131 Md. 407 (1917) the testator had provided that trustees appointed by him should collect certain rents due from tenants of improved real estate comprising the trust estate and distribute the net proceeds of their collections after the payment of all reasonable costs and expenses attending the management of the property "including a commission of five percentum to themselves for administering said trust." The trustees employed a real estate agent to collect the rents and manage the properties, which agent deducted an agreed 5% commission on the rents collected and forwarded the balance to the trustees. The trustees asserted that they were entitled to a 5% commission on the net amount received from their agent for their services in administering the trust. The Court of Appeals disagreed stating:

At page 422: "... It would seem to be clear that the testator expected the trustees to perform the services which they employed the company to do for the five per cent. commissions, and they were not entitled to pay commissions to that company, and then get five per cent. themselves."

The reasoning of the court in *Parker* would, we think, control the proper construction of Article 93, Section 316, inasmuch as the commission provided for thereby contemplates that sale, accounting and distribution of the proceeds be performed by the executor and we feel that if he chooses to delegate any of his duties he must do so at his own expense. We believe that in practical application this view will work no hardship on an executor who has employed a realtor to sell real estate of which the power of sale has been conferred upon the executor inasmuch as the orphans' court should be apprised of the commission due the realtor by the executor when application is made to it to fix the executor's commission on the sale under Article 93, Section 316.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

REGISTER OF WILLS—MINORS—GUARDIAN AND WARD—WIDOWED FEMALE UNDER THE AGE OF 21 NOT SUBJECT TO GUARDIANSHIP UNDER JURISDICTION OF ORPHANS' COURT—WIDOWED FEMALE 17 YEARS OF AGE CANNOT QUALIFY AS GUARDIAN OF HER MINOR CHILD'S ESTATE.

August 30, 1963.

Mr. J. Asbury Holloway,
Register of Wills for Wicomico County.

Two questions are posed in your letter of August 23:

1. Does the Orphans' Court have authority to appoint a guardian for a widowed female who is 17 years of age to take custody of personal property of the infant?
2. Can a widowed female of 17 years of age qualify before the Orphans' Court as guardian of her minor child's estate?

I

Section 164 of Article 93, as amended by Chapter 86 of the Laws of 1962, provides:

"Whenever land shall descend or be devised to a male or female under the age of twenty-one years, or any such male or female shall be entitled to a distributive share of the personal estate of any intestate, or to a legacy or bequest under a last will or codicil, or may acquire any real or personal property or estate by gift or by purchase, and the said male or female shall not have a guardian appointed by last will and testament, agreeably to law, the orphans' court of the county in which such infant shall reside shall have power to appoint a guardian to such infant until the age of twenty-one years if a male, and, in the case of a female, until her marriage or she attains the age of twenty-one (21) years, whichever shall first occur; and such appointment may be made at any

time after the probate of the will, or administration granted on the estate of the deceased under whom the infant appears to be so entitled to land, and it may be made if the court shall think proper, in the case of personal estate, either before or after the administrator shall have passed his account."

We believe the proper construction of this grant of jurisdiction upon the Orphans' Courts of this State divests the Orphans' Court of any authority over the personal estate of a female under the age of 21 years at the time that she contracts a valid marriage and further that in the event of the death of her husband before she reaches her majority her personal estate is not thereupon subjected to the control of a guardian under this section. 25 Am. Jur., *Guardian and Ward*, Section 54. We do not suggest in so construing this section that the other legal disabilities attendant to her infancy, such as the right to contract, etc., are removed by her marriage, and therefore even though she is entitled to possess property in her own right following her marriage we point to the well settled rule that generally she cannot dispose of it until she reaches her majority. *Davis v. Jacquin & Pomerait*, 5 H. & J. 100 (1820), *Fridge v. State*, 3 G. & J. 103 (1830), *Specher v. Speicher*, 206 Md. 108 (1955), 27 Am. Jur., *Infants*, Section 5.

II

It is clear that upon the death of her husband a widow becomes the natural guardian of their infant children and is therefore preferred for appointment as guardian by the Orphans' Courts. Article 93, Section 166; Article 72A, Section 1; *Lefever v. Lefever*, 6 Md. 472 (1854); *Sudler v. Sudler*, 121 Md. 46 (1913). However, Article 93, Section 175, requires as a condition precedent to appointment by the Orphans' Court that an applicant for guardianship give bond conditioned as set forth in Article 93, Section 176. *Lefever v. Lefever*, *supra*, *Clarke v. State*, 8 G. & J. 111 (1836).

We do not believe the 17 year old widow in question possesses sufficient contractual capacity to execute the bond so required. Under Maryland law if a contract executed by an infant is not beneficial to him, it is void *ab initio*; if it is uncertain whether the contract is for the infant's benefit or to his prejudice, the same is merely voidable at his election. *Fridge v. State, supra, Monumental Building Association v. Herman*, 33 Md. 128 (1870), *Crown Cork and Seal Company v. Fankhanel*, 49 F. Supp. 611 (D. Md. 1943). Whether a bond given by the present 17 year old applicant for guardianship would be void *ab initio* or merely voidable at her election, it would not meet the standards imposed by Article 93, Sections 175 and 176, for the protection of the ward's estate. Although the contractual disabilities of infancy have been removed in certain transactions by the Legislature, *Specher v. Sprecher, supra, Cephalis v. Briscoe*, 202 Md. 419 (1953), there has been no contractual capacity conferred by the Legislature which would be applicable in the present instance.

We are, therefore, of the opinion that the 17 year old widow in question is incapable of qualifying as guardian of her minor child's estate before the Orphans' Court of Wicomico County.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

REGISTERS OF WILLS—EXECUTORS AND ADMINISTRATORS—
PROCEDURE TO BE FOLLOWED IN THE DISPOSITION OF
FUNDS DEPOSITED WITH THE REGISTRY OF THE ORPHANS'
COURT TO THE ACCOUNT OF UNKNOWN OR UNLOCATED
BENEFICIARIES OF AN ESTATE.

September 5, 1963.

Mr. Clifford L. Stafford,
Register of Wills
for Caroline County.

In your letter of August 26, 1963, you have requested that we outline the proper procedure to be followed for disposition of funds deposited in the Registry of the Orphans' Court to the account of unknown or unlocated beneficiaries of an estate, administration and distribution of which has been otherwise completed.

Article 93, Section 300, of the 1957 Code, which authorizes such a deposit, was reenacted by Chapter 399, Section 39, of the Acts of 1957, the provisions thereof having formerly been codified as Article 16, Section 245 of the 1951 Code. This section provides in part that:

“ . . . Upon the expiration of a period of seven (7) years from the date of the deposit of any such fund or funds into the said ‘registry’ and no claimant or claimants having appeared and made claim therefor within such time; then and in such event the said fund or funds shall be and become payable to the county council or board of county commissioners of the several counties, or the mayor and city council of Baltimore City for the use of the public schools of the respective City of Baltimore, or the several counties, as the case may be, after due compliance by the said register of wills with the provisions of §21 of Article 16.

“If any such unlocated person, or persons, or his or their legal representative, or representatives, shall appear at any time, after such payment has

been made, the county council or the board of county commissioners or the mayor and city council of Baltimore City receiving such payment shall repay the same or a pro rata share thereof, to the persons entitled thereto, without interest."

The procedure provided for in Article 16, Section 21, of the 1957 Code, to which reference is made above is now set forth in Rule V79 of the Maryland Rules by virtue of the repeal of Article 16, Section 21, by Chapter 36, Section 1 of the Acts of 1962. Under that Rule the executor or administrator of the estate from which the deposit was made over seven years ago should file a petition with the Orphans' Court to distribute the funds on deposit. All parties known to have any interest in the fund on deposit shall be named in the petition as defendants and in the event that there are beneficiaries of the fund whose identity is not known to the executor or administrator they should be named as defendants under the designation of "unknown beneficiaries under the will of X," or "unknown heirs of X," or some similar designation.

Subsection b4 of Rule V79 requires:

"In addition to any other material allegations, a petition filed pursuant to this Rule shall set forth—

"(i) the interest of each party named in the petition,

"(ii) in the case of an unknown beneficiary, the reason it is believed that there may be such person, the efforts made to ascertain his identity, and, insofar as possible, who such person is supposed to be, and

"(iii) in the case of an absent beneficiary, such facts as will show that the person filing the petition has made diligent search for such beneficiary and has been unable to ascertain whether he is living or dead, or if living, whether he is a resident or nonresident or where he can be found."

If the court is satisfied that sufficient effort has been made to ascertain whether there are any unknown beneficiaries of the estate and the whereabouts of any known beneficiaries, it should pass an order of publication in accordance with Rule 105 of the Maryland Rules.

After the expiration of the time fixed in the order of publication for pleadings by the unknown or absent beneficiaries, the Orphans' Court should enter its order awarding the fund to the Board of County Commissioners of your county for the use of the public schools subject to the repayment by the Board within the provisions of Article 93, Section 300, above quoted. The costs attendant to the procedure above outlined should be paid from the fund being distributed.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

RETIREMENT SYSTEMS

JUDGES—PENSIONS—METHOD ADOPTED IN ADMINISTERING
LAW WITH REGARD TO COMPUTATION OF ACTIVE SERV-
ICE OF JUDGE FOR PENSION PURPOSES APPROVED.

December 31, 1963.

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

You have advised us that recently a question has been raised as to the propriety of the method which has been adopted to compute the "active service" of judges for purposes of determining their pension on retirement as provided for in Article 26, Section 49, Annotated Code of Maryland (1957 Edition, as amended). The pertinent portion of that section provides:

"Every elected judge of the circuit court for any of the counties, of the Supreme Bench of Baltimore City, and of the Court of Appeals of Maryland, shall be paid, after the termination of active service, if he is then at least sixty years of age or when he becomes sixty years of age, a pension or salary calculated at the rate of seven hundred and fifty dollars (\$750.00) per annum *for each year, or any part thereof, of active service* by appointment and election as a judge of the circuit court for any of the counties, of the Supreme Bench of Baltimore City, and of the Court of Appeals of Maryland, up to and including sixteen years of such active service, so that the maximum pension or salary for such service payable hereunder to any one person shall not exceed the sum of twelve thousand dollars (\$12,000.00) per annum. In addition to the payment of a pension or salary of seven hundred and fifty dollars (\$750.00) for each year of service, each judge of the Court of Appeals shall be allowed one hundred dollars

(\$100.00) for each year of service as a member of the Court of Appeals but, in no event, shall the total pension or salary exceed thirteen thousand six hundred dollars (\$13,600.00)."

The difference between the present construction of the above emphasized language and the construction which has been urged upon you in variance therewith is illustrated by the following example:

	<i>Year</i>	<i>Month</i>	<i>Day</i>
Judge "A" retires	1964	1	30
Qualified	1950	11	29
	13	2	1

Under your construction Judge A would be entitled to 14 years of active service since he has served 13 full years plus part of another year.

The proffered construction of Section 49 would allow Judge A 15 years on the theory that he performed service in 15 different calendar years or parts thereof.

We are of the opinion that the present construction of this section gives full effect to the legislative intent. The language of the section is clear in our view that the pension granted shall be computed at \$750.00 per annum "for each year, or any part thereof, of active service." The Legislature did not provide, as the proffered construction would require, that the pension should be calculated at \$750.00 per annum "for each calendar year in which a judge performed active service."

In *Clark v. Tawes*, 187 Md. 195 (1946), the Court of Appeals of Maryland was called upon to construe the earlier statutory authority for judges' pensions. The judge in that case had been appointed but had retired prior to seeking election for a full judicial term, prior to the effective date of the statute under which he claimed a pension. Noting that the Legislature had not provided a pension for a judge in this category, the court commented at page 199:

"We have no authority, in a case where the Legislature has spoken clearly, to distort its words and to usurp the function of the legislative branch of the government by making judicial law. It is true that real intent must prevail over literal intent. *State v. Petrushansky*, 183 Md. 67, 36 A. 2d 533, and cases there cited. But that rule of construction is adopted only when the literal words of a statute say something that the Legislature could not possibly have meant. It does not apply when the only bases for a construction other than a literal one are either that the Legislature should not have said what it did, or that it would not have said it, had it been in possession of all the facts. We cannot assume to say what the Legislature should have said, nor can we say whether it knew the facts or not, nor whether it would have decided differently had it known them. All we can determine in this case is what the Legislature did say. And there is no ambiguity here."

We think this comment applies with equal force as an answer to the proffered change of construction of Section 49 which would require a change in the method now in effect for determining "active service" within the provisions of that section.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

RETIREMENT SYSTEMS—EMPLOYEES' RETIREMENT SYSTEM
 —PARTICIPATION BY EMPLOYEES AND OFFICERS OF
 MUNICIPAL CORPORATION—NON-TEACHING EMPLOYEE
 OF COUNTY BOARD OF EDUCATION IS EMPLOYEE OF
 COUNTY WHICH BOARD SERVES—CONSTRUCTION OF
 STATUTES RELATING TO SAME SUBJECT MATTER SO AS
 TO HARMONIZE THIS EFFECT.

September 13, 1963.

*Mr. Christ G. Christis, Director,
 Employees' Retirement System.*

In your letter of September 9, 1963, you present the question as to whether non-teaching employees of a county Board of Education may qualify for membership in the Employees' Retirement System (hereinafter referred to as The System) where the county whose public education is under the supervision of such Board in conjunction with the State Department of Education has not approved membership for its employees. Stated in other terms, your question is whether a county Board of Education may act independently of the county which it serves in approving membership of its employees in The System. The term "non-teaching employee", as used throughout this opinion, means an employee who would not fall within the definition of "Teacher" set forth in Article 77, Section 108(3) of the 1957 Code.

By Chapter 969 of the Acts of 1945, the Legislature extended the option to Municipal Corporations to allow their employees to participate in The System. The provisions governing this option are now codified as Sections 21-30 of Article 73B. In this Act, Municipal Corporations to whom this option was extended were defined as any "county, incorporated town or municipality or other political sub-division of the State". This definition was expanded by Chapter 615 of the Acts of 1949 to include "any board or commission created by an Act of the General Assembly for public purpose and not for the profit of any private person or corporation". Section 21 (1) of Article 73B.

This office has previously ruled that non-teaching employees of a county Board of Education are employees of the county which the Board serves and, consequently, are entitled to membership in The System when that county elects to make membership in The System available to its employees. 34 Opinions of the Attorney General 198 (1949); 37 Opinions of the Attorney General 332 (1958). Cf. *Clauss v. Board of Education*, 181 Md. 513 (1943). As such employees of the county, we are of the opinion that the right of non-teaching employees of a county Board of Education to participate in The System is no greater than that of any other employee of the same county. Section 22 of Article 73B provides:

“ . . . that the officers and employees of any municipal corporation shall not be included in said Employees' Retirement System of the State without the approval of the legislative body of any such municipal corporation. Should the legislative body of any municipal corporation on or after January 1, 1946, give its approval to the participation of its officers and employees in the said Employees' Retirement System of the State as hereinabove provided, such employees shall be eligible to participate in said Employees' Retirement System of the State as specifically provided hereinafter for such employees.”

Thus, the right of any county employee to participate in The System is conditioned upon all officers and employees of the employer county being subjected to Section 23 of Article 73B, which provides that membership in The System shall be optional for those officers and employees in service with the county on the date that approval is given by the legislative body of the county, but which makes membership in The System a condition of employment for anyone employed by the county after the date of such approval if membership would have been compulsory had he entered State service in a similar position.

Although a county Board of Education undoubtedly qualifies under a literal interpretation of a "board or commission created by an Act of the General Assembly for public purpose and not for the profit of any private person or corporation", Article 73B, Section 21 (1), *supra*, Article 77, Section 3, 6 *et seq.*, *Clauss v. Board of Education, supra*, we do not believe that the Legislature intended to abrogate the requirements of Article 73B, Section 22 when it enacted Chapter 615 of the Acts of 1949, amending the definition of municipal corporations contained in Section 21 of Article 73B. Rather, we believe that this amendment must be harmonized with the general scheme of the provisions governing participation in The System by officers and employees of a municipal corporation set up at the time of the original legislation extending the benefits of The System to officers and employees of approving municipalities, in accordance with the reasoning of the Court of Appeals in *May v. Warnick*, 227 Md. 77, 83 (1961) :

"It is well-established law that in construing legislative enactments, all statutes relating to the same subject matter are to be considered and harmonized as far as possible. And this rule applies when the statutes were passed at different dates, separated by long or short intervals. The statutes are to be compared and brought into full accord if possible, but if they are insusceptible of a construction which will permit all their provisions to fall into complete agreement, they are to be made to operate together as far as possible, consistent with the evident intent of the latest enactment. *Balto. Credit Union v. Thorne*, 214 Md. 200, 134 A. 2d 84. Cf. *Reed v. President & Com'rs of the Town of North East*, 226 Md. 229, 172 A. 2d 536; *Height v. State*, 225 Md. 251, 170 A. 2d 212; *Phillips v. Comptroller*, 224 Md. 350, 167 A. 2d 913."

Clearly, when the Legislature extended the option to municipal corporations to approve membership of their officers

and employees in The System by Chapter 969 of the Acts of 1945, it conditioned this option with the requirement that on approval by the legislative body of the municipal corporation of participation of the employees of that municipal corporation in The System, all of its officers and employees, whether then in service or thereafter employed, would be subject to the provisions of Article 73B, Section 22, above quoted.

We, therefore, conclude that since non-teaching employees of a county Board of Education are employees of a county, they are not eligible for membership in The System unless approval is given by the legislative body of the county which the Board serves for all officers and employees of the county to become members, as required by Section 22 of Article 73B.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

RETIREMENT SYSTEMS—EMPLOYEES' RETIREMENT SYSTEM
—ELECTED OR APPOINTED OFFICIALS—ESTABLISHMENT
OF CREDIT FOR PREVIOUS SERVICE.

October 2, 1963.

*Mr. C. G. Christis, Director,
Employees' Retirement System.*

We have your letter of September 19, 1963 in which you advise us of the following factual situation which has presented a problem to your office.

A was recently appointed a Trial Magistrate for Cecil County, and as such an appointed State official, has elected to exercise the option of membership in the Employees' Retirement System. On April 1, 1953, A was employed by Cecil County, on which date Cecil County approved participation in the System by its employees, pursuant to the provisions of Article 73B, Section 21, *et seq.* As of that date, A had been employed by Cecil County for a period of 13 years, 9 months, and was given prior service credit for this service rendered to the County when he was admitted to the System. He continued to be employed by Cecil County and continued his membership in the System until July 1, 1959, at which time he terminated his employment with Cecil County and withdrew from membership in the System. In now electing to join the System, you have raised the question as to how A is properly to be given credit for his previous membership service, April 1, 1953 through July 1, 1959, and service rendered to Cecil County prior to its approval of its employees' participation in the System.

The answer to your inquiry depends on the construction of Subsections 5 and 6 of Section 3 of Article 73B, as recently amended by Chapter 145 of the Acts of 1963. Subsection 5, after providing that membership in the System shall be optional with elected or appointed officials, goes on to provide:

“ . . . All such officials shall be entitled to credit for previous service rendered by them to the State,

or a participating municipal corporation, including service rendered prior to the establishment of the Employees' Retirement System. If any such official is entitled to a pension or retirement allowance under the provisions of any other law, and such pension or retirement allowance is supported wholly or in part by the State of Maryland except benefits from Social Security, such official shall be deemed to have waived the benefits thereof by accepting the payment of benefits under this article. Upon receiving a claim for such service credit from the official, the board of trustees of the Retirement System shall verify the fact of such previous employment and the creditable service to which the member is entitled, compute the amount due from such political subdivision for which credit is claimed, and submit a statement to the participating municipal corporation for such amount, such computation to be based upon the compensation actually received by the official from the municipal corporation during the period for which service is to be credited. The participating municipal corporation is authorized and directed forthwith to pay the said amount to the Retirement System, or to place it in the next ensuing budget for prompt payment when that budget becomes effective. The board of trustees is authorized and directed to include any amount due from the State in the appropriation allowed by the next ensuing State budget.

"Any such official who receives membership service credit for service rendered to the State or to a participating municipal corporation under the provisions of this subsection shall pay to the retirement system by single payment, within such period of time as may be determined by the board of trustees, the contributions, with interest, which he would have paid had he been a member of the retirement system but withdrew. Provided, how-

ever, that any such member may waive the payment of any or all such contributions, in which case upon retirement any ordinary disability retirement allowance or any allowance due to non-reappointment or non-reelection to any office payable to such an official, shall be reduced by the actuarial equivalent of those contributions which he had not paid, with interest to date of retirement." . . .

Sub-Section 6 provides:

"Should any member in any period of six consecutive years after last becoming a member be absent from service more than two years, or should he withdraw all or part of his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member; provided, however, that any member who was absent from service for more than two years on account of the transfer or lease to the United States of the facility or property where said member was employed and who continued to work at the same place as an employee of the United States until the return of the property to the State after the war, when he again became an employee of the State, shall be entitled to credit for all service as an employee of the State before he became an employee of the United States as hereinbefore described and his prior service certificate shall again become effective as if he had not ceased to be an employee of the State. *However, any such person who has withdrawn his accumulated contributions (other than one who has become a beneficiary or died) may UPON APPROVAL OF THE BOARD subsequently redeposit in the Retirement System the amount of accumulated contributions previously withdrawn, with interest to date of redeposit, and regain previous service credit with the condition, however, that he may not retire within three*

years after the date of re-entry in the retirement system.” (Emphasis supplied.)

The above emphasized portion of Sub-section 6, contains the material added by the amendment of this subsection enacted by Chapter 145 of the Acts of 1963.

It is a well recognized principle of statutory construction that when dealing with amendments to existing law, the amendment will be given effect in light of existing provisions, and, where possible, its effect will be harmonized as far as possible with existing legislation covering the same subject. *May v. Warnick*, 227 Md. 77, 83 (1961). Applying this principle, it is clear that prior to the enactment of Chapter 145 of the Acts of 1963, A, in the situation above outlined, could only have established his credit for previous service rendered to Cecil County through the procedure set forth in Sub-section 5, above quoted. Nothing contained in the amendment of Sub-section 6 specifically refers to the procedure for establishing previous service on the part of appointive or elective officials. Nor do we read in this amendment of Sub-section 6 any legislative intent to repeal the provisions of Sub-section 5 with regard to establishing previous service credit by elective or appointive officials. It is our opinion, therefore, that when dealing with optional membership of elected or appointed officials, Sub-section 5 provides the only procedure for establishing previous service credit on the part of these officials. Necessarily, therefore, it is our opinion that Chapter 145 of the Acts of 1963 has no effect whatsoever on elected or appointed officials, and must be limited in its scope of applicability to those members of the System who are compelled to accept membership in the System as a condition of their employment.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

EMPLOYEES' RETIREMENT SYSTEM—OPTION OF ELECTED OR
APPOINTED OFFICIAL OF STATE TO CONTINUE MEMBERSHIP
AFTER EXPIRATION OF TERM OF OFFICE—MEMBER
OF BOARD OF ELECTION SUPERVISORS—PUBLIC OFFICE.

November 1, 1963.

*Mr. Christ G. Christis, Director,
Employees' Retirement System.*

You have recently received an application from a former member of the Board of Election Supervisors of Anne Arundel County to continue his membership in the Employees' Retirement System. The appointed term of the applicant expired on June 1, 1963.

Your decision as to whether the application may be granted depends on a construction of Sections 4 and 5 of Article 73B, Annotated Code of Maryland (1957 Edition, as amended), which provides:

"§4. Continuing membership after expiration of term of office.

Any member of the Retirement System who is currently a member by virtue of being an elected or appointed official shall have the right at his option to continue membership in the system following the end of the term of office for which he was last elected or appointed. Such right shall be contingent upon such person making all the payments which would have been made by him and also by the State had he continued to be a member of the system by virtue of holding such elective or appointed office."

"§5. Continuing membership of former officials upon proper payments.

Any former member of the Retirement System who was formerly a member by virtue of being an elected or appointed official shall have the right at

his option to continue membership in the system, provided such right shall be contingent upon such person making all the payments which would have been made by him and also by the State had he continued to be a member of the system by virtue of holding such elective or appointed office."

The Court of Appeals of Maryland has construed the phrase "elected or appointed official" as used in these sections as synonymous with "public officer." *Gary v. Board of Trustees*, 223 Md. 446 (1960). In commenting on the test used to distinguish between an employee and an officer the court in the *Gary* case stated at Page 449:

"This Court has laid down tests to aid in drawing the line between an employee and an officer, although it has said consistently that each case must be decided on its own facts, that no one of the tests is conclusive, and, from time to time, has varied the emphasis put on the respective tests. Indications as to whether a public servant is or is not an officer are found in the presence or absence of the following: is he required to take an official oath; is he issued a commission; is a bond required; is the position called an office; is the position one of dignity and importance; does the public servant exercise in his own official right some of the sovereign powers of government for the benefit of the public; does he have a fixed tenure?"

Of the above tests, it has been held that the exercise by the public servant of some of the sovereign powers of government for the benefit of the public is the most important single factor to be considered. *Howard County Commission v. Westphal*, 232 Md. 334 (1963).

The Board of Election Supervisors for Anne Arundel County is created by Article 33, Section 1. The members of this board are appointed by the Governor with the advice and consent of the Senate for two year terms. As a condition to their qualifications on the board, members appointed

to it are required to take and subscribe to the oath required of public officers by Article I, Section 6 of the Constitution. In acting as the board which regulates the franchise of the citizens of this State there is no doubt that the members exercise an important portion of the sovereign powers of government. In *Riggin v. Lankford*, 134 Md. 146 (1918) the Court of Appeals held that a member of the Board of Election Supervisors for Somerset County was a civil officer within the meaning of Article XI, Section 10 of the Constitution, which delegates to the Governor the authority to nominate with the advice and consent of the Senate all civil officers of the State whose appointment or election is not otherwise provided for by the Constitution.

For the foregoing reasons we are of the opinion that a member of the Board of Election Supervisors of Anne Arundel County is an appointed official within the meaning of Sections 4 and 5 of Article 73B, *supra*, and that the application before you should be granted.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION

INHERITANCE TAX—TAXATION BY MARYLAND OF INTANGIBLES OF NON-RESIDENT DECEDENT—RECIPROCITY WITH NEW JERSEY ESTABLISHED.

April 26, 1963.

Mr. Clifford L. Stafford,
Register of Wills
for Caroline County.

This will respond to your letter of April 22, 1963, wherein you ask whether you may tax certain intangibles, in Maryland, of a person dying a resident of New Jersey.

Code, Article 81, Section 174 (1957 Edition) provides:

“Except as to tangible personal property having an actual situs in the State of Maryland, no tax on commissions of executors or administrators of non-resident decedents, and no inheritance, estate, or death or transfer tax of any character, in respect of personal property (including also therein mortgages upon real or personal property located within the State of Maryland) of nonresident decedents, shall be payable (a) if the decedent at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of the distribution, transfer or other disposition of such personal property of such decedent in Maryland did not impose a transfer tax or death tax of any character in respect of personal property of residents of this State (except tangible personal property having an actual situs in such state or territory or foreign country), or (b) if the laws of the state, territory or country of residence of the decedent at the time of such distribution, transfer or other disposition contained a reciprocal exemption provision under which residents of Maryland are exempted from transfer taxes or death taxes of

every character in respect of personal property (excepting tangible personal property having an actual situs in such state or territory or foreign country), provided the State of Maryland allows a similar exemption to residents of the state, territory or country of residence of such decedent. For the purpose of this section the District of Columbia and possessions of the United States shall be considered territories of the United States. Nothing in this section contained shall be construed to subject to taxation anything otherwise exempt therefrom."

It then becomes necessary to determine whether reciprocity exists between New Jersey and Maryland on taxation of intangibles of nonresidents.

New Jersey law does not permit taxation of intangibles of nonresidents. C.C.H., *Inheritance, Estate and Gift Tax Service*, Section 81,047.

Consequently, we are of the view that reciprocity exists between New Jersey and Maryland and that no inheritance tax is due. See 40 Opinions of the Attorney General 617; 29 Opinions of the Attorney General 88; 26 Opinions of the Attorney General 466; and 24 Opinions of the Attorney General 876.

THOMAS B. FINAN, *Attorney General*.

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

TAXATION—CHAPTER 825 OF ACTS OF 1963—TRANSITIONAL PERIOD IN HARFORD COUNTY—REAL PROPERTY AND PERSONAL PROPERTY ASSESSMENTS TO BE USED IN STRIKING SIX MONTH FRACTIONAL LEVY FOR LOCAL TAXES.

July 10, 1963.

*Mr. William H. Riley, Chief Supervisor
of Assessments, Department of
Assessments and Taxation.*

By recent letter, you have inquired whether or not Harford County, in striking a 6-month fractional levy for the first half of the calendar year 1964, can levy upon personal property assessments made for the taxable year 1963. Presently, Harford County's date of finality is December 1, and both its taxable year and its fiscal year coincide with the calendar year. Chapter 825 of the Laws of Maryland of 1963 establishes uniform fiscal and taxable years and a uniform date of finality throughout the State. Pursuant to the requirements of this Act, all of the counties and Baltimore City are to establish as taxable and fiscal years the period from July 1 through the June 30th next following and as the date of finality for such period the first day of January immediately preceding its commencement. The Act provides for a transitional period, from June 1, 1963 to June 30, 1966, during which every political subdivision must bring itself into compliance with these provisions. Harford County proposes to make the necessary change-over in 1964, by the striking of a 12-month levy for a taxable and fiscal year commencing July 1, 1964, and ending June 30, 1965. It is because Harford County's present fiscal year is the calendar year that the aforementioned fractional levy must be made for the first six months of 1964.

Section 2 of Chapter 825 specifically authorizes fractional levies of the type contemplated by Harford County; it provides:

“As part of the transitional provisions authorized in this section, in any county, city or town, or

taxing district, which in one or more respects does not conform to the requirements of this Act, the board of county commissioners or county council by resolution, the legislative body of the city by ordinance or resolution, or the governing body of the taxing district by its regular procedure may establish the procedures and dates for conformity with this Act, so long as these procedures and dates are within the requirements and intent of this Act. The county, city or town, or taxing district may make a fractional levy or levies of county, city or town, or taxing district taxes for a fractional portion or portions of the transitional period; and any such fractional levy may be collected separately or added to the levy for either the next previous or next subsequent period."

There is no doubt that Harford County can levy its proposed 6-month tax upon the assessments of *real property* existing as of the date of such levy, regardless of when these assessments were first made. Both by statute and long-established administrative practice, real estate assessments are treated as continuing from year to year, until changed. Sections 7 and 14(c) of Article 81, Annotated Code of Maryland (1957 Edition and 1962 Supplement); *Mid Towne Plymouth, Inc. v. State Department of Assessments and Taxation*, 228 Md. 66, 71-72 (1962).

Harford County's fractional levy upon tangible personal property, as proposed, would be based upon assessments of such property made for the calendar (and taxable) year 1963, which assessments, in turn, would be based upon a taxpayer's stock in business during the calendar year 1962. Section 15(a) of Article 81 of the Annotated Code of Maryland (1957 Edition and 1962 Supplement). And the Court of Appeals has held that assessments of tangible personal property made by the State Department of Assessments and Taxation are not continuing. *Mid Towne Plymouth, Inc. v. State Department of Assessments and Taxation*,

supra. Nonetheless, we believe that Harford County's plan, to strike a fractional levy upon the assessments of tangible personal property made for the year immediately preceding such levy, is altogether proper and lawful.

First, in providing for the striking of a fractional levy, the General Assembly obviously intended that said levy be made upon both real and tangible personal property. The Act is devoid of any indication to the contrary.

Second, it must be pointed out that the Act, while it specifically contemplates the necessity of a fractional levy in some counties, does not direct the State Department of Assessments and Taxation to make "fractional assessments". Under the Act, the Department is to continue its existing procedures; on neither a State-wide nor a local basis is it to require the filing of a 6-month personal property return. Thus, in any county, such as Harford, where the Act necessitates the striking of a fractional levy for purposes of local taxation, it is clear that certain annual assessments made by the State Department of Assessments and Taxation will serve as the tax base for an 18-month period. In other words, if Harford County did not levy upon the 1963 assessments for the first six months of 1964 (in addition to the year 1963), it would be obliged to levy upon the 1964 assessments for all of 1964 and, also, for the first six months of 1965. The selection of one of these two alternatives has been left by the General Assembly to Harford County, and its choice of the former is based upon sound, practical grounds. The county will need operating revenue to meet its 6-month budget requirements at the very outset of that period. This necessity could not be satisfied if the county were to levy upon the 1964 assessments of tangible personal property, because the returns for these assessments would not be filed with the State Department of Assessments and Taxation until April of that year (1964), and the actual assessments would not be certified until some time thereafter.

Thus, at the time Harford County's proposed fractional levy is made, the only existing assessments upon tangible

personal property will be those for the year 1963. It is this fact and the broad authority granted by Section 2 of the Act which distinguish this situation from that in the *Mid Towne Plymouth* case, *supra*.

Fourth, any individual inequities that would result from the use of the 1963 personal property assessments for an 18-month period are readily curable. Section 67 of Article 81, Annotated Code of Maryland (1957 Edition and 1962 Supplement), provides for the reduction or abatement of an assessment "after the date of finality for any year, whether a protest against said assessment was filed before the date of finality or not, in order to . . . prevent injustice". This section affords ample protection to the taxpayer whose stock in business may have substantially decreased since the date of finality for the 1963 assessment.

For the foregoing reasons, we are of the opinion that Harford County's proposed plan for revising its fiscal operations to conform with the requirements of Chapter 825 of the Laws of Maryland of 1963 is legally sufficient.

THOMAS B. FINAN, *Attorney General*.

STUART H. ROME, *Asst. Attorney General*.

TAXATION—SALES TAX—BALTIMORE MARITIME EXCHANGE
NOT EXEMPT FROM PAYMENT OF.

July 16, 1963.

*Mr. Edward F. Engelbert, Chief,
Retail Sales Tax Division.*

This will acknowledge receipt of your recent letter in which you ask for our opinion as to whether or not the Baltimore Maritime Exchange qualifies for an exemption from the Maryland Retail Sales Tax as a "non-profit religious, charitable, or education institution . . ." Enclosed with your letter is a brochure entitled "The Baltimore Maritime Exchange." The contents of this brochure describe the functions of the Exchange which, in the words of Mr. Duer, Exchange Counsel, are as follows:

"The Baltimore Maritime Exchange, although not an agency of the State of Maryland or the City of Baltimore, nevertheless provides a public service in maintaining information as to the location of ships proceeding up and down the Bay and into the Port of Baltimore; in maintaining information as to the amounts and kinds of cargoes coming into the Port and in passing along such information to interested governmental agencies, including the City of Baltimore, Maryland Port Authority and other public bodies. It has been accorded a tax exemption by the Internal Revenue Service and, more recently, the assessment against personal property owned by it has been abated by the State Department of Assessments and Taxation.

"The Maryland Port Authority contributes the sum of at least \$5,000.00 per year towards the operations of the Exchange, which is entirely a non-profit organization; none of its officers or Directors receive any pay whatsoever, although, of course, the employees, including the Manager, do receive compensation."

Mr. Duer has indicated that the Exchange has received an exemption from the payment of the Federal Income Taxes pursuant to the provision of Section 501 of the Internal Revenue Code and has also received an exemption from the payment of the personal property taxes to the State of Maryland. The fact that Baltimore Maritime Exchange has obtained an exemption under Section 501 of the Internal Revenue Code does not necessarily mean that the Federal Government considers the organization as "religious, charitable, or educational" in nature. In fact it would appear that the Federal Government does not consider the Exchange to be in that category since apparently their exemption is predicated on one of the other provisions of Section 501—probably that according tax exemption to business leagues, chambers of commerce, real estate boards, and boards of trade. That this would appear to be the basis of the exemption is illustrated by the fact that Mr. Duer advised us that to his knowledge donations to the Exchange would not be considered tax deductible under Section 170 of the Internal Revenue Code, which permits deductions for contributions only in the event that the contribution is, *inter alia*, to a church, educational institution, or hospital.

Nor does the fact that the Exchange has received an exemption from personal property taxes necessarily indicate that our State Department of Assessments and Taxation would regard the Exchange as a charitable, educational, or religious institution. Section 9 of Article 81, which sets forth personal property tax exemptions, contains some 56 separate exemptions, and it would appear that those relating to institutions of a nonprofit nature are considerably broader than those under the sales tax statute. For example, fraternal beneficiary associations, fire companies, war memorials, etc., are specifically exempt from taxation, thus indicating a broader scope on personal property tax exemption than can be read into the rather limited provisions of Section 326(i) of Article 81 (the relevant sales tax exemption provision).

A review of the Internal Revenue rulings, etc., relating to the construction of the term "charitable institution" as

used by the Federal Government in construing the provisions of Sections 170 and 501 of the Internal Revenue Code, show no instance where a charitable exemption has been accorded to an organization of a status similar to that of the Baltimore Maritime Exchange. See C.C.H. Federal Tax Report 63, paragraphs 1850, et seq., and 3000, et seq.

On the contrary, those annotations dealing with the exemption for business leagues, chambers of commerce, real estate boards and boards of trade indicate that the Baltimore Maritime Exchange more probably fits in that category of organization. See C.C.H. Federal Tax Report 63, paragraphs 3039.01, et seq.

Although this office has on occasion been somewhat generous in its construction of the term "charitable" as contained within subsection (i) of Section 326 (see, for example, 32 Opinions of the Attorney General 463, extending the charitable exemption to include the Maryland Society for the Prevention of Cruelty to Animals), the fact remains that, where the charitable exemption has been applied, it is related to organizations supplying services or performing functions on behalf of persons or other subjects in a less fortunate economic or social circumstance.

The Baltimore Maritime Exchange, laudable though its objectives might be, would not in our opinion be considered as coming within the charitable exemption category. Since it is obviously not a religious organization, the only other alternative would be to place it within the exemption for educational institutions. Although the Exchange does engage in the dissemination of information, it would not normally be considered to be an educational institution as that term is ordinarily understood by the average citizen. In the past we understand it has been the policy of your Department to limit exemptions to educational institutions to those who provide instruction toward the furtherance of one's career. We see no reason to depart from your previous construction of the exemption in the present instance, and therefore it is our opinion that the Baltimore Maritime Exchange would not come within the exemption accorded to

educational institutions within subsection (i) of Section 326 of Article 81.

Mr. Duer suggested that perhaps the fact that the Exchange provides a service which would otherwise have to be provided by a state or local agency might in itself entitle them to an exemption from taxation. The exemption accorded to instrumentalities of the state and local governments is not contained within subsection (i) of Section 326, but rather is to be found in subsection (a) thereof exempting "sales to the State of Maryland or any of its political subdivisions." Although this exemption has been construed as including agencies of state and local political bodies, the fact remains that it has never been accorded to an organization purely private in the conduct of its affairs even though it provides a public service that might otherwise be the subject of a governmental dissemination. In one sense almost any institution of a nonprofit nature provides a service which might otherwise have to be the subject of regulation or dissemination by the Federal Government. We have, however, found no case which has accorded to such an organization the status of a governmental or similar type agency which might otherwise be exempt from taxation.

In view of the above, we must reluctantly conclude that sales of tangible personal property to the Baltimore Maritime Exchange must be considered as coming within the provisions of the sales tax law and are to be subject to the tax. There is no doubt that this organization provides excellent and valuable services not only to its members but also to the citizens of the State at large. However, as yet, the Legislature has not seen fit to include it within the several categories to which tax exemption has been accorded.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

TAXATION—INHERITANCE TAX ON FRACTIONAL INTEREST OF
DECEASED IN REALTY—CORRECT METHOD OF APPRAISING
VALUE OF FRACTIONAL INTEREST.

July 16, 1963.

*Mr. W. E. Beers, Chief Appraiser,
The Orphans' Court
for Montgomery County.*

Re: Estate of Louisa G. R. Wade

Your letter of July 12, 1963 raises the question of the proper method to be applied by you in appraising the fractional interest of a deceased in real property of which she was seized and possessed at the time of her death for the purpose of assessment of inheritance taxes against the devisees of this real property under the Last Will and Testament of Mrs. Wade.

It appears from your letter and the attached appraisal report of the independent appraiser employed by the Executor of this estate that Mrs. Wade died on April 25, 1962, at which time she owned a $\frac{2}{5}$ th undivided interest in a 53 acre tract of land situate in Montgomery County, Maryland and known as "Echo Dale". The independent appraiser referred to above conducted an appraisal of this 53 acre tract, applying the usual standards of appraisal of real estate, and on September 4 informed a representative of the Executor that it was his opinion that the property had a fair and reasonable market value as of the date of death of \$68,100. However, it was his opinion that, in computing the value of the interest of the deceased, it was not proper to consider that this interest was worth more than 50% of the arithmetical value of the $\frac{2}{5}$ th interest which she held at death.

We understand that you have no dispute with the value of the entire tract as appraised by the independent appraiser, but you question whether it is proper to down-

grade the $\frac{2}{5}$ th interest of the deceased merely because it is less than an entire interest.

We agree with your doubts expressed with regard to the theory of evaluation of this partial interest and we are confirmed in this opinion by the case of *Wingert v. State*, 129 Md. 28 (1916). In the *Wingert* case the deceased died seized of an undivided $\frac{1}{7}$ th interest in real estate which was subsequently appraised by the appraisers appointed by the Orphans' Court of Washington County at $\frac{1}{7}$ th of the value of the entire tract in which the deceased held his partial interest. The taxpayers challenged the appraisal contending that the fractional interest should be downgraded because of its nature as a partial interest only. The Orphans' Court of Washington County disagreed and overruled their objections to the appraisal as filed. On appeal to the Court of Appeals of Maryland the decision of the Orphans' Court of Washington County was affirmed. The court, in affirming, reasoned:

"The action of the Orphans' Court in this case in approving the return of the appraisers in assessing the value of an undivided one-seventh interest at one-seventh of the value of all the real estate as a whole, and this to be taken as the true value upon which the taxes shall be paid we think was correct, and in conformity to the requirements of the statute. Any other method would lead to confusion, be the subject of speculation and conjecture and 'not compatible with public convenience or the prompt collection of revenue for the State.'

"The appraisal of the real estate, as an undivided whole and then dividing the result, or amount by seven, would clearly give the value of each one-seventh interest, of the value of the whole, and this method, it seems to us, not only gratifies the statute but fixes a fair and proper method for determining the value of undivided interests in real property for the purpose of the collateral inheritance tax."

Based on the *Wingert* case, it is our opinion that the appraisal of the fractional interest of the deceased in the present case would be $\frac{2}{5}$ th of \$68,100 or \$27,240.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—REFUNDS OF REAL PROPERTY TAXES—SECS. 213 AND 214, ART. 81, ANNOTATED CODE OF MD. (1957 ED. AND 1963 SUPP.)—TRANSFER OF PROPERTY TO FEDERAL GOVERNMENT DURING TAXABLE YEAR DOES NOT ENTITLE TRANSFEROR TO PRO TANTO REFUND WHERE PROPERTY WAS PROPERLY TAXABLE TO IT AS OF DATE OF FINALITY.

July 22, 1963.

*Henry J. Tarantino, Esq.,
County Attorney for
Anne Arundel County.*

You have asked whether or not a corporate lessee of real property under a long term lease from the federal government is entitled to a pro rata refund of real property taxes when said lease is purchased by the government after the commencement of the taxable year and after the lessee has paid in full all such taxes for that year. The lease in question was negotiated in 1950 under the Wherry (Housing) Act of 1949, 63 Stat. 570; and, under both its terms and §§8(1) and 8(8)(e) of Article 81 of the Annotated Code of Maryland (1957 Edition and 1962 Supp.), the lessee is responsible for all taxes upon the property demised to the same extent as though it were the owner thereof, with certain exceptions to be noted below. Of course, the problem arises because the federal government, the prospective purchaser of the lease under 42 U.S.C.A., §1594a, is exempt from both State and local real property taxes.

As of the date of finality for the assessment upon which the taxes in question were computed, as of the date said taxes were due, and as of the date said taxes actually were paid, the lessee was in possession of the leased premises. Thus, assuming no error in the method of assessment or in the calculation of the tax thereon, the lessee has not paid "more money for ordinary taxes than was properly and legally chargeable to or collectible from such person." This being true, the lessee, regardless of subsequent purchase of the lease, would not be entitled to a

refund under either §213 or §214(a) of Article 81 of the Annotated Code of Maryland (1957 Edition and 1963 Supp.). It is axiomatic that the date of finality is the date as of which tax liability for the ensuing taxable year is to be determined; and, as of that date of finality applicable to the tax year in question, the lessee was in possession of the demised premises—as, indeed, it still is—and liable for the taxes which it now seeks to partially recoup.

You have specifically inquired whether or not, under the circumstances presented, the lessee would be afforded any relief by §214(b) of Article 81 of the Annotated Code of Maryland (1957 Edition, 1963 Supp.), which provides the mechanism whereby a taxpayer entitled to a reduction in local taxes under §511 of Public Law 1020 [Chapter 1029], enacted by the Congress of the United States in 1956, 42 U.S.C.A., §1594 (Historical Note), might obtain such reduction in the form of a refund after its full tax bill has been paid. Insofar as it is here pertinent Public Law 1020 provides for a reduction in State or local real property taxes in “such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: * * * ” While this provision does authorize a refund of some taxes under certain specified conditions, it offers not a word of support for a refund on the sole basis of the federal government’s purchase of the lease in question. (Parenthetically, it should be noted that Public Law 1020 has been the subject of a previous opinion of this office, which opinion may be found at 42 Opinions of the Attorney General 414.)

If the lessee taxpayer is to get any “tax relief,” it must do so through its negotiations with the government over the

terms of the purchase of its lease, as, for the foregoing reasons, it is not entitled to a pro rata refund under Maryland law. Refunds are a matter of legislative grace, *Wasena Housing Corp. v. Levay*, 188 Md. 383, 52 A. 2d 903 (1947), and the General Assembly has not as yet extended its grace to taxpayers situated similarly to that involved here.

THOMAS B. FINAN, *Attorney General*.

STUART H. ROME, *Asst. Attorney General*.

TAXATION—INHERITANCE TAX—STOCK DIVIDEND NOT TAXABLE WHERE SUCH DIVIDEND LEAVES STOCKHOLDER'S OWNERSHIP IN CORPORATION SAME AS BEFORE DECLARATION OF SUCH DIVIDEND—EXPENSES INCURRED IN CONNECTION WITH ADMINISTRATION OF ESTATE—HOTEL BILLS, AIRPLANE TICKETS AND LONG DISTANCE TELEPHONE CALLS HELD NOT A PROPER ADMINISTRATION EXPENSE.

July 29, 1963.

*Mr. George M. Nutwell,
Register of Wills
for Anne Arundel County.*

We have your letter of July 18th in which you raise two questions in connection with the Second Administration Account to be filed in the above estate being administered in your office. The first question which you pose deals with how stock dividends declared during administration on common stocks which form a part of the personal estate of the deceased are to be accounted for in the Second Administration Account, and, more particularly, whether any value is to be ascribed to the stock received by the Executors as such a dividend. Your second question arises because the Executors are claiming a right to include as proper disbursements in the Second Administration Account expenses incurred by them for hotel bills and airplane tickets in connection with trips made to your office to fulfill their duties of accounting with your office in connection with the administration of the estate and also for long distance telephone calls made to your office for the purpose of discussing the administration of the estate.

As you point out in your letter, it is true that income received by the estate during the course of administration is subject to inheritance taxes, when this income is distributed to the legatee or distributee. 35 Opinions of the Attorney General 331 (1950); 29 Opinions of the Attorney General 236 (1944); 24 Opinions of the Attorney General 927 (1939); 12 Opinions of the Attorney General 266

(1927). However, a stock dividend received by the Executors on securities which form a part of the estate is not really income to the estate. In this connection a distinction must be made between a cash dividend paid on securities and a stock dividend. This distinction has been well stated as follows:

“* * * the distribution in specie to its shareholders of a portion of the profits or surplus assets of the corporation, such distribution ordinarily, but not necessarily, being in the form of cash. Declared on the then existing capital stock, it subtracts so much from the treasury of the corporation and transfers it to the pockets of the shareholders. It entitles the shareholder to a present return on his investment either in money or in something from which money can be presently realized without diminishing the proportionate interest which he previously held in the corporation or reducing his proportionate share of future dividends or distributions of assets. A stock dividend, on the other hand, takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. It implies a continuance of the corporation with the same assets and the same liabilities. The title to all corporate property remains in the corporation as before, but corporate profits theretofore available for distribution in dividends are permanently appropriated to fixed capital, the shareholders receiving merely symbols or evidences of such appropriation. Where a stock dividend issues, the enterprise remains the same. The interests of the shareholders remain the same and in the same proportions, assuming that the dividend is declared in the same kind of stock, since the whole number of shares after the pro rata distribution, as before, represent the same corporate assets. Such a ‘dividend’ does not distribute property or add to the shareholder’s ready cash. It changes the form of his investment,

ordinarily by increasing the number of his shares, thereby diminishing the value of each share and leaving the aggregate value of all his stock substantially the same. Such an increase simply dilutes the shares as they existed before. Unlike a cash dividend, therefore, the stock dividend cannot be translated into money for the shareholder without a corresponding diminution in the proportionate interest formerly held by him and in the ratable amount of future dividends and distributions to which he would otherwise be entitled. Because a stock dividend is of such a nature it is, in essence, not a dividend at all in any true or usual sense of the word, but rather the opposite; it has been well characterized as merely an incident or process in corporate bookkeeping. * * * 13 Am. Jur., *Corporations*, §648.

For this reason we advise you that the stock dividends are to be reported in the Second Administration Account but that no value is to be ascribed to them.

The second question which you pose is answered by a construction of Article 93, §6 of the Annotated Code of Maryland (1957 Edition). This section provides that commissions are to be allowed to an Executor for his services in administering the estate within the limits therein set forth. In addition, it allows him to charge as disbursements in his account expenses properly incurred in connection with his administration including "his allowance for costs and extraordinary expenses (not personal) which the court may think proper to allow, laid out in the administration or distribution of the estate or in the recovery or security of any part thereof". These costs and expenses contemplated by this provision are, of course, in addition to the commissions allowable to the Executor above referred to. From a description of the expenses which are in question, hotel bills, airplane tickets and long distance phone calls, we assume that you are dealing with non-resident Executors in this estate. The mere fact that they are non-residents,

however, would not change, in our opinion, the legitimate costs of administration under the section above quoted. This office has ruled that expenses for telephone calls incurred by an Executor are not a proper administration expense for which he is to be given credit in his Administration Account. 21 Opinions of the Attorney General 709. We were of the opinion there that these expenses were properly part of the service for which the Executor received his commissions. We feel that the hotel expenses and airplane tickets which are before you in the present case fall into the same category. We do not mean to imply that if such expenses were incurred in the protection of the estate, such as where it might be necessary to conduct certain financial transactions involving estate property which made such expenses necessary, that these would not be considered "extraordinary expenses (not personal)." However, in this case it would appear that the only reason for these expenses is the fact that the Executors are non-residents. We do not think that, as such, they qualify as extraordinary.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—INHERITANCE—VALUATION DATE FOR ASSESSMENT OF INHERITANCE TAX ON REMAINDER INTEREST WHICH AT THE TIME OF TESTATOR'S DEATH WAS VESTED SUBJECT TO BEING DIVESTED IN WHOLE OR IN PART UNDER THE DEVISE CREATING IT.

August 16, 1963.

Mr. Thomas W. Parks,
Register of Wills for
Washington County.

Your letter of July 31, 1963, raises two questions which are presented by the following circumstances:

A died testate on May 24, 1957, and by the second paragraph of his will devised the residue of his estate to his wife "during the period of her natural life, she to receive all of the income and emoluments therefrom and to keep the same in proper condition and repair and pay any taxes thereon when due and payable, with the right and privilege on the part of my said wife during her lifetime to sell and convey any of said property and reinvest the proceeds from the sale thereof as she may deem most advisable, keeping account thereof, and with the further right and privilege on the part of (I) my said wife, in the event the net income from my said estate is not sufficient to reasonably support and maintain her, to use so much of the principal of my said estate as may from time to time be necessary for her to use for her maintenance, support and medical attention during her lifetime."

The remainder interest in the residue was devised to collateral relations of A.

The residuary estate thus devised was made up solely of the home property of A and his wife which was appraised by your office following A's death at \$10,000. A's wife con-

tinued to occupy the property until recently, when in exercise of the power of sale granted to her, she sold it for \$5,000, which we assume was the best price obtainable on the market, and deposited the proceeds in a savings institution. Shortly after the sale, A's wife died.

You inquire as to the proper valuation of the estate in remainder for the purpose of now assessing inheritance taxes against the remaindermen and also whether the remaindermen are responsible for the funeral expenses of A's wife who died insolvent.

I

Under A's will his wife was devised a life estate with power of sale of the remainder interest. This remainder was vested in the class to whom it was devised subject to being divested in whole or part on the exercise of the power granted to the life tenant. Miller, *Construction of Wills*, Section 220 and Section 230; 25 Opinions of the Attorney General, 630 (1940). In the opinion of this office just cited, we pointed out that for inheritance taxation of the life interest coupled with a power identical to the one involved in the instant case that:

". . . the interest of the widow must be valued as an ordinary life estate, and a tax paid only on that amount, with the understanding that should she exercise the power to dispose of the property during her lifetime, an additional tax will be paid on the same basis as if she had acquired the property in fee. In other words, if, for example, under the equity rule for valuing dower interests and life estates, the present tax is computed on three-tenths of the appraisal value of the property, then, should she later convey the property, an additional tax on seven-tenths will be payable * * *".

You have advised us that this procedure has been followed in valuing the life estate of A's wife.

In *Shaughnessy v. Perlman*, 198 Md. 619 (1951) the Court of Appeals of Maryland ruled that remainder interests are to be valued for purposes of inheritance taxation as of the date that they vest in possession and not as of the date on which they were created. The Court there reasoned:

(At page 626) “. . . The effect of this construction is that the taker pays on the basis of what he gets, whether more or less than the value at the date of the testator’s death. The contrary construction might require a remainderman to pay on a value that had entirely vanished at the time the remainder vested in possession. Cf. *Downes v. Safe Deposit and Trust Company*, 164 Md. 293, 299, 164 A. 874, 86 A.L.R. 1024.”

Pursuant to this authority, we advise you that the remaindermen of the estate of A should be taxed on the proceeds of the sale of the property now on deposit in the savings institution to which proceeds they became entitled on the death of A’s wife.

II

The life estate of A’s wife, although coupled with a power of sale during her lifetime, which enabled her to completely consume the interests of the remaindermen, terminated completely on her death. Miller, *Construction of Wills*, Section 220. Furthermore, remaindermen are not liable for debts of the life tenant nor of her estate. *Weber v. Bien*, 143 Md. 561 (1923), 10 M.L.E., *Estates*, Sections 29 and 46. It follows therefore that the remaindermen of A’s estate are not liable for the funeral expenses of A’s wife.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—INHERITANCE TAX—CONSTRUCTION OF WILLS—
DIRECTION THAT INHERITANCE TAXES BE PAID OUT OF
RESIDUE APPLICABLE TO PROPERTY PASSING BY INTER-
VIVOS GIFT MADE BY TESTATOR IN CONTEMPLATION OF
DEATH WHERE INTENTION OF TESTATOR SUFFICIENTLY
EXPRESSED.

August 19, 1963.

Mr. George M. Nutwell,
Register of Wills for
Anne Arundel County.

You have asked for our opinion as to the proper construction of a portion of the residuary clause contained in the will of the above named testator, as the same affects the ultimate burden of inheritance taxes due the State by virtue of certain gifts made by the testator during his lifetime which have been determined by you to have been made in contemplation of death. The question arises under the following factual situation.

On November 14, 1961, the testator transferred to his daughter certain personal property having a value of \$17,141.55, which transfer was made as an absolute gift over which the daughter took dominion and control as of that date. On December 19, 1961, the will under construction was executed by the testator who died on April 28, 1962. The portion of the residuary clause to which our attention has been directed provides:

“From this portion of my estate, all estate, inheritance, transfer, or succession taxes, whether occasioned by property passed under this my will, or otherwise, shall be paid by my Executor.”

You have asked whether this provision shifts the burden of the inheritance due on the gift made to the testator's daughter on November 14, 1961, from her to the Executor for payment from the probate estate of the testator.

It has always been recognized in this State, as well as throughout the country, by courts which have had occasion to consider this question that a testator is fully competent to place the burden of inheritance taxes on any fund or portion of his estate which he so chooses. The difficulty which arises in the application of this principle is ascertaining from the words employed whether the testator intended to shift the burden of taxation from the person on whom that burden is placed by the State. 40 Opinions of the Attorney General 520 (1955). In ascertaining this intention full effect must be given to the language employed by the testator and cognizance must be taken of the situation in which the testator found himself at the time of the execution of his will. 22 M.L.E., *Wills*, Sections 213-215.

The Court of Appeals of Maryland in *Maron v. Girard Trust Company*, 168 Md. 692 (1935), was called upon to construe a provision in the will of a testator who owned property outside of the United States at the time of his death in addition to his local property. (It was not clear whether he owned the foreign property when he executed the will in question.) That testator provided that all inheritance and transfer taxes "imposed by the State of Maryland or any other state, or by the United States" should be paid out of the residuary estate. The foreign country where the testator owned certain property imposed a succession tax on the property located there. The Court ruled that the above quoted language did not sufficiently demonstrate the testator's intention that the foreign succession tax was to be paid from the residuary of his probate estate. Inasmuch as this decision is unreported, the rationale of the Court in reaching this result is not recorded. However, the decision can be explained on either of two grounds. In employing the words "State of Maryland or any other state or by the United States" in describing the taxing authorities for the inheritance or succession taxes, the testator negated any presumed desire on his part to include taxes imposed by a foreign nation for payment from his probate estate. Further, since it was not clear whether the foreign property was owned by him at the time

he executed his will, it could not be reasonably inferred that in employing this language he intended to relieve the recipient of this property at his death from the payment of any foreign succession tax.

Likewise, in 40 Opinions of the Attorney General 520 (1955), this office ruled that the following direction of a testator was insufficient to shift the burden of inheritance tax from the designated beneficiary of two United States Savings Bonds owned by the testator at her death:

"I hereby direct that all Estate and Inheritance taxes, payable either to the United States Government or the State of my residence shall be paid by my Executor from the Residuum of my estate. It is my intention that none of said taxes shall be charged back to any Legatee under any specific devise herein contained."

After reviewing the general rules as to necessity of ascertaining the intention of the testator in construing such a clause, we concluded that the recipient of the bonds in question was not relieved of the obligation to pay an inheritance tax "where the will contains no specific language making such direction applicable to property not part of the estate subject to administration."

Generally, where a testator has indicated his intention that the residuum of his estate is to assume the burden of inheritance or succession taxes levied upon property passing by virtue of his death but not subject to administration, this direction has been given effect. Annotation, Burden of estate or succession tax in respect of intervivos gift or trust, 115 A.L.R. 916, 920, supplemented in 15 A.L.R. 2d 1216, 1224; Annotation, Construction and effect of provisions of will relied upon as affecting the burden of taxation, 37 A.L.R. 2d 7.

Considering then the language employed by the testator in the instant case, it is clear that he intended that the burden of inheritance taxes assessed on property passing other than under his will and subject to administration

should be payable from the residuum of his estate, for he said just that.

"Sitting in his armchair", it is also evident that at the time he drew his will he was aware of the substantial gift he had made to his daughter approximately two months before and it is reasonable to assume that he and/or his draftsman were cognizant of the possibility that an inheritance tax would be assessed on this gift in the event of his death within two years of the date that it was made. Article 81, Section 151.

When these factors are considered, it is our opinion that the testator had sufficiently expressed his intention that any inheritance taxes assessed by virtue of the gift he made to his daughter in contemplation of death be paid from the residuum of his estate.

Having so concluded, we wish to add that the tax payable from the residuary estate on behalf of the donee of the gift, the daughter, constitutes a legacy to the daughter under her father's will which legacy is subject to an inheritance tax at the lineal rate. *Bouse v. Hutzler*, 180 Md. 682 (1942), 42 Opinions of the Attorney General 399 (1957); 26 Opinions of the Attorney General 457 (1941); 19 Opinions of the Attorney General 488 (1934); 9 Opinions of the Attorney General 244 (1924).

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—RECORDATION TAX—SALE AND LEASEBACK—NOT
TO BE TREATED AS MORTGAGE TRANSACTION—STAMPS
REQUIRED BOTH ON DEED AND ON LEASE.

August 26, 1963.

*Mr. James F. Carney, Clerk
of the Superior Court of Baltimore City.*

This will acknowledge receipt of your request for an opinion with respect to the documentary stamps to be charged for the recording of a deed between Atlantic Cement Company, Inc., Grantor, and The Prudential Insurance Company of America, Grantee. You also ask for an opinion as to the amount of documentary stamps to be charged for the recording of a lease of this property from Prudential Life Insurance Company of America, Landlord, to Atlantic Cement Company, Inc., Tenant. Counsel offering these documents for recording has taken the position that this sale and leaseback arrangement is nothing more than a financing transaction in the nature of a mortgage and that therefore the two instruments should be recorded as though they comprised a single mortgage transaction.

For the reasons expressed below, it is the opinion of this office that a sale and leaseback is not to be regarded as a mortgage transaction but is to be treated as a sale transaction and a lease transaction and that documentary stamps are to be charged accordingly.

The sale and leaseback has in recent years become a very popular method by which a property owner in need of funds or desiring expansion can obtain the necessary capital and simultaneously secure certain Federal tax advantages that would not be accorded to him were he to simply borrow the money and give the lender a mortgage on the property. It is precisely because the Internal Revenue Department does not regard these transactions as mortgages that these tax benefits are available. For example, if a sale and leaseback agreement is properly drawn, the

vendor-lessee is entitled to an income tax deduction for the full rent paid for the premises, whereas in a mortgage transaction he would be able to deduct only that portion of each payment attributable to interest. In addition, a sale and leaseback arrangement involving real estate, in effect, permits the vendor-lessee to depreciate the value of the real estate by deducting the rental payments in full. In the ordinary situation where the borrower retains title to the property, he is not permitted to depreciate real estate but only the improvements thereon. In conjunction with the vendor-lessee's right to deduct the amount of the rent, in a sale and leaseback the right to depreciate the value of the improvements to the property is shifted to the vendee-lessor, who, however, inherits the all too frequent quarrels with the Internal Revenue Department with respect to the proper depreciation schedule to be followed.

Furthermore, in the sale and leaseback arrangement, if the vendor-lessee sells at a price in excess of the basis of the property, a capital gains tax must be paid. Such a taxable event would not ordinarily occur in a mortgage transaction.

In addition to the tax consequences that differentiate a mortgage from a sale and leaseback, there are certain non-tax differences as well. For example, many lending institutions are limited by law as to the amount of the mortgage loan which can be made in proportion to the value of the security received. In a sale and leaseback arrangement, however, the lending institution may often, in effect, give the vendor-lessee a much higher loan in terms of permissible ratio of the loan to the value of the security. As a result, life insurance companies have found sale and leaseback arrangements particularly attractive. Also, through a sale and leaseback a vendor-lessee may produce more favorable working capital ratios without extensive investment in fixed assets, even though the preferred accounting practice requires footnoting of the balance sheet for a long term lease obligation. Further differentiations between mortgages and sales and leasebacks are found in the

loss of the value of the reversion if no repurchase option is contained within the sale and leaseback arrangement, whereas in a mortgage transaction once the debt is paid the property is reinvested in the mortgagor. (It is, of course, possible for a vendor-lessee in a sale and leaseback arrangement to offset the loss of a reversion by obtaining favorable renewal options for long terms and at substantially lower rentals.) Also, in the sale and leaseback arrangement the vendor-lessee is tied to the lease and thus loses some of the flexibility that might ordinarily be available to a mortgagor who, should the property become a liability, can prepay the mortgage and sell the same and move to another location.

It is precisely because of the differences expressed above that companies have found the sale and leaseback arrangement in some situations to be preferable to a mortgage transaction, and therefore to say that a sale and leaseback is nothing more than a mortgage is to ignore the very reasons why the sale and leaseback transaction is entered into in the first place.

We have examined in detail the sale and leaseback agreement entered into between Atlantic Cement Company, Inc., and The Prudential Life Insurance Company of America and the attendant documents and it is abundantly clear that this transaction was carefully drafted for the purpose of according to the parties the tax and other benefits which are available to sale and leaseback arrangements but which are not available in a mortgage transaction. Illustrative of this is the carefully drafted repurchase option contained within Article 31 of the lease which does not give the tenant the absolute option to repurchase but rather leaves that option to the Landlord. In addition, there are a number of other provisions in the lease which differ from the ordinary mortgage transaction. See, for example, Article 18 wherein the vendor-lessee agrees to subordinate the lease to any mortgage which the vendee-lessor may secure on the property.

In short, it is clear that in transactions of this nature the parties thereto will take the position before the Department

of Internal Revenue that the transaction is not a mortgage at all but is, on the contrary, a bona fide sale and leaseback. In view of this it would seem most inconsistent for us to permit them to make a totally different assertion to us; i.e., that the transaction is a mortgage rather than a sale and leaseback. Since the parties have selected the form for the transaction, and since sales and leases are each subject to recordation taxes under the appropriate provisions of Article 81 of the Code, we feel that your office should treat these documents in accordance with what the documents themselves purport to be.

Therefore, please be advised that recordation stamps on the deed are to be computed in accordance with the provisions of Section 280 of Article 81 of the Code, which require stamps to be affixed on the value of the purchase price for the property. With respect to the lease, recordation stamps are to be charged in accordance with the provisions of Section 280, which require that the annual rent be capitalized on the basis of 10%, and that recordation stamps be charged on the resultant figure.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

TAXATION—INHERITANCE TAX—EXEMPTION FROM COLLATERAL TAX IN FAVOR OF CHARITABLE FOUNDATION PERFORMING SUBSTANTIAL PART OF ITS ACTIVITIES IN MARYLAND AND/OR DISTRICT OF COLUMBIA—MORRIS MILLER FAMILY FOUNDATION, INC.

September 26, 1963.

Mrs. Virginia M. Black,
Register of Wills
for Montgomery County.

You have requested our opinion as to whether a legatee under the will of the above named testatrix, who died on April 8, 1961, qualifies for exemption from the collateral inheritance tax imposed by Article 81, Section 150, of the Maryland Code (1962 Supplement) as 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 * * *.”

The legatee in question, Morris Miller Family Foundation, Inc., was incorporated in Maryland in September, 1951, for the expressed purposes, as set forth in its charter, of receiving and administering funds for scientific, educational and charitable ends. The charter of this nonstock corporation provides that no part of the net income of the corporation shall inure to the private benefit of any individual. The information supplied you by the executor of this

estate discloses that the corporation has for the years 1959 through 1962 made contributions to various charitable and educational groups, the majority of which conducted a substantial part of their activities in the State of Maryland or the District of Columbia. You are further informed that the corporation served no function other than to receive gifts or legacies and to proceed to make gifts and grants such as described. Also, we have been supplied with a certified copy of the minutes of the meeting of the Board of Directors of the corporation held in August, 1963, wherein it was resolved that the corporation would continue to so confine a substantial part of its activities to Maryland and/or the District of Columbia.

The purposes for which the corporation in question was formed and which have been shown to have been carried out by the information supplied to you, as referred to above, are not unlike the purposes of the Whitehall Foundation, Inc., whose status as a legatee entitled to the exemption in question was reviewed by the Court of Appeals of Maryland in *Coursey v. Hanover Bank*, 206 Md. 180 (1955). The court there said that the exemption was applicable. Furthermore, the resolution of the Board of this corporation indicates that its past practice of confining a substantial amount of its gifts and grants to organizations performing important charitable services in Maryland and the District of Columbia will continue. Cf. *Shaughnessy v. Linguistic Society*, 198 Md. 446 (1951) and *Coursey v. Hanover Bank*, *supra*.

The Court of Appeals in *Coursey v. Hanover Bank*, *supra*, stated, at page 185:

"The obvious purpose of the exemption statute was to encourage bequests to corporations of the types mentioned, by foregoing the tax of 7½%, provided a substantial part of the money passing under the bequest could reasonably be expected to be spent for worthy public purposes in Maryland. But there was no provision for an exact *quid pro quo*,

nor were corporations organized in other States, or operating on a national basis, excluded * * *."

We are of the opinion that granting an exemption to the legatee in question serves that legislative intent.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—INHERITANCE TAXES—JOINTLY OWNED PROPERTY—LIABILITY OF SURVIVING JOINT TENANT OF REMAINDER INTEREST IN REAL ESTATE ON DEATH OF HIS CO-TENANT—POSTPONEMENT OF PAYMENT OF TAX IN REMAINDER INTEREST UNTIL THE SAME VESTS IN POSSESSION—"POSSESSION" RESULTING FROM SURVIVING JOINT TENANT IN REMAINDER AND LIFE TENANT UNITING IN SALE OF PROPERTY.

September 30, 1963.

Mr. Thomas M. Eichelberger,
Register of Wills for
Frederick County.

You have requested our opinion as to the proper assessment of inheritance tax under the following factual situation. In June of 1930 A gratuitously conveyed certain real estate to his brother and sister, B and C, as joint tenants, reserving to himself a life estate in the property. In September of 1961, B died. A and C have now agreed to sell the property.

Under this factual situation, B and C took vested remainders in the real estate in question under the conveyance from A. This office has ruled that the surviving joint tenant of a remainder interest in property is liable for the taxes imposed by Article 81, Sections 149 and 150, on the death of his co-tenant, in view of the broad language of Section 151 of that Article, defining the property which is subject to the imposed taxes as including, "all property in which the decedent prior to his death had an interest as a joint tenant." 40 Opinions of the Attorney General 629 (1955). For this reason, on B's death, C's survivorship to his interest in the remainder, following A's life estate, was a taxable event. However, since at the time of B's death his interest in the remainder was not possessory and A survived to it with no right to possession thereunder, the payment of the tax was postponed until such time as the remainder vested in possession. *Shaughnessy v. Perlman*, 198

Md. 619 (1951), 39 Opinions of the Attorney General 276 (1954).

Although the life tenant of this property is still alive and the interest received by C by virtue of B's death is still not vested in possession, A and C, by agreeing to unite in the disposition of the property are prepared to terminate A's life estate therein. Under these circumstances, for the purposes of the inheritance tax liability of C, arising from the taxable event of the death of his co-tenant in 1961, the interest of B which C received as a surviving joint tenant at that time, must be treated as vesting in possession at this time. 32 Opinions of the Attorney General 413 (1947). We are, therefore, of the opinion that C is now liable for payment of the collateral inheritance taxes imposed by Article 81, Section 150, based on the value of B's interest to which he survived at the time of B's death.

In valuing this interest, for purposes of taxes, you should determine the value of the real estate in question as of September, 1961 and the value of A's life interest therein, as determined by the procedures set forth in Article 81, Section 160, considering A's age at the time of B's death. After subtracting the value of A's interest from the value of this property in September of 1961, one-half of the balance is subject to tax at the collateral rate of $7\frac{1}{2}\%$.

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—IMPOSITION AND COLLECTION OF ORDINARY
STATE TAXES ON REAL PROPERTY—TRANSITION PERIOD
UNDER CHAPTER 825, LAWS OF 1963—TAXABLE YEARS
—DATE OF FINALITY—FRACTIONAL LEVIES—POWERS
OF BOARD OF PUBLIC WORKS.

October 29, 1963.

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

You have asked our opinion as to the proper procedures for the collection of ordinary State taxes upon real property during the transitional period provided for in Chapter 825 of the Laws of Maryland of 1963, which became effective on June 1, 1963.

This statute provides for a uniform date of finality, a uniform fiscal year, a uniform taxable year, and a uniform due date for ordinary taxes for the State and for every county, incorporated city or town and taxing district. The date of finality for real property is established as January 1; the fiscal year is established as the period commencing on July 1 and ending on the 30th day of June next following; and the taxable year is established as the same period as the fiscal year. Such uniformity has been achieved, principally, by the amendment of Section 2(20) of Article 81 of the Annotated Code of Maryland and by the enactment of Sections 2(20a), 2(20c) and 29A of said Article, which, in their material portions, provide as follows:

“2. Definitions

(20) The phrase ‘date of finality’ means the date as of which assessments become final for the taxable year next following, subject only to correction as herein authorized . . . These dates are as specified in Section 29A of this Article.

(20a) The term ‘fiscal year’ means for the State and for every county, incorporated city or town, and taxing district the period by or for which

appropriations are made, expenditures are authorized, accounts are reckoned, and books are balanced. The period is as specified in Section 29A of this Article.

(20c) The term 'taxable year' means for the State and for every county, incorporated city or town, and taxing district the period by or for which property taxes are computed, levied and collected, . . . The period is as specified in Section 29A of this Article.

29A. Dates specified.

(a) From and after December 31, 1965, for the State and every county, incorporated city or town, and taxing district the date of finality is January 1; . . .

(b) For the State and for every county, incorporated city or town, and taxing district, beginning July 1, 1966, the fiscal year is the period starting July 1 in each year and ending the thirtieth day of June following.

(c) For the State and for every county, incorporated city or town, and taxing district, beginning July 1, 1966, the taxable year is the period which starts July 1 in each year and ends on the thirtieth day of June following."

Also, Section 48(a) of Article 81 of the Annotated Code of Maryland, as amended by Chapter 825, provides that all ordinary State, county, incorporated city or town, and taxing district taxes shall be due and payable on July 1 and in arrears on October 1; the previous due date was January 1.

By the express provisions of Section 29A, the uniform date of finality (January 1) does not become established until after December 31, 1965, and the uniform taxable and fiscal years (both July 1 through June 30 next following) do not become established until after June 30, 1966.

In a strict sense, however, this is not correct. As respects the fiscal operations of the State, Section 30(e) of Article 19 of the Annotated Code of Maryland, as enacted by Chapter 825, makes the fiscal year specified in Section 29A(b) immediately effective for all State offices, officers, departments, boards, commissions, and institutions. This is of little practical consequence, as all State governmental bodies already were operating on a July 1-June 30 fiscal year prior to the enactment of these provisions. Furthermore, as respects the State's taxable year (as distinguished from the taxable year for the imposition of ordinary *local* taxes) and date of finality, Section 31(a) of Article 81 of the Annotated Code of Maryland, as enacted by Chapter 825, provides:

“31(a) All ordinary State taxes shall be levied for the calendar year until such time as they are levied for the ‘taxable year’ as defined in Sections 2(20c) and 29A of Article 81 of this Code, as amended from time to time. The Board of Public Works shall determine upon the time and procedure for changing the taxable year to be in conformity with said Sections 2(20c) and 29A of Article 81.”

This section gives the Board of Public Works the power—indeed, imposes upon it the duty—to “determine upon the time and procedure for changing the taxable year” for ordinary State tax purposes from the calendar year to the 12-month period commencing July 1. Under this broad grant of authority, the Board of Public Works may order the changeover to the new State taxable year in advance of the deadline date specified in Section 29A(c). However, such a changeover—if not of necessity, then as a matter of practicality—shall be contingent upon the transitional procedures employed in the various counties, cities, towns and taxing districts.

Pursuant to legislation antedating the enactment of Chapter 825, the various counties and Baltimore City have established widely varying timetables and time periods

regarding the assessment of real property, the imposition and collection of taxes thereon, and the budgeting of these taxes. At the time Chapter 825 went into effect, 18 counties had a date of finality of January 1, while 5 counties and Baltimore City had a date of finality other than January 1; 3 counties had a taxable year that commenced on July 1, while 20 counties and Baltimore City had a taxable year that commenced on January 1; and 12 counties had a fiscal year that commenced on July 1; while 11 counties and Baltimore City had a fiscal year that commenced on January 1. Also, there were at least nine different dates as of which real property taxes were due and payable in these 24 political subdivisions, July 1 being the due date in only eight of them.

Because of these local variances, to obtain immediate Statewide conformity with the provisions of Chapter 825, upon its enactment, would have been all but impossible. Thus, Section 2 of the Act creates a 3-year transpositional period, ending June 30, 1966, within which each political subdivision must bring itself into compliance. Section 2 also provides that

“ . . . until any required transition is completed the political subdivision may continue as necessary or desirable under and according to the provisions of Article 19 and Article 81 of the Annotated Code of Maryland, and also of its charter or local laws, as if this Act had not been enacted.”

Under this statutory authority, many of the political subdivisions of the State will continue their present assessment, taxation and budgetary practices, effecting the requisite changeover not in 1964 but in 1965 or 1966. Furthermore, those political subdivisions presently operating on a fiscal year coinciding with the calendar year will find it either necessary or desirable, under additional provisions contained in Section 2 of the Act, to strike a fractional levy and collect taxes for the first six months of their year of transition. This is true because, for these polities, their operating period under prior legislation will conclude on

December 31, while that established by Chapter 825 will not commence until the following July 1. Few, if any, taxing units have the monetary surplus in their treasuries to meet the operating costs of government for a 6-month period without this additional taxpayer support. For those units that do not have such a surplus, the only alternative to a fractional levy is an indulgence in deficit financing. (The 12 counties already operating on a fiscal year commencing July 1 will not require a fractional levy.)

During the transitional period, several polities, in a continuance of present practices, will be sending out tax bills in advance of July 1. So, also, will most of those polities that strike fractional levies. May a full year's State taxes be included in these bills; must they be included; or must they not be included? This question arises because Section 48(a) of Article 81 of the Annotated Code of Maryland, as amended by Chapter 825, provides that all ordinary State and local taxes shall not be due and payable until July 1. However, this provision must be read in the light of the elaborate transitional provisions of Section 2 of the Act, one of which confers broad transitional powers upon the Board of Public Works; it provides:

"Also, as part of the transitional provisions authorized by this section, the county, city or town, or taxing district shall conform to and participate fully in whatever times and procedures may be determined by the Board of Public Works for the imposition and collection of State taxes during and for the transitional period."

This language and that contained in Section 31(a) of Article 81, quoted above, empowers the Board to determine the times and procedures for the State's conversion to the new taxable year and for the imposition and collection of ordinary State taxes prior to the time (June 30, 1966) that Chapter 825 becomes fully effective. Pursuant to this authority, the Board may, in the transitional period, permit or require the collection of ordinary State taxes at any time during the taxable year for which they are levied.

And, until December 31, 1965, or sooner, if the Board requires it, the State's taxable year commences on January 1.

With respect to the State's conversion to the new taxable year, it already has been stated that, under Section 31(a) of Article 81, quoted above, the Board of Public Works may order conversion prior to the deadline date of July 1, 1966, specified in Section 29A(c) of Article 81, also quoted above. It should be added that nothing in Chapter 825 requires that the new taxable year for purposes of ordinary State taxation be established in every political subdivision simultaneously. Logically and legally, it is not necessary, in this context, that each taxpayer pay ordinary State taxes for the same tax liability period. As was cogently stated in 44 Opinions of the Attorney General 365, 369, 370 (1959):

“ . . . The fact of the matter is that since taxes are a *recurrent obligation*, the only significance of a ‘tax year’ insofar as the taxpayer is concerned is to give him assurance that he will not have to pay more than one tax during that period. Other than from that standpoint, it makes no difference to the taxpayer whether the tax period is a calendar year or fiscal year. What the taxpayer is interested in, however, is that he not be required to pay for the cost of government during a given period more than once, regardless of when the taxes are collected * * *.”

Of course, what the taxpayer is also interested in is that he not be obliged to pay proportionately more for ordinary State taxes than any other taxpayer in any other political subdivision. However, regardless of when any particular polity within the State is ordered by the Board to adopt the new taxable year as the liability period for the payment of ordinary State taxes, this inequity would not result. Whether or not the changeover is effected in all political subdivisions simultaneously, between now and June 30, 1966, when the changeover to the new taxable year will be completed for all political subdivisions within the State, no taxpayer will be liable, in the form of ordinary

State taxes, for either more or less than his proportionate share of the cost of State government during this period.

If the Board of Public Works chooses to effect the conversion of the State's taxable year to that provided for by Chapter 825 on an ad hoc basis, changing over each political subdivision as it adopts the provisions of that Act relating to local assessments and taxation, such would curtail the power of the Board to require the collection of ordinary State taxes in the first six months of the calendar year in which this changeover is made. If the conversion is made on this ad hoc basis, the old State taxable year would conclude on December 31, but the new State year would not commence until the following July 1. The State cannot compel the collection of its taxes in advance of this latter date, in the period of conversion, for no fewer than two reasons. First, as respects the political subdivision making the conversion, Section 48(a) of Article 81, as amended by Chapter 825, would become fully effective during the conversion period, and that section provides that all ordinary State and local taxes shall not be due and payable until July 1. Second, the 6-month conversion period would be a part of neither the old nor the new taxable year; therefore, ordinary State taxes levied for a taxable year could not be attributed to it.

For every taxpayer in every political subdivision, whether the conversion to the State's new taxable year is achieved simultaneously or on a piecemeal basis or ad hoc basis, the 6-month conversion period (from *January 1* to June 30) will constitute a gap in State taxable years and, in a sense, in taxpayer liability for ordinary State taxes. While Chapter 825 authorizes the political subdivisions, where appropriate, to strike fractional levies for ordinary *local* taxes during the gap period, the Act contains no similar authorization for the imposition of ordinary *State* taxes. During the 18-month period covered by the gap period and the first State taxable year immediately following it, all those who pay ordinary State taxes will pay them for only a 12-month period.

From the taxpayer's point of view, however, this non-liability period is largely illusory, and few, if any, will gain any real benefit from it. It means essentially two things. First, those taxpayers who heretofore may have received bills for ordinary State taxes on January 1 or at some other time during the first six months of the calendar year will not be receiving these bills until July 1. Second, liens on real property for the payment of current ordinary State taxes, which heretofore may have attached on January 1 or at some other time during the first six months of the calendar year, will not attach until July 1. Of course, whatever practical benefits the gap period may confer upon the parties to a private transfer of real estate during that period, through the apportionment between them of ordinary State taxes, is a matter beyond the scope of this opinion.

From the State's point of view, the gap period represents the first year in which revenue from ordinary taxes, which heretofore may have come into the State treasury in the first six months of the calendar year, will not be received until after July 1; such of these taxes which heretofore have been collected between *January* 1 and October 1 (the date as of which taxes are in arrears) will, in the year of the gap period and henceforth, be collected between *July* 1 and October 1. In other words, when Chapter 825 becomes fully effective, virtually the only State real property taxes that will reach the State treasury in the first six months of each calendar year will be in the form of payments by delinquent taxpayers of taxes that become due and payable the preceding July 1.

This office has been reliably advised by the Comptroller's office that, presently, there is a sufficient surplus on hand to sustain the operations of our State government during the gap or conversion period. In the remote event that this projection is erroneous, operational costs during this period possibly might be met by one or both of two methods. First, if the surplus does not already exist, it could be created by an increase in the tax rate for those years before the full

impact of Chapter 825 becomes felt. Second, the legislature could establish the 6-month gap period as a taxable period and could provide that a separate fractional levy of ordinary State taxes be stricken for collection therein. In the event that this last alternative is pursued, it would be imperative that the changeover in the State's taxable year, for every political subdivision, be made at the same time; for such a levy would have to be imposed on a State-wide basis.

THOMAS B. FINAN, *Attorney General*.

STUART H. ROME, *Asst. Attorney General*.

TAXATION—INHERITANCE TAXES—EXEMPTION FROM COLLATERAL INHERITANCE TAXES TO BE STRICTLY CONSTRUED—LEGACY TO MEMBER OF RELIGIOUS ORDER NOT EXEMPT NOTWITHSTANDING THE LEGATEE'S GIFT THEREOF TO THE ORDER OF WHICH HE IS A MEMBER.

November 13, 1963.

Mr. Leroy C. Shaughnessy,
Register of Wills.

You advise that you have been presented with several claims for the exemption from collateral inheritance taxes provided in Article 81, Section 150, Annotated Code of Maryland, 1957 Edition, as amended. In each instance the legatee making the claim is a member of a religious Order which requires as a condition to entrance by an applicant that he take a vow of poverty and, in addition, agree to deliver to the Order any property to which he may become entitled after becoming a member thereof. The religious Orders in question are organized and operated exclusively for religious purposes and these organizations perform a substantial part of their activities within the State of Maryland or the District of Columbia.

You point out that when the legatee's vows as to poverty are honored by him, the legacy in question will be ultimately received and appropriated by the religious Order of which he is a member, and in light of this you ask whether the exemption is applicable.

The pertinent portion of Article 81, Section 150 provides:

“* * * 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 educa-

tional 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 * * *."

This exemption from collateral inheritance taxes, as any other tax exemption, is strictly construed in its application and unless the taxpayer can demonstrate that the exemption claimed has been clearly allowed by law, it must be denied. *Clarke v. Union Trust Company*, 192 Md. 127 (1949).

The Court of Appeals of Maryland in construing the exemption from collateral inheritance tax in *Coursey v. Hanover Bank*, 206 Md. 180, 185 (1955), stated:

"The obvious purpose of the exemption statute was to encourage bequests to corporations of the types mentioned, by foregoing the tax of 7½%, providing a substantial part of the money passing under the bequest could reasonably be expected to be spent for worthy public purposes in Maryland * * *."

The subject of the legacies in question passes to the religious organizations by virtue of a gift by the legatee rather than under the terms of the Will which made the legacies and, therefore, in our opinion does not qualify as exempt under any reasonable interpretation of this legislation. 42 Opinions of the Attorney General, 402 (1957).

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—INHERITANCE TAX—TAX EXEMPTION PROVIDED
FOR SURVIVING SPOUSE—U. S. BONDS REGISTERED IN
NAME OF DECEDENT “PAYABLE ON DEATH” TO SURVIV-
ING SPOUSE NOT TAXABLE UNDER EXEMPTION PROVIDED
FOR SURVIVING SPOUSE.

November 22, 1963.

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

You have asked our opinion as to whether inheritance taxes are due on certain United States Savings Bonds registered in the name of the deceased whose estate is being administered in the Orphans' Court of Baltimore City “payable on death” to his surviving spouse.

When dealing with these types of so called P.O.D. bonds in situations where the owner and the beneficiary were not husband and wife, this office has ruled that a tax on the whole value of the bond at the date of the death of the owner is payable by the beneficiary, inasmuch as during the lifetime of the owner the interest of the beneficiary can properly be characterized as a “mere expectancy” insufficient to raise the beneficiary to the status of a joint tenant with the owner of the bonds in question. 42 Opinions of the Attorney General 373 (1957); 27 Opinions of the Attorney General 401 (1942); Cf. 40 Opinions of the Attorney General 546 (1955); 24 Opinions of the Attorney General 835 (1939). However, the situation presented by your inquiry requires an examination of the exemption provided from inheritance taxation for the benefit of a surviving spouse, which is found in Article 81, § 151 of the Annotated Code of Maryland (1957 Edition, as amended), and provides:

“The taxes imposed by §§ 149 and 150 of this subtitle shall apply to all tangible or intangible property * * * including property over which the decedent retained any dominion during his life-

time, except, however, any interest, legal or equitable of any surviving spouse in any freeshare account in any building or homestead association or in any monies on deposit or in any registered bond of the United States in the name of husband and wife passing to such surviving spouse or in any property of any nature owned by husband and wife either as joint tenants or as tenants by the entireties passing to such surviving spouse." * * *

The exemption thus provided for the surviving spouse is the result of several amendments to this section of Article 81 dealing with the property subject to inheritance taxation. Just two years following the imposition of an inheritance tax against property passing on death to a surviving spouse of the decedent, the Legislature saw fit to lighten this burden on the surviving spouse by excepting from the property subjected to the tax:

"* * * any interest, legal or equitable of any surviving spouse in any freeshare account in any building or homestead association or in any monies on deposit in the names of husband and wife passing to such surviving spouse." Chapter 189 of the Acts of 1937.

By the Acts of 1945, Chapter 742, this exemption for interests of the decedent in "freeshare accounts" and "monies on deposit" passing to the surviving spouse was broadened when the exemption was repealed and reenacted as follows:

"* * * except, however, any interest, legal or equitable of any surviving spouse in any freeshare account in any building or homestead association or in any monies on deposit or in any registered bond of the United States in the name of husband and wife passing to such surviving spouse * * *"

We think it is clear that, following these two amendments, no matter what the form of registration of a bond of the United States in the names of the decedent and his

surviving spouse, if under the form of registration employed, the interests of the decedent passed automatically on his death to his surviving spouse by operation of law, the interest passing was not taxable under the exemption provided. Cf. 35 Opinions of the Attorney General 296 (1950). The question remains, therefore, as to the proper interpretation of the amendment to what is now Section 151 of Article 81, *supra*, by Chapter 620, Section 111 of the Acts of 1951. That amendment added to the exemption provision the following language:

“* * * or in any property of any nature owned by husband and wife either as joint tenants or as tenants by the entireties passing to such surviving spouse. * * *”

In extending the exemption beyond interests of the decedent in freeshare accounts, monies on deposit and United States bonds so as to have it apply to “any property of any nature”, the Legislature limited this extension of the exemption to property owned by husband and wife either as joint tenants or as tenants by the entireties. We can find nothing in this amendment to characterize it as other than an enlargement of the then existing exemption from inheritance taxation provided for a surviving spouse of a deceased. We therefore conclude that the limitation as to ownership of the property thereby additionally exempted to joint tenancies and tenancies by the entireties existing in such property between the decedent and his surviving spouse to have no application to freeshare accounts, monies on deposit and United States bonds which were exempt before its enactment. For this reason, we are of the opinion that the exemption of United States bonds passing to a surviving spouse by operation of law from inheritance taxation, notwithstanding the form of registration in the names of the decedent and the surviving spouse, was established by Chapter 742 of the Acts of 1945, *supra*, and was unaffected by the amendment enacted by Chapter 620, Section 111 of the Acts of 1951. Since the United States Savings Bonds in question under the registration whereby they

were payable on death to the surviving spouse passed by operation of law to that surviving spouse on the death of the owner, the interest so passing qualifies for the exemption.

What we have concluded here with regard to United States Savings Bonds registered in the name of the decedent and his surviving spouse, applies with equal force to interests of a decedent in "freeshare accounts" or in "monies on deposit" which his surviving spouse takes by operation of law but must be limited to these classes of property. When dealing with any other type of property passing by operation of law to a surviving spouse, the exemption has been limited by the Legislature to property "owned by the husband and wife either as joint tenants or as tenants by the entireties."

For the reasons expressed above, 44 Opinions of the Attorney General 375 (1959) has no application when applying the exemption embodied in Article 81, Section 151, *supra*, in favor of a surviving spouse to interests of a decedent in any "freeshare account in any building or homestead association or in any monies on deposit or in any registered bond of the United States in the name of husband and wife passing to such surviving spouse."

THOMAS B. FINAN, *Attorney General*.

ROBERT L. KARWACKI, *Asst. Attorney General*.

TAXATION—RECORDATION TAX—SEC. 277(A) OF ART. 81
DOES NOT IMPOSE A RECORDATION TAX UPON FINANCING
STATEMENTS RECORDED BY THE STATE DEPARTMENT OF
ASSESSMENTS AND TAXATION PURSUANT TO SEC. 9-
401(1) (B) OF ART. 95B.

December 16, 1963.

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

Your recent letter asks whether financing statements filed with and recorded by your Department pursuant to Section 9-401(1) (b) of Article 95B of the Annotated Code of Maryland, 1963 Supplement, are subject to the recordation tax imposed under Section 277(a) of Article 81 of the Annotated Code of Maryland, 1963 Supplement.

The first sentence of Section 277(a) provides:

“A tax is hereby imposed 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 with the clerks of the circuit courts of the respective counties, or the clerk of the Superior Court of Baltimore City, provided that conveyances to the State or any agency thereof or any political subdivision of the State shall not be subject to the tax or charge imposed by this section * * *.”

We need not be concerned here with the second and final sentence of this sub-section, for it merely defines what is meant by “instrument of writing”.

Section 277(a) imposes a tax only upon instruments “offered for record and recorded in this State *with the clerks of the circuit courts of the respective counties, or the clerk of the Superior Court of Baltimore City.*” (Emphasis supplied). Thus, no tax is imposed upon similar instru-

ments recorded with your Department, and whether the result thereby suggested is attributable to legislative oversight or to a specific legislative intent, is a matter of conjecture beyond the scope of this opinion.

Therefore, we are of the opinion that your Department may not collect any recordation tax on financing statements recorded by it, for the elemental reason that such a tax has not been imposed. Of course, nothing herein is intended to cast any doubt upon the authority of your Department to collect a filing fee as provided for by Section 9-403(5) of Article 95B of the Annotated Code of Maryland, 1963 Supplement.

THOMAS B. FINAN, *Attorney General*.

STUART H. ROME, *Asst. Attorney General*.

TAXATION—COMPTROLLER—INCOME TAX—LIQUIDATING DIVIDENDS—UNREALIZED APPRECIATION OF ASSETS DISTRIBUTED TO SHAREHOLDERS IN CORPORATE LIQUIDATION NOT TAXABLE AS “DIVIDEND”.

December 31, 1963.

*Frank W. Forestell, Esquire,
Income Tax Division,
Comptroller of the Treasury.*

Recently you have asked for our advice with respect to the income tax liability of the Maryland stockholders in a Maryland corporation known as Insuranshares Certificates, Inc. which is now in liquidation. We have been advised that the facts with respect to this liquidation are as follows:

Insuranshares Certificates, Inc. (hereinafter referred to as I.C.I.) was formed in 1929 as an investment company to hold shares of stock of various insurance companies. At the time of its incorporation the stock of I.C.I. was assigned a par value of \$10.00 per share and the stock was issued in exchange for shares of insurance stock held by five unincorporated investment trust funds. It is our understanding that a substantial portion of the present portfolio of I.C.I. consists of original shares which were acquired by I.C.I. at the time of its formation in 1929. Most of the balance of the shares in the I.C.I. portfolio were acquired through sales of original shares, and represent reinvestments of the proceeds. The incorporation of I.C.I. was almost coincident with the stock market crash. The effect of the depression on the securities held by I.C.I. is indicated by the following:

	<i>Cost</i>	<i>Market</i>
Report of five trust funds		
on 8/31/29	\$13,775,592.09	\$18,427,801.00
Report of ICI on 6/30/31	13,481,880.38	9,237,409.25
Report of ICI on 6/30/32	12,545,121.21	2,599,321.25

The unfortunate timing of the incorporation of I.C.I. resulted in an overall deficit. Through December 31, 1962

(the last day of business prior to liquidation) this deficit is summarized as follows:

Income for interest and dividends	
less expenses and dividends paid	\$1,545,533.37
Net loss on securities sold	4,468,655.27
Accumulated deficit	\$2,923,121.90

This accumulated deficit is not reflected on the books of the corporation as presently kept because the corporation in 1931 recapitalized, and thereby reduced the capital stock of I.C.I. from a par value of \$10.00 per share to a par value of \$1.00 per share. The resulting adjustment of \$9.00 per share (aggregating approximately \$8,000,000.00) was credited to paid-in surplus and used to absorb the decline in value of securities. The following is a comparison of the balance sheets from I.C.I. as of December 31, 1962 showing the effect of this recapitalization.

	Books of ICI As Though No Recap- italization Had Occurred	Books of ICI Reflecting 1931 Recapitalization
Net Worth		
Capital Stock	\$1,547,680.00	\$ 186,700.00
Paid-In Surplus	3,444,435.06	
Accumulated Earnings		
(Deficit)	(2,923,121.90)	1,882,293.16
	\$2,068,993.16	\$2,068,993.16
Less: Cost of 3000 shares of Treasury Stock	115,768.17	115,768.17
	\$1,953,224.99	\$1,953,224.99

Unrealized Appreciation
on Securities in

Portfolio	\$6,098,893.41 ¹	\$6,098,893.41 ¹
	<u>\$8,052,118.40</u>	<u>\$8,052,118.40</u>

Thus, if the 1931 recapitalization is ignored it appears that as of December 31, 1962 I.C.I. has suffered a net loss as a result of the sales of various shares of stock held by it, which loss has resulted in an over-all accumulated earnings deficit.

A plan of liquidation was adopted by the stockholders of I.C.I. and under the plan corporate activity ceased as of December 31, 1962, with the actual liquidating distribution to shareholders to be carried out during 1963. Under the plan, the portfolio stocks held by I.C.I. are distributable in kind to the extent practicable. That is to say, a rate of distribution of each portfolio stock to each shareholder in I.C.I. was determined, and the stock actually distributed to each shareholder of I.C.I. upon liquidation. Each shareholder received, not cash, but rather a distribution in kind of the assets of I.C.I. The balance sheet of I.C.I. as of December 31, 1962, indicates that as of that date there was an unrealized appreciation of the market value of the portfolio securities held by I.C.I. in the amount of \$8,106,593.41, thus, although the book value of these assets distributed is less than the original par value of the stock of I.C.I., the market value of these assets distributed is substantially in excess of the original capital contribution attributable to the I.C.I. stock.

The question on which you seek our advice is whether this unrealized appreciation in the value of the portfolio stock distributed in kind to the I.C.I. shareholders over and above

¹In actual fact the unrealized appreciation was \$8,106,593.41; however, the books of I.C.I. carry it at \$6,098,893.41 after deducting the sum of \$2,007,700.00 representing a provision for the approximate amount of federal income tax on the appreciation should these assets be sold by the corporation.

the original capital contribution attributable to the I.C.I. stock may be taxed to these shareholders.¹

For the reasons expressed below it is our opinion that this unrealized appreciation is not to be taxed to the shareholder recipients since it does not represent "earnings of the corporation" as that term is used in Section 279(j) of Article 81 of the Maryland Code (1957 Edition, as amended).

The taxable status of liquidating dividends is to be ascertained by reference to a number of sections of Article 81 of the Maryland Code. Section 288 imposes a tax on the taxable net income of individuals or corporations. Section 285 specifies that "taxable net income" is the "gross income" of the taxpayer less certain deductions and exemptions. Section 280 defines "gross income" as including "dividends" and Section 279(j) defines "dividend" as follows:

"'Dividend' means any distribution made by a corporation (domestic or foreign) out of its net profits, whenever earned, to its stockholders or

¹ We understand that your department has already determined to ignore the fact that the par value of each share of I.C.I. stock was reduced from \$10.00 to \$1.00 in 1931 on the theory that such a bookkeeping device will not preclude the taxpayer from asserting the fact that the original capital contribution was \$10.00 per share and not \$1.00 per share. Such a view would seem reasonable and in accordance with advice previously received by you from this office in 38 Opinions of the Attorney General 308 where you were advised to ignore a restatement of a balance sheet where the value of the property held by a corporation which had appreciated was written up on the books of the corporation and the increased value was credited to surplus. This office stated at Page 310 as follows:

"You also suggest that the act of the corporation in writing up the real estate on its books and making a corresponding credit to surplus was a realization by it which would convert the appreciation in value into earnings. However, it would not seem to us that taxable consequences should turn, in this case at least, upon a purely internal bookkeeping technique. Any surplus so created would be capital surplus rather than earned surplus under the rationale of the *Sears* case, *supra*." (*Sears v. Commissioner*, 78 N. E. 2d 89 (Mass., 1948).)

members, whether such distribution be made in cash or other property, except stock of the same class in the corporation. *Amounts paid in liquidation or dissolution of a corporation shall be treated as dividends to the extent that they represent earnings of the corporation.*" (Emphasis supplied.)

Thus, under the provisions of Section 279(j) the test of whether or not a liquidating distribution is to be treated as a dividend is whether it represents "earnings of the corporation", and the problem before us therefore is whether or not unrealized appreciation is to be considered as "earnings" of the corporation.

That the test of taxability is whether or not the earnings are those of the corporation rather than those of the liquidating distributee was affirmed by the Maryland Court of Appeals in the recent case of *Rafferty v. Comptroller*, 228 Md. 153 (1962). There the court determined that any distribution made by a corporation out of its net profits to its stockholders was a taxable dividend despite the fact that a distribution in full liquidation was in an amount less than the basis of the stock held by the liquidating distributee. Thus, in the *Rafferty* case a person suffering a capital loss as a result of a liquidating distribution was nevertheless held to be subject to tax to the extent that the liquidating distribution was attributable to the net profits of the corporation. See also 20 Md. L. Rev. 266, Cromwell "*Liquidating Dividends Under The Maryland Income Tax.*"

The problem of unrealized appreciation as "earnings" of the corporation was first considered by this office in an opinion to you dated August 7, 1953, reported in 38 Opinions of the Attorney General 308. In that opinion we were asked whether or not the distribution to the sole shareholder, of real property held by a corporation, either as an original contribution by the shareholder or purchased by the corporation out of capital, was a dividend to the shareholder to the extent that the appreciation in the value of the real estate exceeded that portion of the stockholder's contribution to the company's capital allocable to such

property. In our opinion we determined that a sale by a corporation of property with a resulting realization of gain equalled "earnings", and that unrealized appreciation was not to be considered as earnings. As stated in that opinion:

"* * * It is the general principle of income taxation that realization must occur before 'earnings', 'profits' or 'gains' come into being. In this case, whether or not there was a realization by the shareholder, there was none by the corporation itself. Thus, the dividend in kind was not from earnings, but rather represented a return of capital."

This opinion was based on the theory that the corporation had never realized income from the appreciated real estate because the corporation had never sold or exchanged it, and thus the additional value attached to the property had never been converted into "earnings of the corporation".

Of course, this opinion in 38 Opinions of the Attorney General is not to be interpreted as a holding that the taxable status of the distribution is to be determined by referring to the actual property distributed to ascertain whether it constituted a part of the capital of the corporation as distinguished from corporate property which was purchased out of corporate earnings. In an opinion reported at 41 Opinions of the Attorney General 343, it was stated that, generally speaking, corporate distributions, even though out of the original capital of the corporation, were to be considered to be dividends to the stockholders to the extent that earnings and profits of the corporation existed "since all distributions are presumed to be from earnings and profits as such existed."

The result reached by this office in 38 Opinions of the Attorney General was foreshadowed by the case of *Sears v. Commissioner of Corporations*, 78 N.E. 2nd 89 (Mass., 1948) which involved a corporate dissolution. In that case capital funds of a Massachusetts corporation had been used to purchase stock in another company which had increased in value while held by the corporation. The stock was dis-

tributed to the shareholders in kind and it was contended that the shareholders were subject to the Massachusetts income tax on the appreciation in value of the property. The court held that there was no realization of income by the corporation and hence the dividend was made from capital rather than from "accumulated profits". The Massachusetts statute taxed dividends from accumulated profits but exempted distributions from capital. The Massachusetts court specifically ruled that there was no realization of income by the corporation although there might indeed be realization of income by the shareholder.

As stated by the Massachusetts court:

" 'Profits' does not include mere appreciation in market value. It commonly involves dealings of some kind and a shifting of assets from one form to another. Subsection (g) was designed to make clear that no income tax was to result from distributions of capital assets, but that such a tax was to result only from distributions of assets which had already acquired the status of profits * * *."

A similar result to that reached in the *Sears* case was reached by the Court of Appeals of Kentucky in *Luckett v. Kentucky Trust Company*, 320 S.W. 2nd 790 (1959) which involved the distribution in kind of a parcel of real estate in a corporate liquidation where the real estate had appreciated in value. The Kentucky income tax law defined dividends as any distribution by a corporation "out of its current earnings or profits, or out of its accumulated earnings or profits, to its shareholders or members, whether the distribution was made in cash or other property * * *." The Kentucky court, commenting on the unrealized appreciation on the value of the real estate, noted as follows:

"* * * In this case the appreciation is wholly unrealized and there has been no transaction which has established a realization of either profit, earnings or income. There has been no change in the original land investment. There may be some

enhancement of the value of the property in the form of 'unearned increment', but its amount cannot be determined by transfer on dissolution of a corporation alone where no sale is involved * * *."

The *Luckett* decision confined the earlier case of *Collins v. Kentucky Tax Commission*, 261 S.W. 2nd 303 (1953) (holding a liquidating distribution in kind to be taxable) to the situation where, immediately after the distribution in kind, the stockholder's in concert arrange for a sale of the distributed assets, thus, making the liquidation "in effect a distribution of earnings or profits."

Therefore, in view of the authorities cited above it is the opinion of this office that the unrealized appreciation in the value of the portfolio securities distributed to the stockholders of I.C.I. are not to be considered as "earnings" of I.C.I. and therefore are not taxable to the stockholder distributee under the provisions of the Maryland income tax law.

THOMAS B. FINAN, *Attorney General*.

RUSSELL R. RENO, JR., *Asst. Attorney General*.

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