ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1968

FRANCIS B. BURCH
ATTORNEY GENERAL

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

ATTORNEYS GENERAL OF MARYLAND

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

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

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

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

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

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

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

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 Superseded by Carroll.

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

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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
[1]Luther Martin	1818
Nathanial Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
[2]Alexander Randall	1864
Isaac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William Pinkney Whyte	1887
John P. Poe	1891
Harry M. Clabaugh	1896
George R. Gaither, Jr.	1899
Isidor Rayner	1900
William S. Bryan, Jr.	1904
Isaac Lobe Straus	1908
Edgar Allan Poe	1912
Albert C. Ritchie	1916
[3]Ogle Marbury	1918
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr.	1930
Herbert R. O'Conor	1934
William C. Walsh	1938
William Curran	1945
[4]Hall Hammond	1946
[5]J. Edgar Harvey	1952
[6]Edward D. E. Rollins	1952
[7]C. Ferdinand Sybert	1954
[8 9 10]Thomas B. Finan	1961
[11]Robert C. Murphy	1966
[12]Francis B. Burch	1966

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

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

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

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

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

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

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

[9]Elected at election of November, 1962.

[10]On October 13, 1966, Mr. Finan resigned as Attorney General to accept an appointment as an Associate Judge of the Court of Appeals of Maryland.

[11]On October 13, 1966, Mr. Robert C. Murphy was sworn in as Attorney General to serve for Mr. Finan's unexpired term.

[12]Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.

STATE LAW DEPARTMENT

Francis B. Burch	Attorney General
Robert F. Sweeney	Deputy Attorney General
[1]David T. Mason	Assistant Attorney General Chief, CRIMINAL DIVISION
Thomas A. Garland	Assistant Attorney General Chief, CIVIL DIVISION
[2]James R. Klein	First Assistant Attorney General
[3]Edward F. Borgerding	First Assistant Attorney General
Franklin Goldstein	Assistant Attorney General
Fred Oken	Assistant Attorney General
[4]Edward L. Blanton, Jr.	Assistant Attorney General
[5]Morton A. Sacks	Assistant Attorney General
[6]Alan M. Wilner	Assistant Attorney General
Donald Needle	Assistant Attorney General
Alfred J. O'Ferrall, III	Assistant Attorney General
[7]Frank A. DeCosta	Assistant Attorney General
Lewis A. Noonberg	Assistant Attorney General
S. Leonard Rottman	Assistant Attorney General
Bernard L. Silbert	Assistant Attorney General
[8]William B. Whiteford	Assistant Attorney General
Henry J. Frankel	Assistant Attorney General
George W. Liebmann	Assistant Attorney General
[9]Thomas N. Biddison, Jr.	Assistant Attorney General
[10]James L. Bundy	Assistant Attorney General
[11]Martin B. Greenfeld	Assistant Attorney General
[12]John J. Garrity	Assistant Attorney General
[13]H. Edgar Lentz	Assistant Attorney General
[14]Henry R. Lord	Assistant Attorney General
Jon F. Oster	Special Assistant Attorney General for the Comptroller of the Treasury
[15]Anthony M. Carey	Special Assistant Attorney General for the Department of Assessments and Taxation
[16]Joseph R. Raymond	Special Assistant Attorney General for the Department of Assessments and Taxation
[17]Loring E. Hawes	Special Assistant Attorney General for the University of Maryland
[18]Mrs. Estelle A. Fishbein	Special Assistant Attorney General for the University of Maryland
William E. Brannan	Special Assistant Attorney General for the Unsatisfied Claim and Judgment Fund
Richard C. Rice	Special Assistant Attorney General for the Department of Forests and Parks

Girard H. Kessler	Special Assistant Attorney General for the State Retirement Systems
Joseph D. Buscher	Special Assistant Attorney General for the State Roads Commission
William T. S. Bricker	Special Assistant Attorney General for the Department of Motor Vehicles
Louis E. Schmidt	Special Assistant Attorney General for the State Health Department
Donald H. Noren	Special Assistant Attorney General for the State Health Department
Edward R. Jeunette	Special Assistant Attorney General for the Department of Mental Hygiene
George B. Cavanaugh	Special Attorney for the Department of Mental Hygiene
J. Howard Holzer	Special Attorney for the State Accident Fund
Arnold Weiner	Special Assistant Attorney General for the Department of Employment Security
Edward S. Digges	Special Assistant Attorney General for the Department of Chesapeake Bay Affairs
N. Barton Benson	Special Assistant Attorney General for the State Insurance Department
Albert A. Levin	Special Attorney for the Second Injury Fund—Workmen's Compensation Commission
J. Max Millstone	Special Attorney for the Department of Public Improvements
Norman Polovoy	Assistant Attorney General, Chief, CONSUMER PROTECTION DIVISION
John N. Ruth	Assistant Attorney General, Consumer Protection Division
[19]Frederick T. Dunn	Investigator, Consumer Protection Division
Philip Z. Altfeld	Securities Commissioner
Frederick O'Fiesh	Assistant Securities Commissioner
Miss Dickee M. Howard	Assistant Attorney General
Miss Jeanette M. Finnegan	Administrative Assistant—State Law Department
Mrs. Katherine D. Hudlin	Administrative Assistant II
Mrs. Edith H. T. Vester	Accounting Associate
Miss Agnes T. Conroy	Stenographer, Law and Legislative

Miss Inez M. Bull	Stenographer, Law and Legislative
Miss Adele Kemper	Stenographer, Law and Legislative
Mrs. Ida Beyer Hoover	Stenographer, Law and Legislative
Mrs. Gwendolyn J. Clarke	Stenographer, Law and Legislative
Mrs. Mary E. Munley	Stenographer, Law and Legislative
Mrs. Suzanne Estep Fraunhoffer	Stenographer, Law and Legislative
Mrs. Mary G. Kress	Stenographer, Law and Legislative
Miss Frances M. Schroeter	Stenographer, Law and Legislative
Mrs. Anna B. Alokones	Stenographer, Law and Legislative
Mrs. Marian P. Otto	Stenographer, Law and Legislative
Mrs. Edyth T. Quantz	Stenographer, Law and Legislative
Mrs. Ruby M. Doyle	Stenographer, Law and Legislative
Mrs. Beverly P. Strohm	Stenographer, Law and Legislative
Mrs. Hope Ward	Stenographer, Law and Legislative
Mrs. Melinda L. Biddlecomb	Stenographer, Law and Legislative
Mrs. Anne R. Marder	Secretary III
Mrs. Mary M. McDonald	Secretary II
Mrs. Rosalie Petrella Wilson	Secretary II
Miss Joan A. Willner	Secretary I

[1]Resigned December 31, 1968 to accept appointment as Chairman, Board of Parole
[2]Deceased, August 17, 1968
[3]Appointed First Assistant Attorney General August 17, 1968
[4]Resigned April 30, 1968
[5]Resigned September 3, 1968
[6]Resigned January 31, 1968
[7]Resigned August 30, 1968 to become Administrative Assistant to the Governor
[8]Resigned February 16, 1968
[9]Appointed February 19, 1968
[10]Appointed October 1, 1968
[11]Appointed September 16, 1968
[12]Appointed October 7, 1968
[13]Appointed January 2, 1968
[14]Appointed September 30, 1968
[15]Resigned July 1, 1968
[16]Appointed July 1, 1968
[17]Resigned April 1, 1968
[18]Appointed June 18, 1968
[19]Appointed June 5, 1968

ANNUAL REPORT FOR 1968

January 1, 1969

Honorable Marvin Mandel
Governor of Maryland
State House
Annapolis, Maryland

DEAR GOVERNOR MANDEL:

Pursuant to the provisions of Section 10 of Article 32A of the Annotated Code of Maryland (1957 Edition), I am herewith submitting to you a report of the proceedings and activities of the State Law Department for the period beginning January 1, 1968, and ending December 31, 1968.

The total number of cases in courts of various jurisdictions increased substantially during 1968. The Court of Special Appeals, which began its operation in 1967, showed for the September Term, 1968, an increase of approximately 13.10% in the number of criminal appeals docketed. There was also a substantial increase in the number of civil cases appealed to the Court of Appeals during this period.

The Civil and Criminal Divisions of the State Law Department are both working at full capacity and the demands on the personnel of these Divisions for approval of legislation, opinions and the writing of briefs and miscellaneous pleadings and appearances in court continue to mount.

I am indicating below the various courts and the number of cases in each in which the Department participated. Some of these cases have been finally completed; others are in the process of trial; and some are still pending.

Supreme Court of the United States		62*
*(includes Petitions for Certiorari)		
United States Court of Appeals for the Fourth Circuit		111
United States District Court for the District of Maryland		156
Court of Appeals of Maryland September Term, 1968		
Civil Appeals	40	
Criminal Appeals	11	
Post Conviction	2	
Miscellaneous Docket (Petitions for Certiorari)	242	
Total		295
Court of Special Appeals of Maryland September Term, 1968		
Criminal Appeals Docketed	500	
Post Conviction	122	
Defective Delinquent	23	
Total		645
Cases in Lower Courts		93
Maryland Tax Court Cases	185 Closed in 1968 250 Filed in 1968	
Department of Employment Security	63 Circuit Courts and Baltimore City	
State Accident Fund	295 Circuit Courts and Baltimore City	

The Consumer Protection Division has been in operation for 18 months and now receives an average of 1,500 complaints, inquiries and requests for assistance each week from Maryland consumers. In an effort to make its services more readily available to citizens living in the inner city, we have recently assigned an Investigator to each of four storefront Police Community Relations Centers in Balti-

more. These centers are located on Pennsylvania Avenue, Cherry Hill Shopping Center, Greenmount Avenue and East Baltimore Street. We believe that this effort to get closer to those citizens who have the greatest need for our services is a positive and forward step in our continuing efforts to give greater protection and assistance to our citizens.

In addition to our inner city locations, the Consumer Protection Division continues to assign investigators on a monthly basis to Hagerstown and Cumberland to serve the people of Western Maryland, Easton and Salisbury on the Eastern Shore and Silver Spring, Rockville and Upper Marlboro to assist citizens living in the Greater Washington Metropolitan area. In addition, we also visit Fort Meade and the Social Security Complex in Woodlawn on a regular monthly basis. Our efforts to make the Division's services more convenient and available to citizens throughout the State have been warmly received.

The Division also recently passed a milestone when its total monetary recoveries, refunds and replacements of merchandise topped one million dollars. The Consumer Protection Division has also developed a consumer education program which is now being made available to schools throughout the State. The Division will continue to develop innovative programs and techniques in order to perform a more effective service for the citizens of Maryland.

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

All bonds submitted to the Department of 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 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 the Department

as to legality before being filed with the State departments indicated by statute.

The General Assembly convened on January 17, 1968, and adjourned on March 26, 1968. The Annapolis office of the Attorney General during this session was in charge of Mr. James B. Cook, Assistant Attorney General, although Mr. Sweeney and I were in regular attendance, together with other members of my 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 1965 then Governor J. Millard Tawes, because of the great interest of the citizens of Maryland in modernizing and revising the present Maryland Constitution, appointed a nonpartisan commission of outstanding Marylanders to study the need for a Constitutional Convention for the purpose of preparing recommendations as to the necessary changes in the State Constitution. The Legislature then enacted legislation which enabled the calling of a convention and provided for the election of delegates to draft a proposed new Constitution. The final draft of the proposed document was approved by the Convention on January 8, 1968, and on May 14, 1968, a special election was held to permit the voters of Maryland to accept or reject the proposed State Constitution. The majority of the votes cast during this election were against the adoption of the proposed new Constitution.

During the session of the Constitutional Convention, the State Law Department performed in the capacity of legal adviser to the Convention and advised the delegates as to the proper form and legal sufficiency of many proposals considered by them.

In February, 1968, I attended the mid-year meeting of the National Association of Attorneys General in Washington, D. C. Deputy Attorney General Robert F. Sweeney accompanied me. In March, accompanied by the Department's entire Criminal Division, I participated in the mid-winter meeting of the State's Attorneys Association in Baltimore. During the latter part of April, Mr. Norman

Polovoy, Chief of the Consumer Protection Division, and I attended the Southern Conference of the National Association of Attorneys General. In June Mr. Sweeney and I attended the 62nd Annual Meeting of the National Association of Attorneys General in Boston, Massachusetts, and during the early part of July we were present at the Fourth Judicial Conference in Hot Springs, Virginia. During the early part of December Messrs. Sweeney, Polovoy and I participated in the meeting of the Executive Committee of the National Association of Attorneys General in San Francisco, California.

This office sustained a grievous loss on August 17, 1968, with the sudden and untimely passing of James R. Klein, First Assistant Attorney General. I appointed Edward F. Borgerding, Assistant Attorney General, to replace Mr. Klein as First Assistant.

A detailed Financial Statement of the State Law Department for the fiscal year beginning July 1, 1967, and ending June 30, 1968, is included herewith.

When I took office as Attorney General, I instituted a policy of evaluating the performance and work load of each Assistant Attorney General at least twice a year. These evaluations have been extremely helpful in keeping abreast of the State's increasing demand for legal services, and I shall continue this practice throughout my term of office.

I hope this report of our activities for the year 1968 meets with your approval.

Sincerely,

FRANCIS B. BURCH,
Attorney General.

Financial Statement of the State Law Department for the Fiscal Year Beginning July 1, 1967 and Ending June 30, 1968

Appropriations and Budget Credits

Program .01	$580,401.25
Program .02	4,891.00
Program .03	809.00
Program .04	60,801.00
Program .05	62,685.00
	$709,587.25

Program .01

Legal Counsel and Advice:	
Appropriation	$579,281.00
Appearance Fees	363.00
Budget Credits	1,120.25
	$580,764.25
Appearance Fees turned into State Treasury	363.00
Net Appropriation plus budget credits	$580,401.25

Salaries:		
Attorney General	$ 20,000.00	
Deputy Attorney General	19,250.00	
Assistant Attorney General III (3)	49,928.00	
Assistant Attorney General II (11)	167,372.00	
Special Attorney IV (Part salary)	7,150.00	
Special Attorney III (2)	16,353.00	
Administrative Assistant, State Law Department	12,290.00	
Administrative Assistant II	8,794.00	
Accounting Associate II	8,478.00	
Stenographer, Law and Legislative (12)	84,119.00	
Secretary II	5,329.00	
Salaries		$399,063.00

Expenses (Exclusive of Salaries):		
Technical and Special Fees	$ ——	
Communications	23,813.00	
Travel	12,292.00	
Motor Vehicle Operation and Maintenance	3,472.00	
Contractual Services	65,354.00	
Supplies and Materials	4,876.00	
Equipment—Replacement	4,349.00	
Equipment—Additional	11,132.00	
Fixed Charges	53,200.00	
Total Operation Expenses	$178,488.00	
Salaries	$399,063.00	
Total Expenditures		$577,551.00
Original General Fund Appropriation		$524,116.00
Transfer of General Fund Appropriation		55,165.00
Total General Fund Appropriation		$579,281.00
Less: General Fund Reversion		1,730.00
Net General Fund Expenditure		$577,551.00

Program .02

Subversive Activities Control:		
Appropriation		$ 4,891.00
Salaries:		
Assistant Attorney General II	$ 3,579.00	
Salaries	$ 3,579.00	
Expenses (Exclusive of Salaries):		
Contractual Services	$ 1,261.00	
Total Expenses	$ 1,261.00	
Salaries	3,579.00	
Total Expenditures		$ 4,840.00

Original General Fund Appropriation		$ 8,038.00
Transfer of General Fund Appropriation		— 3,147.00
Total General Fund Appropriation		$ 4,891.00
Less: General Fund Reversion		51.00
Net General Fund Expenditure		$ 4,840.00

Program .03

Sundry Claims Board:		
Appropriation		$ 809.00
Expenses:		
Contractual Services	$ 772.00	
Total Expenditures		$ 772.00
Original General Fund Appropriation		$ 5,000.00
Transfer of General Fund Appropriation		— 4,191.00
Total General Fund Appropriation		$ 809.00
Less: General Fund Reversion		37.00
Net General Fund Expenditure		$ 772.00

Program .04

Division of Securities:		
Appropriation		$ 60,801.00
Salaries:		
Securities Commissioner	$ 12,511.00	
Assistant Securities Commissioner	16,169.00	
Assistant Attorney General II	12,735.00	
Stenographer, Law and Legislative	7,542.00	
Secretary II	4,859.00	
Salaries	$ 53,816.00	

Expenses (Exclusive of Salaries):		
Communications	$ 1,600.00	
Travel	1,745.00	
Contractual Services	589.00	
Supplies and Materials	1,515.00	
Equipment—Additional	538.00	
Fixed Charges	691.00	
Total Operation Expenses	$ 6,678.00	
Salaries	53,816.00	
Total Expenditures		$ 60,494.00
Original General Fund Appropriation		$ 50,767.00
Transfer of General Fund Appropriation		10,034.00
Total General Fund Appropriation		$ 60,801.00
Less: General Fund Reversion		307.00
Net General Fund Expenditure		$ 60,494.00

Program .05

Division of Consumer Protection:		
Appropriation		$ 62,685.00
Salaries:		
Assistant Attorney General III	$ 17,600.00	
Chief Investigator, Consumer Protection	10,811.00	
Investigator, Consumer Protection	510.00	
Stenographer, Law and Legislative	6,469.00	
Secretary II	2,791.00	
Salaries	$ 38,181.00	

Expenses (Exclusive of Salaries):		
Communications	$ 1,706.00	
Travel	3,404.00	
Contractual Services	11,153.00	
Supplies and Materials	994.00	
Equipment—Additional	1,797.00	
Fixed Charges	5,223.00	
Total Operation Expenses	$ 24,277.00	
Salaries	38,181.00	
Total Expenditures		$ 62,458.00
Original General Fund Appropriation		$ 62,685.00
Less: General Fund Reversion		227.00
Net General Fund Expenditure		$ 62,458.00

SUMMARY

Total Net Appropriations and Budget Credits		
Program .01	$580,401.25	
Program .02	4,891.00	
Program .03	809.00	
Program .04	60,801.00	
Program .05	62,685.00	
Total		$709,587.25

Total Expenditures	
Program .01	$577,551.00
Program .02	4,840.00
Program .03	772.00

Program .04	60,494.00	
Program .05	62,458.00	
	$706,115.00	
Budget Credits	1,120.25	
	$707,235.25	
Total Reversion to State Treasury	2,352.00	
Total		$709,587.25

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL of MARYLAND

ACCIDENT FUND, STATE

THE RESERVES AND SURPLUS OF THE STATE ACCIDENT FUND ARE FOR THE EXCLUSIVE BENEFIT OF INSURED POLICYHOLDERS AND THEIR EMPLOYEES, AND SUCH ASSETS CANNOT BE USED FOR GENERAL STATE PURPOSES.

July 3, 1968.

Walter E. Kennedy, Chairman.

You ask if the premiums, reserves and other monetary assets, in excess of operating expenses, belong exclusively to the policyholders of the State Accident Fund, and you ask if the Legislature may turn over such assets to the Treasurer of the State of Maryland to be used by it for general State purposes. In our opinion such assets belong exclusively to the policyholders of the State Accident Fund, and the Legislature may not turn over such assets to the Treasurer of the State to be used by it for general State purposes.

Conversely stated, your question asks if an employer can proceed against the State of Maryland if an award is passed by the Workmen's Compensation Commission against an employer insured by the State Accident Fund and if the Fund were insolvent. In our opinion the answer to this question also is "No.".

As you are aware, the State Accident Fund was created by Chapter 800 of the Acts of 1914, to insure those employers against claims included in the compulsory Workmen's Compensation Law who do not want to or could not obtain insurance from private casualty companies.

The Workmen's Compensation Act, creating the State Accident Fund, acknowledges and has since its inception acknowledged that a duty of the State Accident Fund relative to expenses, reserves, and surplus is to collect money for the same through premiums paid by insured employers. This duty is set forth in Section 78 of Article 101 of the

Code which requires the State Accident Fund to set up a catastrophe fund to protect against any catastrophic hazard. Reserves adequate to meet anticipated losses are dictated both by this Section and sound business practice. The Legislature recognizes and so states in Section 80 of Article 101 that such assets belong to the State Accident Fund. This is acknowledged again in Section 74 which provides that the Commissioners of the State Accident Fund have the power to declare dividends to the subscribers or policyholders in the Fund, either in the form of cash refunds or credits.

A state insurance fund is not synonymous with the state, *State v. Padgett,* 54 N.D. 211, 209 N.W. 388; *Bordson v. North Dakota Workmen's Compensation Bureau,* 49 N.D. 534, 191 N.W. 839, nor is the bureau which administers the fund the state, *State v. Padgett, (supra)*. Although the policyholders have a real interest in the assets of the Fund, there is nothing in the Maryland Statute which directly or impliedly gives such policyholders a right of action against the State in the event the Fund were to become insolvent.

All monies of the Fund have been and are acquired through the collection of premiums from employers.[1] The amount of a premium is determined by the Fund and is based upon the employer's payrolls, reported under proper classification, times the applicable rate per $100.00 of payroll. The rate is determined by an annual review of the loss experience of the particular employer. The premiums thus collected pay compensation to injured employees against the employer-policyholder and the Fund. The balance of the premiums collected constitutes the reserves and surplus of the Fund after the payment of operating expenses. The reserves are set up to provide for any future incurred losses or reopened cases. The surplus from some years is required to offset any deficit which may occur in other years.

The maintenance of adequate reserves and surplus is mandatory under sound business practice as well as under the provisions of Article 101, Section 78 of the Maryland Code noted above. This Section states:

"Surplus; reserve.

Ten per centum of the premiums collected from employers insured in the State Accident Fund shall be set aside by the commissioners of the State Accident Fund for the creation of a surplus until such surplus shall amount to the sum of fifty thousand dollars, and thereafter five per centum of such premiums until such time as in the judgment of said commissioners such surplus shall be sufficiently large to cover the catastrophe hazard. The commissioners shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity."

As a general proposition the State Accident Fund and the funds of the other sixteen (16) States which have similar state insurance have been created not for the benefit of the state but for the benefit of both employers and employees, *Thompson v. State Compensation Commissioner,* 54 S.E. 2d 13, 133 W. Va. 95. Such funds have been held to have the status of private insurance companies, *Rivera v. Johnston,* 225 P. 2d 858, 71 Idaho 70; *Commissioners of State Ins. Fund v. Low,* 138 N.Y. S. 2nd 437, 440, 285 App. Div. 525, affirmed 170 N.Y.S. 2d 795, 3 N.Y. 2d 590, 148 N.E. 2d 136.

The state has been held to have no interest in the fund other than in its proper administration, *Senske v. Fairmont & Waseca Canning Co.,* 45 N.W. 2d 640, 232 Minn. 350.

It has been held that debtors to the fund are not debtors to the state, *Chez v. Industrial Commission of Utah,* 62 P. 2d 549, 90 Utah 447, 108 A.L.R. 365, and the fund itself is held not a state fund, *Bordson v. North Dakota Workmen's Compensation Bureau,* 191 N.W. 839, 49, N.D. 534.

Claims against funds similar to the State Accident Fund are held not claims against the state, as noted in *State v. Padgett, (supra).* Thus if the Legislature were to appropriate the assets of the State Accident Fund and use them

for general State purposes, employers would be deprived of the protection of adequate reserves to guard against claims by injured employees. This well could subject the State to endless suits by policyholders and could raise a serious constitutional question of whether such policyholders are deprived of property without due process of law.

It has been held generally that funds such as the State Accident Fund are special, or trust funds or trust accounts, *House v. State Industrial Accident Commission,* 117 P. 2d 611, 167, Or. 257. The monies thus collected by state funds must be used for workmen's compensation purposes, *McArthur v. Smallwood,* 281 S.W. 2d 428, 225 Ark. 328, and are not available for the general or other purposes of the State, *McArthur v. Smallwood,* (*supra*). The *McArthur* case would seem to answer fully the questions raised by you.

Such funds are private funds as contradistinguished from public funds in the sense that they are collected from not all the people of the state by way of taxation but by way of insurance premiums from certain individuals, corporations, associations, etc., of the state engaged in conducting certain occupations and employments denominated in the act, *Industrial Commission v. School Dist. No. 48 of Maricopa County,* 108 P. 2d 1004, 56 Ariz. 576.

The fund is a public fund only in the sense of being administered by a public body, *Chez v. Industrial Commission of Utah,* 62 P. 2d 549, 90 Utah 447, 108 A.L.R. 365. The fund's character as a public fund may be indicated by a statute providing that industrial insurance premiums may be paid only into the state treasury for the accident and medical aid fund. But it is not public money in the sense of being money of the state to be used for, and on behalf of, the state for a state expenditure, *Chez v. Industrial Commission of Utah,* (*supra*). The *Chez* case, too, would seem to answer fully the questions raised by you.

Generally, such funds are considered as an arm or department of the machinery set up by the Workmen's Compensation Act, the administration of which is given to a desig-

nated board, bureau, or commission, such as the State Accident Fund of Maryland.

With reference to a particular state workmen's compensation insurance fund, it has been declared that a fund's entire framework, including its organization, powers, duties, and obligations, shows that it was designed to be self-operating, *Burum v. State Compensation Ins. Fund,* 184 P. 2d 505, 30 C. 2d 575, and of a unique and quite special character. In this connection, the State Accident Fund, unlike other agencies of the State, must be in a financial position to provide protection for its insured to an extent that is at least on a par with private casualty insurance companies. This requires that the State Accident Fund not only maintain an adequate sum of money set aside for catastrophies as noted above, but also requires that the State Accident Fund carry reinsurance.

The Fund presently carries reinsurance in excess of $75,000.00 up to a maximum of $1,000,000.00 for any one accident. Such reinsurance may be obtained only if the State Accident Fund itself, like other workmen's compensation insurers, carries reserves and surplus adequate to meet reasonably anticipated claims as well as claims occasioned by a catastrophe. The liability of the reinsurer comes into effect when claims occasioned by any single accident exceeds $75,000.00.

If the Legislature were to take over the reserves and surplus of the State Accident Fund, the State Accident Fund would be unable to obtain such reinsurance. This would drastically curtail if not totally destroy the ability of the Fund to provide reasonable protection for its policyholders as no reinsurer would be willing to write reinsurance where the original insurer carries neither reserves nor surplus.

We can find no precedent anywhere in the country for the State to take over the reserves and surplus of the State Accident Fund, although there are sixteen other states with comparable funds.

California has a fund similar to Maryland's State Accident Fund and is designated as the State Compensation Insurance Fund. The California Fund is ultimately self-supporting and maintains full reserves. In case a surplus exists, the directors may declare a cash dividend or allow credit or renew premiums of subscribers, somewhat similar to the authority granted to the State Accident Fund of Maryland.

So, too, in Colorado, the State Compensation Insurance Fund is self-supporting. The Colorado Act has special provisions as to reserves, and mandamus will lie to compel the state treasurer to invest the Fund's money as directed by the Commission, *Long v. Industrial Commission*, 204 P. 892. Its reserves are therefore independent of state funds, as are those of the State Accident Fund of Maryland.

Idaho's State Insurance Fund is, likewise, self-supporting and is maintained by premiums, 5% of which are set aside for surplus. The State Insurance Fund's reserves may be invested in securities authorized for savings banks as provided by Section 72—912 of the *Idaho statutes*. Idaho's reserves, also, are independent assets.

In Michigan, the State Accident Fund expenses are paid out of the fund and are not paid by the State.

In Nevada, the State Insurance Fund is independent and the State of Nevada is not liable for the payment of compensation or for expenses; See *Nevada Statutes* 616.395, 616.390, 616.325, 616.497, 616.145.

In New York, the State Insurance Fund must maintain a reserve as per rules of the Insurance Superintendent according to the provisions of Article 6, Section 86 of the New York Code, which provides " . . . Reserves shall be set up and maintained adequate to meet anticipated losses and all claims and policies to maturity . . . and sufficient surplus to cover the catastrophic hazard . . . " must be maintained. Thus, New York requires that independent reserves and surplus be maintained, similar to the existing Maryland law.

The State Insurance Fund of Ohio may hold investments of its own as can the Maryland Fund.

In Oregon, that State's Accident Fund is declared to be a trust fund, in which the *state has no proprietary interest* and "the State disclaims any right to reclaim these contributions . . . ". See: Section 656.634, formerly Section 656.454 of *Oregon Revised Statutes*. Investments and reserves of the Oregon Fund are provided for in Section 291.602—291.620, and reserves are provided for in Section 656.458 of the Oregon Revised Statutes.

In Wyoming the State Treasurer is *required* to set aside as a reserve fund 25% of excess of monthly receipts over expenditures according to Section 27—134 of the Wyoming Statutes. The reserve fund shall be invested in any one or more of several categories — "the purpose of creating said reserve fund . . . is to provide a fund within the industrial accident fund sufficiently large to pay great and unusual demands upon the industrial accident fund . . . " Therefore, the reserves and surplus may not be expended by the State of Wyoming for a state function other than for the payment of the claims against the Industrial Accident Fund.

The aforegoing illustrate the conditions which prevail almost universally in those states which have funds similar to the State Accident Fund of Maryland.

The very purpose of maintaining the integrity of the State Accident Fund's reserves and surplus is to assure immediate and prompt payment of his compensation to the injured workman.

We cannot see the constitutional validity of Maryland taking over the reserves and surplus of the State Accident Fund. All the authorities seem to require that the premiums paid by employers to the state accident funds of the several states should be left as an integral, independent entity to assure the compliance by the particular fund with any awards passed against it under the provisions of the particular workmen's compensation statute of a given state.

In our opinion, the rationale of *Subsequent Injury Fund v.*

Pack et al., (decided June 5, 1968) 250, Md. 306, 242A. 2d 506, is further substantiation that the Legislature may not appropriate the funds of the State Accident Fund for the State's general purposes. The *Pack* case, by proper analogy may be extended to include the funds of the State Accident Fund.

In the *Pack* case, the question presented was whether the Subsequent Injury Fund has authority to appeal an order or an award of the Workmen's Compensation Commission. The Court of Appeals held that it did not, thereby affirming the opinion of the lower court. The Subsequent Injury Fund was created by Chapter 809 of the Acts of Maryland, 1963, codified as Code (1957) Art. 101, Section 66 (1964 Repl. Vol.). The Subsequent Injury Fund derives its assets by assessments imposed upon employers and insurers as set forth in the above statute. These monies, thus collected, are used to pay awards of workmen's compensation to injured employees, such as the State Accident Fund is required to pay. The Court of Appeals in the *Pack* case stated:

> "Article VI, of Section 3 of the Constitution of Maryland (1867), also imposes upon the State Treasurer certain duties and obligations regarding 'monies of the State' which he received into his custody. However, the assessments paid into the Subsequent Injury Fund do not constitute 'monies of the State' as contemplated by Article VI and the duties incumbent upon the State Treasurer by this Constitutional provision are inapposite to this case."

Similarly, in our opinion, Article VI Section 3 of the Constitution (*supra*) and the duties incumbent upon the State Treasurer by the Constitutional provision are inapplicable to the funds of the State Accident Fund, because such funds, as indicated in the *Pack* case concerning the Subsequent Injury Fund, do not constitute "monies of the State" as contemplated by that Article. It is reasonable to think that the Court of Appeals will follow the *Pack* decision in

the event that the question of the State's proprietary interest in the monies of the State Accident Fund should come before that Court.

Furthermore, the rights and obligations of the State Accident Fund and the employer who is insured by the Fund are set forth in the policy of insurance issued by the Fund. Such policy of insurance does not directly or indirectly empower or give a right to such employer to go against the State of Maryland generally in the event that the Fund becomes insolvent. Therefore, such employer has a right to be protected by the maintenance of adequate reserves, etc.

The taking over of the assets of the State Accident Fund by the State for general State purposes would thereby place the fate of the permanently disabled, and the widows and children of fatally injured workmen, under the action of the Appropriations Committee each time the Legislature meets. One could envison no secure future for any disabled person under such an arrangement. In fact, it is contrary to one of the first principles of any insurance system, *i.e.*, the maintenance of adequate reserves to cover incurred liabilities. It is mandatory in Maryland that all private insurance carriers abide by this principle. The State Accident Fund is required to do likewise.

Another serious problem may also arise in attempting to budget compensation benefits that are generated as a result of accidents and not through predetermining budgetary requirements. This latter point is a reason for the very existence of substantial reserves and surplus.

The monies which the State Accident Fund has accumulated by careful management are in effect a trust fund which belongs to the employers who have purchased workmen's compensation insurance from the State Accident Fund.

For these reasons we feel that the Legislature may not take over monies of the State Accident Fund and apply them to the general State purposes.

FRANCIS B. BURCH, *Attorney General.*

J. HOWARD HOLZER, *Special Attorney.*

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[1] During the fiscal year ended October 31, 1915, the then State Industrial Accident Commission transferred the sum of $15,000.00 to the State Accident Fund in order to initially set up the Fund.

ALCOHOLIC BEVERAGES

LICENSES—A PRIVATE CLUB LICENSEE IN CECIL COUNTY IS PROHIBITED FROM SELLING, GIVING AWAY, OR PERMITTING THE CONSUMPTION OF ALCOHOLIC BEVERAGES ON THE PREMISES ON SUNDAY IN CECIL COUNTY BY VIRTUE OF SECTION 90(B) AND SECTION 95B OF ARTICLE 2B OF THE ANNOTATED CODE OF MARYLAND (1967 CUMULATIVE SUPPLEMENT).

February 7, 1968.

Honorable Nancy Brown Burkheimer.

Your letter of December 23, 1967, inquires whether private clubs in Cecil County may under the terms of Article 2B of the Annotated Code of Maryland (1957 Edition) sell, give away, or permit consumption on the premises of alcoholic beverages on Sunday. It is our opinion, as explained below, that the law does not permit such activity by private clubs in your county on Sunday. We assume for purposes of this letter that the private clubs referred to all hold liquor licenses issued under the provisions of Article 2B.

Section 3 (a) of Article 2B provides that no person, which term includes corporations and unincorporated associations but excludes a consumer who purchases alcohol for his own use, shall buy, possess, or sell alcoholic beverages unless duly licensed under the Article. Sections 10, 15, and 20 of Article 2B, all of which are applicable to Cecil County, provide for the issuance of Class "C" licenses which permit the storage and sale by private clubs of beer, beer and wine, and beer, wine and liquor, respectively, for consumption on the premises only. Section 25 of Article 2B provides for the issuance of special Class "C" beer, beer and wine, and beer, wine and liquor licenses, respectively, which entitle the holder thereof to exercise the privileges of a Class "C" licensee "for the use of any person holding any entertainment conducted by any club, society or association at the place therein described, for a period not exceeding seven consecutive days from the effective date thereof . . .".

Section 90 of Article 2B is entitled "Sundays". Section 90(b)(1) makes it a criminal offense in Cecil County as well as other enumerated counties " . . . for anyone to sell or for any licensed dealer to deliver, give away or otherwise dispose of any alcoholic beverages on Sunday" with the proviso set forth in Section 90(b)(2) " . . . that it shall not apply to or affect special Class C licenses issued under the provisions of this article . . . ". Section 95B is entitled "Cecil County" and reads as follows:

> "In Cecil County, notwithstanding any other provisions of this subtitle, the hours during which *sales* of any alcoholic beverages may be made *under any class of license* issued under this article on any weekday are from 6 o'clock a.m. daily to 2 o'clock a.m. on the following day, except that on Saturday the closing hour shall be 12 o'clock midnight. It is unlawful for any person *to sell or* for any person *to consume* any alcoholic beverages on any premises licensed under this article between the hours of 2 o'clock a.m. and 6 o'clock a.m. on any day of the week or at any time on Sunday. (1965, ch. 360.)." (emphasis supplied)

Your letter poses the basic problem of construing the combined effect of the quoted provisions of Sections 90(b) and 95B. Section 95B was enacted by the Legislature in 1965; the quoted language of Section 90(b) came into the law in 1947, although the subsection has been repealed and reenacted with amendments in 1961, 1963, 1965, and 1967. None of these amendments changed or affected the pertinent language of the section under consideration here.

Section 95B indicates a clear legislative intent to proscribe in Cecil County (1) the sale by anyone and (2) the consumption by anyone upon licensed premises of alcoholic beverages on Sunday "notwithstanding any other provision of this subtitle". Unless the repeal and reenactment of Section 90(b) in 1967 was intended to repeal or limit Section 95B, the latter provision is still in full force and effect in Cecil County. It is our opinion that the Legislature did

not intend to repeal or abrogate in any manner the effect of Section 95B by its repeal and reenactment of Section 90(b) in 1967. The fact that no reference was made to Section 95B in the 1967 reenactment[1] and that there was no amendment or repeal of Section 95B in 1967 reinforces our opinion in this respect. The law does not favor repeal by implication and the Court of Appeals has held that a later statute shall not be found to have repealed an earlier one unless it is evident from the language of the later statute that the Legislature plainly intended to do so. *Pressman v. Elgin,* 187 Md. 446 (1947); *Welsh v. Kuntz,* 196 Md. 86 (1950).

Thus it is our opinion that Section 95B prohibits the *sale* by anyone or the *consumption* by anyone on licensed premises of alcoholic beverages on Sunday in Cecil County. It is our further view that Section 90(b) has the effect of prohibiting the *gift, delivery, or other disposition* of liquor on Sunday by Cecil County clubs with the exception of those that hold special Class "C" licenses issued under Section 25 of Article 2B. In our opinion the term "licensed dealer" as used in Section 90(b) was intended by the Legislature to designate any licensee who sold liquor at retail or wholesale and thus would include a private club licensed to sell alcoholic beverages.[2]

It is our opinion, therefore, that both Section 95B and Section 90(b) of Article 2B of the Annotated Code of Maryland are applicable to private clubs in Cecil County. We believe that the first section flatly prohibits clubs from selling liquor on Sunday and that Section 90(b) prohibits the gift, delivery, or other disposition of liquor on Sunday by Cecil County clubs except for those that hold special Class "C" licenses issued under Section 25 of Article 2B. Finally, we believe it is unlawful for a licensed club in your County to permit consumption of alcohol upon its premises on Sunday. Section 95B makes it illegal for any person to consume alcohol under these circumstances and thus if a club licensee permitted such activity to take place, he

would probably be guilty of aiding and abetting a misdemeanor.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

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[1] Chapter 324 of the Laws of 1967 repealed and reenacted Section 90(b)(2) to authorize clubs in Caroline County holding beer, wine and liquor licenses to sell alcoholic beverages between certain hours on Sundays. Chapter 623 of the Laws of 1967 repealed and reenacted Section 90(b)(2) to remove from the prohibition of the section Class "B" beer, wine and liquor licenses in Worcester County regulated by the provisions of Section 106 of Article 2B.

[2] In this connection it is to be noted that, although Section 2 of Article 2B does not define "licensed dealer", it does define "retail dealer" as "a person who deals in or sells any alcoholic beverage to any person other than a license holder". A licensed club would appear to normally fall within the category of "retail dealer" and thus would be included within the broader designation "licensed dealer".

ALCOHOLIC BEVERAGES—MINOR IN POSSESSION OF, ON PUBLIC HIGHWAY WHILE RIDING IN AUTOMOBILE.

February 8, 1968.

Honorable John H. T. Briscoe.

In your recent letter you requested this office to render an opinion relative to an interpretation of Article 2B, Section 184 (Maryland Code), "Alcoholic Beverages", which states:

> "It shall be unlawful for any minor in St. Mary's County to . . . drink, or have in his possession, any alcoholic beverages in any public place or on any public highway."

You indicate that "it has been contended that this provision of the law does not apply in cases in which a minor is found in possession of alcoholic beverages in a motor vehicle on a public highway and not directly upon said highway in person." You further indicate that you feel this construction of the statute is too narrow.

This office agrees with you. While the general rule of law is that a criminal statute must be strictly construed in favor of a defendant (see *Gatewood v. State,* 244 Md. 609; *Fowel v. State,* 206 Md. 101), nevertheless:

> "Where the statutory language is plain and free from ambiguity and so expresses a definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended. The courts are not at liberty to surmise the legislative intention to be contrary to the words and letters of the statute, or to insert or delete words with a view of making the statute express an intention which is different from its plain meaning. . . . In the absence of anything to indicate a contrary intent, it must be assumed that the words used have the meaning naturally

given them in ordinary usage, for if the language used is plain and unambiguous there is no room for construction." *Fowel v. State,* supra, at pp. 105-106.

". . . But in giving a statute a sensible, reasonable construction, if the words be susceptible of two interpretations, the construction should be in harmony with the manifest intent of the act and should not lead to an absurdity. *Kolb v. Burkhart,* 148 Md. 539, 543-44, 129 Atl. 670 (1925); *Mitchell v. State,* 115 Md. 360, 364-65, 80 Atl. 1020 (1911)." *Gatewood v. State, supra,* at page 617.

It, therefore, becomes important to know what is meant by "on" a public highway.

" 'On' means 'upon—the surface'." *Riser v. Federal Life Ins. Co.,* 207 Iowa 1101, 224 N.W. 67, 68, 63 A.L.R. 292; to the same effect *Century Dictionary and Robert V. Clapp Co. v. Fox,* 124 Ohio St. 331, 336, 178 N.E. 586."

In *London Assurance Corp. v. Thompson,* 62 N.E. 1066 (N.Y.), the court said:

". . . On does not always mean on top of or resting upon, for some times, but less frequently, it means contiguous to, as when we say 'a house on Main Street,' . . ."

" '[O]n does not always or necessarily imply actual contact, and is not infrequently used to designate nearness in place or situation. Structures are often described as being on a street, or on a road, or on a stream, when in fact they do not physically touch the street, road or stream. This latitude in the use of the word is recognized in law.' *Forest View Land Co. v. Atlantic Coast Line R. Co.,* 120 Va. 308, 91 S.E. 198, 201."

In *State v. Hitchcock,* 146 S.W. 40 (Mo.), the court, in construing a constitutional provision, held that:

> "According to Webster's and the Century Dictionaries, the word 'upon' is synonymous with the word 'on' in all its meanings; the word 'up' being almost eliminated in the definitions."

"The meaning of the law may be gathered from the evil intended to be remedied." *Pa. v. Hoyt Shaw,* 22 Pa. Co. Ct. R. 415, 416. The court, in this case, in construing a compact between Pennsylvania and New Jersey relating to offenses committed on the Delaware River held that:

> "In our opinion the word 'on' should here be used in the sense of 'over'.
>
> . . . .
>
> "The words over, on and upon are often synonymous, and have the same meaning and effect. It is said that a person passes over a road if he crosses it on the surface, as well as when he passes above it on a bridge . . . . "

It is the opinion of this office that the statute is clear and not subject to ambiguous meaning, and that the legislative intent was to prevent the possession of alcohol by a minor on a public highway, whether standing, sitting, lying, walking or riding any conveyance on said highway. Any other interpretation would make the Act an absurdity.

FRANCIS B. BURCH, *Attorney General.*

HENRY J. FRANKEL, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES—BOARD OF LICENSE COMMISSIONERS —TERM OF OFFICE—APPOINTMENTS SUBJECT TO ARTICLE II, SECTION 13 OF CONSTITUTION IF LEGISLATURE DOES NOT OTHERWISE PROVIDE—EFFECT OF ARTICLE II, SECTION 10—RIGHT TO ABOLISH OFFICES CREATED BY LEGISLATURE—DOES NOT EXTEND TO OFFICES PROTECTED BY CONSTITUTION—UNCERTAINTY EXISTS AS TO TERM OF PRESENT MEMBERS.

February 16, 1968.

Honorable Jervis Spencer Finney.

In your letter of October 19, 1967, you requested our opinion as to the length of the term of office for present members of the Board of License Commissioners of Baltimore County. The question is occasioned as a result of the following circumstances:

Prior to the 1967 Session of the Maryland Legislature, the authority to appoint the members of the board of license commissioners of Baltimore County was vested, pursuant to Section 148 of Article 2B, in "the Governor, by and with the advice and consent of the Senate . . . " Such had been the case since the enactment of Chapter 370, Laws of Maryland, 1959, which restored to the Governor the power to appoint the members of the board, the County Executive having exercised such authority pursuant to former Section 150(a) of Article 2B under which the members were appointed annually.

According to the terms of Chapter 370, the Legislature provided that "Effective June 1, 1959 the Board of License Commissioners . . . [is] . . . abolished and the tenure of the members of the Board . . . is terminated on that day. As of June 1, 1959, the Governor, by and with the advice of the Senate, shall appoint three persons to constitute the Board of License Commissioners for Baltimore County . . ." This Act took effect on June 1, 1959 and abolished the then existing Board of License Commissioners appointed by the

County Executive. This the Legislature clearly had authority to do, for the office of license commissioner, having been created by the Legislature, could be abolished by it. *Calvert County v. Monnett,* 164 Md. 101, 105; *Anderson v. Baker,* 23 Md. 531 at 627, 628; *Ash v. McVey,* 85 Md. 119, 128; *Davis v. State,* 7 Md. 151, 161.

Following the enactment of Chapter 370, the Governor was advised that although the "statute does not specifically state that June 1 is to be the date of commencement of the terms of future License Commissioners, such an intent appears to be reasonably inferable and, therefore, . . . the terms of the License Commissioners in Baltimore County appear to be for a period of two years, but commencing on June 1 rather than the first Monday in May." 47 Opinions of the Attorney General 136, 142.

It is apparent, therefore, that prior to June 1, 1959 the power to appoint the license commissioners was vested in the County Executive. By restoring the power to appoint the members of the Board to the Governor, with the consent of the Senate, without specifically indicating a term of office, it was assumed in our former opinion that the Legislature brought into play the provisions of Section 13 of Article II of the Constitution, which provides as follows:

> "All civil officers nominated by the Governor and subject to confirmation by the Senate, shall be nominated to the Senate within thirty days from the commencement of each regular session of the Legislature; and their term of office, except in cases otherwise provided for in this Constitution, shall commence on the first Monday of May next ensuing their appointment, and continue for two years, (unless removed from office), and until their successors, respectively, qualify according to Law."

In applying Section 2, we interpreted this Section literally and found that a term of two years was intended, and

ignored the requirement that the term must commence on the first Monday of May.

If the language of Section 13 were applied literally, it would require that (1) any civil officer, (2) appointed by the Governor and confirmed by the Senate, (3) whose term of office is not otherwise provided for in the Constitution, would receive a two-year term commencing on the first Monday in May regardless of what the law creating the office provided. Such an inflexible rule would immediately bring into question the constitutionality of various State offices, such as, for example, the Workmen's Compensation Commission, the members of which are civil officers, appointed by the Governor, with the advice and consent of the Senate, for terms of eight to twelve years (Section 1 (b), Article 101), and the Boards of License Commissioners in Allegany and Washington Counties, the members of which are civil officers, appointed by the Governor, with the advice and consent of the Senate, for six-year, staggered terms, and that of Talbot County, where the appointments are for six years. Obviously, somewhere beyond the confining language of Section 13, the power of the Legislature to create offices appointed by the Governor and confirmed by the Senate, for terms other than two years, or which commence at some point in time other than the first Monday in May, or both, exists.

Article II of the Maryland Constitution defines the executive power vested in the Governor. Section 10 gives the Governor, with the advice and consent of the Senate, the power to nominate and appoint civil and military officers of the State whose "mode of appointment" or "election" is not otherwise provided for "by the law creating the office". Section 13 provides that the "term of office, except in cases otherwise provided for in this Constitution" of the civil officers appointed by the Governor and the Senate "shall commence on the first Monday of May next ensuing their appointment, and continue for two years". The problem is whether the phrase "mode of appointment" in Section 10 is broad enough to include, not only who makes the appoint-

ment, but would also permit the Legislature to create a civil office, appointed by the Governor and confirmed by the Senate which would commence at a time other than the first Monday in May and embrace a term more, or less, than two years. A rigid and literal interpretation of Section 13 would seem to indicate that notwithstanding what the Legislature did, all such civil officers so appointed and so confirmed take office solely for two years, and, regardless of what the Legislature says, the term of office commences on the first Monday of May.

It would seem that the interpretation placed by the Legislature on the provisions of Article II of the Constitution indicate that the Legislature has assumed that it has constitutional authority to provide, in the legislation creating an office, not only that the appointments need not be confirmed by the Senate, but that they may be confirmed by the House of Delegates in certain instances, cf. Article 33, Section 2-1(e), and further, that the Legislature may prescribe a different term of office even for civil officers appointed by the Governor, with the advice and consent of the Senate.

In order to sustain this action of the Legislature, it must be concluded that Section 13 relates only to appointments of civil officers, appointed by the Governor and confirmed by the Senate, whose term of office specifically commences on the first Monday of May and continues for a period of two years, or in which no other term is established by the law creating the office. The Court of Appeals quite early established the principle that the Constitution may receive an interpretation from a long, constant and uniform legislative practice. *City of Baltimore v. State*, 15 Md. 376. In *Harrison v. State*, 22 Md. 468, the Court of Appeals stated that a construction of the Constitution of long duration, continuously practiced since its adoption, and through which rights have been acquired, ought not to be shaken but upon the ground of manifest error and cogent necessity.

In the case of *Johnson v. Duke*, 180 Md. at 442, the Court of Appeals in passing upon the legality of the action of

Governor O'Conor in submitting recess appointments of justices of the peace for Senate confirmation, the Court of Appeals summarized the law of Maryland with respect to the effect of long-standing interpretation as follows:

> "It is a firmly established doctrine that a contemporaneous construction of an ambiguous constitutional provision or a practical construction, which has been acquiesced in for a long period of time may be a valuable aid in determining the meaning and intent of the Constitution in case of doubt. *Cohens v. Virginia,* 6 Wheat. 264, 418, 5 L. Ed. 257; *Levin v. Hewes,* 118 Md. 624, 641, 86 A. 233; 1 *Cooley, Constitutional Limitations,* 144-148. The doctrine is based upon the assumption that the contemporaries of the framers have claims to our deference on the question of interpretation, inasmuch as they enjoyed the best opportunities of learning the intention of the framers and the understanding of the people who ratified the instrument. *Ogden v. Saunders,* 12 Wheat. 213, 290, 6 L. Ed. 606, 632. But it is equally well settled that contemporaneous construction should be resorted to with caution and reserve, and can never be allowed to enlarge, restrict or contradict the plain meaning of the text. *Black, Interpretation of Laws,* Sec. 31. It is the sacred duty of the courts to preserve inviolate the integrity of the Constitution. Hence it would be a violation of their duty to treat the fundamental law as subject to modification except in conformance with constitutional methods. *McPherson v. Blacker, Secretary of State,* 92 Mich. 377. 52 N. W. 469, 472, 16 *L. R. A.* 475, 31 *Am. St. Rep.* 587. Failure to exercise a power expressly granted by the Constitution does not destroy that power. In order that the doctrine of practical construction can be applied by the court, the construction must not result in any unconstitutional usurpation. No acquiescence for any

> length of time can legalize a usurpation of power, where the people have plainly expressed their will in the Constitution and established judicial tribunals to enforce it. *Lawrence University v. Outagamie County*, 150 Wis. 244, 136 N. W. 619, 2 *A. L. R.* 465; 11 *Am. Jur., Constitutional Law*, Secs. 78, 80; 16 *C. J. S., Constitutional Law*, Sec. 32. While a long established custom of the Chief Executives of the State may be shown as an aid in interpreting the Constitution, the failure of the judiciary to acquiesce in that construction nullifies its effect. The Constitution of the State is a higher authority than any act or law of any officer or body assuming to act under it, for such an officer or body must exercise a delegated authority subservient to the basic law by which the delegation was made. In case of conflict the Constitution must govern, and the act or law in conflict with it must be held to have no legal validity. 1 *Story on the Constitution*, Secs. 406, 407; 1 *Cooley, Constitutional Limitations*, 149-151."

We think it cannot be disputed that the interplay of Sections 10 and 13 are open to doubt. The abundance of past opinions of this office attempting to interpret them belie any contention to the contrary. 1 Opinions of the Attorney General 108; 3 Opinions of the Attorney General 277; 7 Opinions of the Attorney General 258; 8 Opinions of the Attorney General 185; 11 Opinions of the Attorney General 191; 20 Opinions of the Attorney General 705; 22 Opinions of the Attorney General 369; 24 Opinions of the Attorney General 1023; 26 Opinions of the Attorney General 245; 32 Opinions of the Attorney General 192; 40 Opinions of the Attorney General 287, and 47 Opinions of the Attorney General 142. Nor can it be said that the long-standing practice has not received judicial approval, for in the case of *Nesbitt v. Fallon*, 203 Md. 534 at 542, the Court of Appeals indicated that the Legislature could have decided to continue the old board had it plainly expressed its intention

to do so, and it was the Legislature's failure to do so that brought the appointments within Section 13 of Article II.

The summary expressed in *Johnson v. Duke* has been reiterated in the case of *Johns Hopkins v. Williams*, 199 Md. 382 at 386; *Norris v. Mayor and City Council of Baltimore*, 172 Md. 667 at 675 ff, and *Pressman v. D'Alesandro*, 211 Md. 50 at 59, 60. In the latter case, the Court refused to apply the rule of contemporaneous construction because the language of the section involved was plain and definite, and because the construction was not contemporaneous. Of great significance to our present inquiry, however, is the fact that Article II, Section 13 was amended as recently as 1964, having previously been amended in 1956, after many of the boards of license commissioners to which we referred earlier were created in a manner that would be unconstitutional if Section 13 were given a literal application.

During the 1967 Session of the Legislature, House Bill 82 was introduced for the purpose of adding a new subsection (e) to Section 150 of Article 2B authorizing the County Executive of Baltimore County to "appoint biennially three persons who shall constitute the board of license commissioners." This Bill was passed by the Legislature, but vetoed by the Governor on June 8, 1967. See the Laws of Maryland, 1967, pages 1760-1761. At the Special Session held in July, 1967, however, the Governor's veto was overridden by the required vote of both Houses of the General Assembly, and House Bill 82 was enacted as Chapter 6, Laws of Maryland, Special Session, 1967. The effective date of the law, however, under Section 31 of Article III of the Constitution of Maryland is deferred until June 1, 1968. Prior to the passage of House Bill 82, the Governor, acting under the law then in effect, appointed the present members of the board of license commissioners, presumably for a two-year term commencing in May, 1967. These appointments were confirmed by the Senate. The commissions of office, we are advised, were dated as of June 1, 1967.

It has been suggested that the effect of Chapter 6 of the Laws of Maryland, Special Session 1967, is to abolish by implication the presently existing Board of License Commissioners in Baltimore County and to authorize the appointment of a new Board by the County Executive, as of the effective date of the Statute—June 1, 1968. The Legislature, in the statute involved in the *Nesbitt* case, clearly specified that the existing board was to be abolished. Similarly, the Legislature, in enacting Chapter 370, Laws of Maryland, 1959, specifically provided that the existing Board of License Commissioners of Baltimore County be abolished.

It is well settled that the Legislature may abolish an office which it creates. It is equally well settled that the Legislature may not abolish an office created by the Constitution or an office which is subjected by the act of the Legislature creating it, to constitutional protection. If the Legislature, in enacting Chapter 370, Laws of Maryland, 1959, and restoring the appointment authority to the Governor, acted in such a way as to make both the appointment and term of office subject to Section 13 of Article II, then the Legislature gave the office constitutional protection, and gave up its power to alter or abolish the office during the term of the present incumbents, not because it made the board a constitutional office, but because it gave the incumbents a constitutional term. Such a result was reached by the Court of Appeals of Kentucky in *Cawood v. Hensley,* 247 S.W. 2d 27-30, in which the Kentucky Constitution provided that all elective officers would serve for a term of four years. A statute authorized a town council to appoint police chiefs for a two-year term, but permitted the council to provide by ordinance enacted sixty days prior to an election that the voters could elect a police chief. The Kentucky Court held that the enactment of the ordinance authorizing an election brought the police chief within the protection of the constitutional provision, and that the former method could not be resorted to until the expiration of the four-year term.

On the other hand, if the Legislature avoided the effect of Section 13 by the simple expedient of providing in Chapter 370 that the appointments were to be made as of June 1st, then the protective mantle of the Constitution was not thrown over the office, and the Legislature reserved the right to abolish the office whenever it was so inclined. We note in passing that if the latter were the case, no term of office is specified in Chapter 370 and notwithstanding the absence of the specific language in House Bill 82 abolishing the term of office, such language may not be necessary where no term was provided in the first instance.

From the foregoing, we conclude that if the present incumbents have a term of two years, they have it solely as a result of Article II, Section 13 of the Constitution. Whether this section was, in fact, invoked, is open to question in view of the fact that the Legislature, in enacting Chapter 370, specifically provided a time when the term of office should commence which was contrary to the Constitution but only if Section 13 applies. Further, the Legislature has retained the power to avoid Section 13, presumably through Section 10, and it has acted on that assumption for years with what we interpret to be the acquiescence of the Governor, the Court of Appeals, as well as the people. Finally, if the Legislature has not given the office of License Commissioner in Baltimore County constitutional protection, it may abolish the office at any time.

Whether it has done so is another matter, and we are unable to resolve this matter in any satisfactory fashion without creating more problems than we would solve, even assuming that the parties interested in this matter would follow our advice. For that reason, we are of the opinion that the most expeditious manner of disposing of this matter would be to file a suit for declaratory judgment under Article 31A to have the effect of Chapter 6, Laws of Maryland, Special Session 1967, construed by a court of competent jurisdiction. In giving you this advice, we are not unmindful of the fact that House Bill 82, when it was

introduced, was intended as an emergency measure. Its sponsors were soon advised that it would be ineffective as legislation in view of the fact its subject matter could not properly be enacted as an emergency measure. The Bill was amended, but not sufficiently to accomplish the result apparently intended, particularly in view of the fact that it was vetoed, and not overridden until a Special Session in June, 1967, deferring for an additional year the effective date of the statute. When this legislative history is superimposed upon the already uncertain status of Chapter 370, Laws of Maryland, 1959, then all of the requisites for a declaratory decree appear to be met. Needless to say, we will be pleased to cooperate with you in every way in order to bring this result about.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

ALCOHOLIC BEVERAGES — WORCESTER COUNTY — CONSTITUTIONALITY OF ARTICLE 2B, SECTION 106—FAILURE OF THE STATUTE TO CONTAIN THE WORD "KNOWINGLY" WOULD NOT RENDER THE SAME UNCONSTITUTIONAL—LICENSEE MAY BE HELD CRIMINALLY LIABLE FOR UNLAWFUL SALES MADE BY HIS EMPLOYEE IN THE ABSENCE OF AND/OR WITHOUT THE KNOWLEDGE OF THE LICENSEE.

April 18, 1968.

Honorable John L. Sanford, Jr.

In reply to your recent inquiry in reference to the constitutionality of the provisions of Article 2B, Section 106, of the Annotated Code of Maryland (1957 Edition) as amended by Chapter 623 of the Acts of 1967 entitled "Alcoholic Beverages," this is to advise you that said section provides:

"106. Worcester County.

"(a) In Worcester County, notwithstanding any other provisions of this subtitle, no holder of any retail alcoholic beverage license shall be permitted to sell, barter, deliver or give away, or otherwise dispose of any alcoholic beverages, or permit any alcoholic beverages to be consumed on the licensed premises, except as hereinafter provided.

"(b) Except as provided in subsections (c) and (d) of this section, no alcoholic beverages may be sold, or permitted to be consumed, between the hours of 2:00 o'clock a.m., prevailing time, on Sunday, and 9:00 o'clock a.m., prevailing time, on Monday; nor between the hours of 2:00 o'clock a.m. and 9:00 o'clock a.m. on the remaining days of the week.

"(c) No beer may be sold for off the premises consumption between the hours of 2:00 o'clock a.m., prevailing time, on Sunday, and 6:00 o'clock

a.m., prevailing time, on Monday; nor between the hours of 2:00 o'clock a.m. and 6:00 o'clock a.m. on the remaining days of the week.

"(d) On Sundays, during the hours of 1:00 o'clock p.m. and 9:00 o'clock p.m., prevailing time, bona fide hotels and restaurants holding a seven (7) day Class B beer, wine and liquor license under Section 19 (m) of this article shall be permitted to serve alcoholic beverages for consumption on the premises only as a supplement to meals and only when seated at a table (and not from a bar or bar stools), or to conventions or such other groups as may be approved by the board of license commissioners, in accordance with the provisions of Sec. 25 (k) of this article. (An. Code, 1951, Sec. 102; 1951, ch. 343, Sec. 92A; 1966 ch. 170; 1967, ch. 623)."

Specifically, you raise the following issues:

I. Whether or not the fact that the statute fails to contain the word "knowingly" would render the same unconstitutional;

II. Whether or not a licensee can be held liable under the provisions of said Act when the Acts in violation thereof are done by a regular employee of the licensee but in the absence of and without the knowledge of the licensee.

I. Addressing ourselves to your first inquiry, it cannot be questioned that the law-making body may make a prohibited act a crime, irrespective of the elements of intent or *scienter*. From the laboratory of criminal jurisprudence, we learn that when public policy requires, the Legislature may prohibit certain conduct as unlawful, independent of any criminal intent, knowledge or negligence.

While it is true that in the prosecution of crimes under the common law apart from statute, it ordinarily is necessary to allege and prove a guilty intent and/or knowledge

and as a general principle, a crime is not committed if the mind of the person doing the act is innocent. An evil intention and unlawful action must occur in order to constitute a crime. However, there are many instances in recent times where the Legislature, in the exercise of the police powers, has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public, the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.

The Supreme Court of the United States held in *United States v. Dotterweich*, 320 U.S. 277, 281, 88 L. Ed. 48, that legislation for regulatory purposes that dispenses with the conditions of awareness of wrongdoing and places the burden of acting at his peril on a person otherwise innocent "but standing in responsible relation to a public danger" is a traditional means of regulation. Examples of approval of the Supreme Court of regulations of the kind referred to, include: *St. Louis & San Francisco R. Co. v. Mathews*, 165 U.S. 1, 41 L. Ed. 611—a statute making a railroad liable, regardless of negligence or fault, for all property injured or destroyed by fire from its locomotives; *United States v. Balint*, 258 U.S. 250, 66 L. Ed. 604, where the language of *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70, 54 L. Ed. 930, 936, that the state may prohibit certain acts in the maintenance of public policy, and provide that "he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance," was followed in upholding an indictment for violation of the narcotics law for selling drugs to one not having a written order in official form without charging that the defendant knew the drug to be such. In the *Shevlin-Carpenter* case, an act of Minnesota was upheld as not denying due process of law by making subject to double

damages and fine or imprisonment one who made a casual and involuntary trespass on state lands by cutting timber thereon without a valid and existing permit. It was said that the statute could be justified as a valid exercise of the police power, although the trespasser might have had reasonable grounds for belief that authority had been granted and honestly acted on such belief. There come to mind, also, workmen's compensation laws, making employers liable without fault and requiring payment to those declared to be dependent regardless of whether they are in fact. See, too, *Cloverland Farms Dairy v. Ellin*, 195 Md. 663, *Maryland Racing Comm. v. McGee,* 212 Md. 74, and cases collected in *4 Wigmore on Evidence,* 3rd Ed., Sec. 1354.

In the field of regulatory law, more attention has perhaps been given by legislatures to the control and management of the liquor business than of any other traffic, because of the ease with which the privilege of engaging in it may be abused, and the social evils ordinarily incident to such abuse. In Maryland no one has a constitutional right to engage in the liquor business. Therefore, the privilege of engaging in the traffic is not a right, but merely a franchise which the state may grant or withhold at will. As a corollary of that power, the State, if it elects to permit and license the traffic, may annex to its consent such conditions as are deemed necessary to prevent an abuse of the privilege, and, in so far as they affect the licensee, they are universally upheld. *Woolen & Thornton on Intoxicating Liquors,* sec. 88. *Miller v. State,* 174 Md. 362, 198 A. 710, 715. Annotated Code of Maryland (1957 Edition), Article 2B, sec. 72, (1968 Replacement Volume) provides, (License not Property.) Licenses issued under provisions of this Article shall not be regarded as property or as conferring any property rights. All such licenses shall be subject to suspension, restriction or revocation, and to all rules and regulations that may be adopted as herein provided.

Considering the aforegoing, it is our opinion that failure

of the statute to contain the word "knowingly" would not render the same unconstitutional.

II. As to your second inquiry, this is to advise that since June 23, 1885, the law has been firmly established that the licensee may be held criminally liable for unlawful sales made by his employee in the absence of and/or without the knowledge of the licensee. *Carroll v. Maryland,* 63 Md. 551.

In the *Carroll* case, the law provided that "any person" who sold liquors to a minor should be fined or imprisoned and his license suppressed. The Court of Appeals of Maryland held that intent was not an essential ingredient of the offense and said of the licensee: "Being engaged in business where it is lawful to sell to all persons except such as are by law excepted, it is his duty to know when a sale is made that it is to a properly situated person. Therefore it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and if he does not do so, the law holds him answerable." The licensee in the *Carroll* case was not present when the sale was made and had no knowledge of it, and the court refused to permit him to prove, by testimony of the bartender, that he had given instructions against sales to minors, and rejected his proffer of his own testimony that the instructions were in good faith and intended to be obeyed. The principle of the *Carroll* case was followed in upholding conviction of the general manager of a hotel for illegal sales by a bartender in *Jessup v. State,* 117 Md. 119.

While *Cicero v. State,* 200 Md. 614, involved a prosecution for violation of a similar statute and was decided on the question of due caution, the conviction of the licensee, who was not present at the time of sale, was upheld. The opinion in *Maryland Racing Com. v. McGee,* 212 Md. 69, 76, cited *Carroll* in support of the proposition that a state, in the exercise of the police power, may prohibit certain acts and provide that one who does, or permits, them does so at his peril and will not be heard to plead in defense good faith or ignorance, so that responsibility or liability

without fault in those situations has been held not to infringe constitutional rights. See *Haskins v. State,* 213 Md. 127. A number of states have taken the same view of the criminal liability of liquor licensees for acts of their agents, committed in their absence, as the Court of Appeals in the *Carroll* case. Cases are collected in an annotation in 139 A.L.R. 306.

For the above reasons, we find that Article 2B, Section 106 of the Annotated Code of Maryland (1957 Edition), as amended by Chapter 623 of the Acts of 1967, is constitutional.

FRANCIS B. BURCH, *Attorney General.*

EDWARD F. BORGERDING, *Assistant Attorney General.*

ALCOHOLIC BEVERAGES—ARTICLE 2B, SECTION 41 (B-6) PERMITS BOARD OF LIQUOR LICENSE COMMISSIONERS FOR BALTIMORE CITY TO GRANT MORE THAN ONE LICENSE FOR RESTAURANT IN A CHAIN STORE NOTWITHSTANDING LIMITATIONS IN ARTICLE 2B, SECTION 41 (A-1) WITH RESPECT TO THE ISSUANCE OF A LICENSE TO A CHAIN STORE, SUPERMARKET OR DISCOUNT HOUSE.

October 31, 1968.

Mr. Joseph Van Collom, Jr.

You have advised us that the Board of Liquor License Commissioners for Baltimore City has received an application for a Class "B" Beer, Wine and Liquor restaurant license by a store for their restaurant located on Howard Street, Baltimore, Maryland. Since 1963 this Company has held a Class "B" Beer, Wine and Liquor License for their restaurant in their store located at Westview Shopping Center in Baltimore County. You have asked whether the Board would be prohibited from issuing a license to the Company because of the provisions of Article 2B, Section 41 (a-1) of the Code of Maryland which provides as follows:

> "(a-1) *Chain stores, supermarkets or discount houses.* — No Class A, B, or D beer, wine, and liquor license, except by way of renewal, shall be granted, transferred, or issued to, or for use in conjunction with, or upon the premises of any business establishment of the type commonly known as chain stores, supermarkets, or discount houses. Nothing in this subsection applies to or affects any such type of business establishment already holding such a license or the possibility of such licensee having the license transferred to a similar type of business establishment."

While it would appear that this provision would prohibit the Board from issuing a license to the Company, the Gen-

eral Assembly in 1968, enacted Chapter 326 which makes an exception to the provisions of Section 41(a-1) by permitting the Board to grant as many as three class "B" licenses to the same licensee provided that any additional license be for a restaurant that has a minimum capital investment of $150,000.00 for restaurant facilities and has a minimum seating capacity of 125 persons. The full text of Chapter 326, which added a new Section 41 (b-6) to Article 2B of the Annotated Code, is as follows:

> "(b-6) Baltimore City — Notwithstanding any other provisions of this Section in Baltimore City, the holder of a Class B, (on sale—hotels and restaurants) Beer, Wine and Liquor License under this Article, by making application in the regular manner and paying the usual fee may obtain an additional Class B, (on sale—hotels and restaurants) Beer, Wine and Liquor License for premises used and occupied as a bona fide restaurant, as may be defined by the Rules and Regulations of the Board of Liquor License Commissioners for Baltimore City, provided that said restaurant has a minimum capital investment of $150,000.00 for restaurant facilities, which sum shall not include the cost of land or buildings, and has a minimum seating capacity of 125 persons. Nothing contained herein shall permit the issuance of more than three (3) such licenses to any person, or for the use of any partnership, corporation or unincorporated association in Baltimore City. The granting of additional licenses hereunder shall be limited and restricted to the purpose of providing alcoholic beverages for consumption on the licensed premises only, with no off sale privileges to be exercised therewith."

It is our opinion that if the Company can establish that they meet the qualifications set forth in Chapter 326, the

Board of Liquor License Commissioners may issue a Class "B" Beer, Wine and Liquor restaurant license for their store located on Howard Street.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

ATTORNEYS

SECTION 44 OF ARTICLE 10 OF THE MARYLAND CODE REQUIRES ATTORNEYS TO ESTABLISH AT LEAST ONE SEPARATE BANK ACCOUNT FOR ALL FUNDS COMING INTO THEIR POSSESSION THAT ARE NOT FEES OR REIMBURSEMENT FOR EXPENSES, PROHIBITS COMMINGLING OF CLIENTS' FUNDS WITH THOSE OF ATTORNEYS IN EITHER A PERSONAL ACCOUNT OR AN ESCROW ACCOUNT, AND IS TO BE ADMINISTRATIVELY ENFORCED BY BAR ASSOCIATIONS AND JUDGES OF THE STATE, NOT THE ATTORNEY GENERAL.

October 25, 1968.

Honorable J. Dudley Digges.

As President of the Maryland State Bar Association, you have asked us to construe certain provisions of the newly enacted Chapter 621 of the Acts of 1968. This provision of the law adds a new Section 44 to Article 10 of the Annotated Code of Maryland entitled "Attorneys at Law and Attorneys in Fact", creating a new subtitle, "Escrow Funds of Attorneys". It requires all attorneys in the State to place in a separate account or accounts monies belonging to clients coming into their hands and provides disciplinary action as well as criminal penalties for violations of the section.

As President of the State Bar Association, you are concerned that attorneys in this State may be uncertain with respect to the effect of this provision because of the broad sweep of its language. You recognize that the Attorney General does not represent the State Bar Association but rather only those departments and State agencies specified in Section 2 of Article 32A of the Code; nevertheless, you believe that an interpretation of this statute by the chief legal officer of the State will be helpful to members of the bar.

Section 44(a) of Article 10 provides as follows:

> "If any attorney is entrusted with, or receives and accepts, or otherwise holds, *deposit monies or other trust monies, of whatever kind or nature,* such monies, in the absence of written instructions or court order to the contrary shall be expeditiously deposited *in an account maintained as a separate account or accounts for funds belonging to others.* In no event shall he *commingle any such funds with his own* or use any such funds for any purpose other than the purpose for which such funds were entrusted to him." (emphasis supplied)

Subsection (b) thereof provides that any attorney wilfully violating the section shall be charged with professional misconduct and shall be proceeded against for "reprimand, suspension, or disbarment under any applicable provision of this article or any other law or the Maryland Rules." Subsection (c) provides that wilful violation of the provisions of subsection (a) shall also constitute a misdemeanor, conviction for which shall result in a fine of not more than $5,000 or imprisonment for not more than five years or both.

Your letter poses four questions. You first ask for a construction of Section 44(a) to determine what funds coming into the hands of an attorney are subject to the requirement of deposit in a separate account. Secondly, you ask whether Section 44(a) requires the maintenance of a separate bank account for each client for whom an attorney holds trust monies. Thirdly, you ask for a construction of the term "commingle" within the context of Section 44 (a) so that attorneys may be clear as to how they may properly handle funds of others and not violate the ban against commingling. Fourthly, you ask our views as to the person or agency that is to enforce the noncriminal sanctions provided for in the section.

In response to your first question regarding the nature of funds to which the separate account rule applies, it is our

opinion that, under the terms of Section 44(a), the Legislature intended an attorney to maintain a separate account for all funds coming into his hands which are not in the nature of payment for services or reimbursement for sums already disbursed on behalf of a client. Thus, in our view, funds collected for a client, monies paid in advance towards future disbursements, monies held for investment purposes, and, in general, any funds held for the benefit of another and to which an attorney himself does not have an absolute right of ownership, must, under the language of this statute, be deposited in a separate account. This account should be clearly titled in our view to indicate its fiduciary nature, for example, "escrow account", "agency account", or "attorney account".

We arrive at this construction from what appears to us to be the clear and unambiguous language of Section 44(a), see *e.g., Comptroller v. A. Cyanamid,* 240 Md. 491 (1965).

Although the title to Section 44 reads "Escrow Funds of Attorneys," it is evident, as you note in your letter, that the General Assembly broadened original House Bill 23, limited in application to attorneys handling escrow funds in real estate transactions, to cover any attorney receiving or otherwise holding trust monies of whatsoever kind or nature. A caption of a section of the Annotated Code printed in italics is not to be construed as a substantive part of the provision. Annotated Code, Article 1, Section 18.

Secondly, you ask whether attorneys must maintain separate bank accounts for each client or whether it is sufficient that a single account be maintained for funds belonging to others. In pertinent part, Section 44(a) provides that trust or deposit monies, in the absence of written instructions or court order to the contrary, ". . . shall be expeditiously deposited in an *account maintained as a separate account or accounts* for funds belonging to others". (emphasis supplied) We construe this language to require only one separate account for clients' funds, although permitting, in the discretion of the attorney, more than one such separate account. In our view, the Legislature did not intend the

burdensome and wholly unworkable requirement that an attorney maintain a separate bank account for each individual client. We believe that the evil which the legislation was intended to remedy is satisfied so long as clients' funds are kept in a separate account, apart from the funds of the attorney himself. Cf. *Gatewood v. State,* 244 Md. 609 (1966) ; *Sanza v. Md. Board of Censors,* 245 Md. 319 (1967).

Next, you ask our view concerning the commingling prohibition set forth in Section 44(a) of Article 10. Specifically, you inquire how an attorney must now process a check which combines both a fee or reimbursement for expenses and monies belonging to a client. In our opinion, the ban against commingling contained in Section 44(a) prohibits an attorney from depositing such a check in his own general account even for the limited purpose of separating out that portion of the check belonging to him from that which belongs to his client. We believe the deposit of such a check in a lawyer's personal checking account would constitute the commingling of funds belonging to another with his own.

In our view the proper manner for processing such a check under the language of the statute would be deposit in the escrow or fiduciary account with concurrent withdrawal from such account of the funds belonging to the attorney. Technically, commingling has taken place when such a combined check is deposited itself in an escrow account but the risk of attachment (and attendant expense and delay in proving the trust character of the funds) or mismanagement of the funds belonging to others, the avoidance of which appears to be the rationale underlying the commingling ban, is minimized in our view when deposit is made in an escrow account. Furthermore, if a lawyer is not permitted to "uncommingle" a check through the escrow account he would have to solicit separate checks in every case where he is collecting sums out of which his own fee or expenses are to be paid. Again, we do not believe the Legislature intended such an oppressive and impractical result. *Gatewood v. State, supra.*

Although the Maryland Court of Appeals does not appear to have construed the term "commingling", courts in other jurisdictions have defined it under a number of different circumstances. Most relevant to the instant statute is the case of *Peck v. State Bar of California*, 17 P. 2d 112 (Calif. 1932), where, in a disbarment proceeding, an attorney was found to have violated the prohibition against commingling set forth in Canon 9 of the California Bar Association.[1] Here the appellant had been retained to effect a purchase of real estate. He deposited a 10% down payment advanced to him by his client in his personal account, which was attached by creditors. No loss to the client occurred because the lawyer arranged funds from other sources to cover the deficit. The court, nevertheless, approved a one year suspension (the Bar Association recommended disbarment) because of the commingling violation, pointing out on p. 114:

> ". . . This salutary rule was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money."

See also *Clark v. State Bar of California*, 246 P. 2d 1 (Calif. 1952), (cash placed in an attorney's safe not commingled where kept in separate marked envelope) ; *Naltner v. Dolan*, 8 N.E. 289 (Ind. 1886), (attorney occupies position of debtor to client and thus is liable even if not negligent where loses trust funds deposited in his own account because of bank insolvency) ; 26 A.L.R. 2d 1334.

Although it is our opinion that an attorney may clear a check combining sums due him and a client through an escrow account, it is our further view that the commingling rule would be violated if funds belonging to the attorney were permitted to remain in the account maintained for others. Such a practice could, in our opinion, subject a client's funds to the risk of attachment or mismanagement.

Our view in this respect is reinforced by *Black v. State Bar of California*, 368 P. 2d 118 (Calif. 1962), where the

court reprimanded an attorney who, as treasurer of a corporation, maintained a corporate account in which he deposited a check in the amount of approximately $27,500, $18,300 of which belonged to the corporation, and $9,200 of which represented his fee. The lawyer did not segregate his fee when he became entitled to it. The court, noting that the risk to the client's money from either mismanagement by the attorney or attachment by a creditor existed, stated that he should have "separated his money from the balance at the earliest reasonable time after his own interest became fixed".

The requirement that an attorney separate out his own funds from an escrow account does not, however, in our opinion preclude the retention in such an account of a reasonable sum to cover service charges or to protect against the risk of inadvertent overdraft upon the account. The reasonableness of such an amount would necessarily vary in light of the size of the account and the number of transactions to which it was subjected.

Finally, you ask our views as to the person or agency which has the responsibility of enforcing the noncriminal sanctions set forth in Section 44(b) of Article 10. Section 44(b) reads as follows:

> "Any attorney wilfully violating the provisions of this section shall be charged with *professional misconduct, malpractice, or conduct prejudicial to the administration of justice* and shall be proceeded against for reprimand, suspension, or disbarment under any applicable provision of this article or any other law or the Maryland Rules." (emphasis supplied)

In our opinion those persons or agencies who are exclusively charged with proceeding against attorneys for professional misconduct, malpractice, or conduct prejudicial to the administration of justice, under the provisions of Sections 12 and 13 of Article 10 of the Code, namely, a judge of any of the several courts of the State, or a bar associa-

tion, as defined in Section 13(a) of Article 10, are empowered to bring proceedings against an attorney for violations of Section 44(a). We do not believe that the Attorney General, under the provisions of either Section 26A or Section 26B of Article 10, is directed under this statute to bring such actions. An action for injunctive relief by the Attorney General under Section 26A and the concomitant powers of investigation given under Section 26B of Article 10 are authorized where offenses constituting the unauthorized practice of law are involved. Manifestly, Section 44(a) does not define an offense constituting the unauthorized practice of law.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

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[1] Canon 11 of both the American Bar Association and the Maryland Bar Association provides in pertinent part: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

AVIATION COMMISSION, STATE

POLITICAL SUBDIVISIONS MAY BY DIRECT CONTACT WITH FEDERAL AUTHORITIES FINALIZE FEDERAL AWARDS FOR AIRPORT CONSTRUCTION LOANS.

April 10, 1968.

Mr. David B. Snyder.

You have forwarded to us an Opinion of the City Solicitor of Baltimore City dated December 16, 1964, which advised the Department of Aviation of Baltimore City that requests by that Department for Federal aid for construction to be performed at Friendship International Airport need not first be submitted to and approved by the Maryland State Aviation Commission (the "Commission").

That Opinion reviewed Article 1A, Section 5, which in relevant part provides that the Commission may "recommend necessary legislation to advance the interests of the State in aeronautics" and "represent the State in aeronautical matters before federal agencies and other State agencies". This grant of authority by the Maryland General Assembly was compared with Sections 137 and 138 of the Charter and Public Laws of Baltimore City (1949 Edition) with respect to the Department of Aviation of Baltimore City, which was conferred power under the provisions of Section 138 "to approve the site of any airport on property owned by the City . . . to maintain, operate and control all airport sites hereafter acquired by the City . . . [and] to develop, maintain, operate and control all airport sites hereafter acquired by the City". These provisions were continued in the 1964 revision of the Charter of Baltimore City.

The City Solicitor, with these provisions in mind, was of the opinion that the authority given the Commission to represent State agencies before federal agencies did not, by the use of the word "State", give the Commission ex-

clusive authority to represent subdivisions in these matters before federal agencies.

We agree. A political subdivision is, of course, included within the term "State". See 46 Opinions of the Attorney General 212, 214 (1961). The General Assembly clearly intended by the provisions of Article 1A to permit the Commission to represent political subdivisions before federal agencies. However, this grant of authority to the Commission was not, in our opinion, a prohibition upon political subdivisions from representing their interests before federal agencies.

For these reasons we are of the opinion, and therefore advise you, that with respect to project approval undertaken by political subdivisions in obtaining funds under the Federal Airport Act the Commission does not have exclusive authority such as would prohibit direct contact by political subdivisions with the responsible federal agency nor must their projects receive the prior approval of the Commission.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

BANKS AND BANKING

BANK COMMISSIONER—UNSECURED LOANS MADE BY CREDIT UNIONS—COMMISSIONER NOT REQUIRED TO APPROVE EACH LOAN MADE—COMMISSIONER'S ADVANCE APPROVAL TO MAKE UNSECURED LOANS IN EXCESS OF $400 REQUIRED—SEC. 152(A), ARTICLE 11.

January 26, 1968.

Honorable William A. Graham.

You have requested our opinion as to the interpretation of Section 152(a) of Article 11 of the Annotated Code of Maryland pertaining to unsecured loans to members of credit unions. Specifically, the question was whether the language of the statute permitted the Bank Commissioner to authorize a credit union to make such loans without the necessity of approving each loan on an individual basis.

Section 152(a) provides as follows:

> *"Bylaws determine purpose, security and terms.* —A credit union may loan to its members for such purposes, and upon such security and terms as the bylaws shall provide, and the credit committee may approve, but security need not be taken for any loan of four hundred dollars ($400.00) or less. In any case where the loan is in excess of four hundred dollars ($400.00) up to a maximum of fifteen hundred dollars ($1,500.00), it shall be subject to the prior written approval of the Bank Commissioner."

The first sentence of this section clearly relates to the general authority of a credit union to make loans upon whatever "security and terms" are provided in the bylaws of the credit union. It is specifically provided that no security need be taken for loans of $400.00 or less. The second sentence, if lifted from the context in which it appears in the statute, would appear to require that each

individual loan of more than $400.00 up to a maximum of $1,500.00 is subject to the prior approval of the Bank Commissioner.

This section was amended by Chapter 569 of the Laws of Maryland, 1963, and Chapter 563, Laws of Maryland, 1967. The 1963 amendment raised from $400.00 to $750.00 the amounts contained in the second sentence of Section 152(a), and the 1967 amendment increased the amount to $1,500.00. The title to Chapter 563 indicates that the purpose of the amendment was "to change the value of loans credit unions may make *without security and without approval of the Bank Commissioner* . . ." It is readily apparent, therefore, that the second sentence of Section 152(a) refers not to any loans made by the credit union but to unsecured loans.

The remaining question is whether each unsecured loan made by a credit union in amounts greater than $400.00 and less than $1,500.00 must be passed upon, individually, by the Bank Commissioner. Admittedly, the use of the word "the" before the word "loan" and the use of the pronoun "it" would appear to lend some credence to the proposition that individual approval of each loan by the Bank Commissioner is required by the statute. An inquiry into the operation of this statute, in practice, reveals, however, that such an interpretation was not intended by the Legislature.

The volume of loans made by credit unions in this State, according to the Fifty-seventh Annual Report of the Bank Commissioner of the State of Maryland (June 30, 1967) reveals a total of $34,398,972.89 in loans made by credit unions outstanding as of that date. While the Report does not indicate the volume of unsecured loans, we are advised that the amount is substantial. From this we must conclude that the Legislature did not intend to require the Bank Commissioner to grant prior written approval for each unsecured loan made.

We are of the opinion, therefore, and advise you accordingly, that Section 152(a) authorizes the Bank Commissioner, upon proper showing, to grant to any credit union

regulated by the Bank Commissioner, in writing, general approval to make unsecured loans in amounts greater than $400.00 but no more than $1,500.00.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

BANKS AND BANKING—SECONDARY MORTGAGE LOANS—REFINANCING—DEFINED AND APPLIED.

June 24, 1968.

Mr. William A. Graham.

You have asked our opinion as to the meaning of the term "refinanced" as used in Section 64 of Article 66 (Annotated Code of Maryland, 1968 Replacement Volume). Said Section 64 provides as follows:

> "No secondary mortgage loan as defined in this subtitle shall be refinanced more often than one time during any twelve-month period of such loan or more often than two times during any five-year period of such loan."

You have cited to us five hypothetical situations and asked our comments as to each. Before referring to the specific situations you have posed we comment in general on the meaning of the term "refinanced".

Although the term "refinanced" may be a generally used term in business and financial circles, it apparently has no definite or well-defined meaning. In the only reported case in this State attempting to define that word, the Court of Appeals noted that, "[t]here are disagreements, even among financial experts, as to the meaning of the word." *Truitt v. Board of Public Works,* 243 Md. 375 (1966).

In *Truitt* the Court interpreted the word "refinancing" so as to permit the Maryland Hospital Commission to loan funds to two hospitals even though those institutions had already started construction of their new facilities and had obtained funds for doing so in anticipation of permanent financing being obtained from the Commission. The Court noted that the term there under construction must be regarded in the context of the practices which it reflected. *Truitt v. Board of Public Works, supra,* p. 394. See also 49 Opinions of the Attorney General 211.

In our opinion, a significant factor in determining if a loan has been "refinanced" is the use of the proceeds derived from the second loan. If the proceeds from the second loan are used to repay the outstanding loan, it would appear that the original loan has been refinanced. In *Bankers Life Co. v. International Telephone and Telegraph,* 239 F. 2d 621 (1956), it was held that a refinancing occurred when the debtor corporation sold stock and used the proceeds therefrom to repay an outstanding loan.

We now turn to the five specific situations you have presented with regard to "second mortgages" secured by confessed judgment notes.* These situations are:—

1. A new loan is made to the borrower evidenced by a new confessed judgment note, with separately stated payments and an unrelated maturity date. The money evidenced by the new confessed judgment note is paid to the borrower in its entirety and no part is applied to the first confessed judgment note. The borrower would pay the regular charges, such as they may be, with respect to the second confessed judgment note.

2. A new loan is made to the borrower, evidenced by a new confessed judgment note under which payments are to commence on the agreed maturity date of the existing note. Again, the full amount of the money, less charges, under the second confessed judgment note are paid to the borrower and are not applied to the first confessed judgment note. Interest and principal repayments under the second confessed judgment note are deferred until the first loan is paid according to its terms.

3. A new loan is made evidenced by a new confessed judgment note unrelated to the existing confessed judgment note and the first note extended as to maturity date without additional charges and the payments thereunder are reduced because

they are paid over a longer period of time. As in 1 and 2 above, no money under the second loan is applied to the first loan.

4. A new loan is made, evidenced by a new confessed judgment note, on which the normal charges are made and part of the net proceeds of the new loan is applied to pay off all or a part of the existing loan.

5. No new loan is made, but the existing confessed judgment note is amended by extending its maturity date without additional charges because of the fact that the borrower feels he can not meet the payments. The effect of this is to reduce the amount of each payment, depending upon the time extension. It also has the effect of increasing the total interest payable under the note.

In our opinion, only item 4 above clearly constitutes a violation of the refinancing provisions of Section 64 of Article 66. The other situations, on the basis of the presented facts, do not constitute a refinancing. Item 2 could cause some concern, but since you have specifically set out that the funds obtained from the second loan are not applied to pay the first indebtedness, we believe there would be no refinancing involved. Of course, because of the timing of the matter, this could be a questionable circumstance, and if the facts proved that the funds from the second loan actually were used to repay the first loan, even circuitously, the second loan would be a prohibited refinancing violation under Section 64 of Article 66.

FRANCIS B. BURCH, *Attorney General.*

S. LEONARD ROTTMAN, *Assistant Attorney General.*

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* Under Article 66, Section 40, confessed judgment notes taken for the purpose of securing a lien on real estate are considered "second mortgages" if the other qualities of secondary financing are present.

BANKS AND BANKING—BANK COMMISSIONER—ADVERTISING BANKING ACTIVITIES—UNLICENSED ORGANIZATION UTILIZES THE NAME "AMERICAN SAVINGS PLANS, INC." —DOES NOT VIOLATE ARTICLE 11, SECTION 108F.

October 8, 1968.

Mr. William A. Graham.

You have asked our opinion as to whether an organization known as American Savings Plans, Inc., whose representatives will be engaged in selling mutual fund shares in Maryland and whose representatives will be registered with the Maryland Division of Securities and State Insurance Department but not the Bank Commissioner, may utilize its corporate name on letterheads and billheads, etc., without running afoul of the prohibition contained in Article 11, Section 108F. That section, the substance of which has been part of the banking laws since 1910, provides:

> "No person, copartnership, corporation or any other entity created under the laws of this or any other state not authorized by its charter to conduct the business of a banking institution and not subject to the supervision, control and examination of the Commissioner, and not required to make reports to him in accordance with the provisions of this article, shall make use of any sign at the place where such business is transacted, having thereon any artificial or corporate name or other words indicating that such place or office is in the place or office of a banking institution as defined in this article; nor shall such person or persons, copartnership or corporation or any other entity make use of or circulate any letterheads, billheads, blank notes, blank receipts, certificates, circulars, or any written or printed, or partly written or printed paper whatever, having thereon any artificial or corporate name, or other word or words indicating that such business is the busi-

ness of a banking institution. Neither shall any such person, copartnership, corporation or any other entity broadcast over the radio or the television in any manner whatsoever, any written or printed statements or any oral statements which would indicate by such media that they are a banking institution.

"Any person, copartnership, corporation or any other entity violating any of the provisions of this section, either individually or as an interested party in any copartnership, or corporation, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not more than three thousand dollars ($3,000.00), or be imprisoned for not more than five years, or by both fine and imprisonment."

We are of the opinion that the use of the corporate name in question would not offend this statutory provision. In our opinion of March 31, 1967 to your department, we held that the use of the name "Allied Bank Credit System, Inc.", in connection with a business not under your jurisdiction, constituted a violation of the statutory provision in question. We "note(d) the relationship between banks and extension of credit", and observed that "the name could well be taken to mean a particular system of extending credit has been established by the 'Allied Bank'. This could certainly indicate to the general public that the business was, in fact, a banking institution". In the same opinion we observed that the use of the word "bank" with respect to organizations not under your jurisdiction was not in all cases improper since, as for instance in "American Bank Stationery Company", the word did not suggest that the company was a "banking institution offering a particular credit system".

In our opinion of November 30, 1967, we held that the use of the names "Bankers Guarantee Corporation" and "Banker Acceptance Corporation" violated the Act since these names might cause the public to "confuse the Bankers Guarantee Corporation and the Bankers Acceptance Cor-

poration with a banking institution subject to the jurisdiction and control of the Bank Commissioner". We also noted that the names "would indicate, to a layman, that both of the corporations render some service to banking institutions or to bankers as a group".

We have also held that the use by federally insured savings and loan associations of the words "savings institution" is violative of the Act. See 24 Opinions of the Attorney General 148 (1939) and 35 Opinions of the Attorney General 102, 105 (1950). In these opinions we took the view that the advertisements in question were misleading since savings and loan associations are specifically prohibited by law from accepting deposits as distinct from shares (see 35 Opinions of the Attorney General 102, 104 (1950)) and since persons dealing with such organizations, which at that time were unregulated by the State, might be misled into a belief that they were "subject to banking regulations and eligible for insurance by the Federal Deposit Insurance Corporation". See 24 Opinions of the Attorney General 148, 150 (1939). In our opinion at 35 Opinions of the Attorney General 105, 108 (1950), we also held that the use of the words "savings account" to describe a building and loan association shares was interdicted by the Act.

We are of the opinion that the use of the name "American Savings Plans, Inc.", does not suggest either the existence of a banking organization advancing credit or the existence of a state regulated and federally insured "savings institution" or "savings account". Accordingly, we consider that the name does not *per se* offend the Act. As noted, we have taken the view that the use of the word "bank" by institutions not under the jurisdiction of the Banking Commissioner is not always prohibited where it would clearly not be misleading, and we consider that the same proposition holds true with respect to the use of the word "savings". We believe, however, that the organization now in question will have to be scrupulously careful to insure that its advertising and promotional materials do not use the term "savings institution" and do not refer to investments made with the Plan as "accounts" or "savings

accounts". We would suggest that you draw the attention of the officers of the corporation to our opinion at 24 Opinions of the Attorney General 148 (1939) and 35 Opinions of the Attorney General 102 and 105 (1950).

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

BANKS AND BANKING—INTEREST AND USURY—CHAPTER 453, ACTS OF 1968, CODE ARTICLE 49, SECTIONS 1-11—(1) COLLATERAL LAWS (RETAIL SALES ACT, SMALL LOAN LAW, CREDIT UNION LAW, ETC.) NOT INTENDED TO BE REPEALED; (2) LENDER CHARGING NOT MORE THAN 8% INTEREST ON UNSECURED LOANS NOT REQUIRED TO BE LICENSED UNDER SECTION 5(B); LOANS TO CORPORATIONS AND LOANS MADE UNDER SECTION 7, REGARDLESS OF INTEREST RATE, DO NOT COME WITHIN SECTION 5 LICENSING REQUIREMENTS; (3) LICENSING REQUIREMENT INAPPLICABLE TO LENDERS LICENSED UNDER OTHER MARYLAND LAWS AND TO LICENSEES UNDER VARIOUS SALES FINANCE ACTS; (4) LOAN DISCLOSURE PROVISIONS DO NOT APPLY TO LICENSEES UNDER LAWS COLLATERAL TO THE ACT BUT DO APPLY TO LOANS MADE BY THEM WHICH ARE WITHIN THE ACT AND NOT SPECIFICALLY REGULATED BY THE LAWS PERTAINING TO THEM; (5) THE "AGREEMENT IN WRITING" REFERRED TO IN SECTION 5(A) OF THE ACT NEED NOT BE SEPARATE FROM THE CONTRACT OF INDEBTEDNESS.

November 21, 1968.

Mr. William A. Graham

During the period of uncertainty as to the meaning and effect of Chapter 453 of the Laws of Maryland of 1968 (House Bill 11) you forwarded to us a number of questions posed to you which we deferred answering because of the existence of pending litigation. In our letter of October 3, 1968, we undertook to segregate the problems so that we shall deal only with questions remaining open since the Court of Appeals decision in the case of *B. F. Saul Co. v. West End Park North, Inc.* [250 Md. 707, 1968; Opinion dated October 2, 1968]. In your reply letter of October 10, 1968, you indicated agreement with our judgment as to the problems resolved by the *Saul* case and, apparently, the inquiries previously directed to you have not been repeated.

The remaining issues presented by you seem to be as out-

lined in your letters of July 3, July 25 and August 13, 1968, as follows.

1. Is a license under Section 5(b) required for the business of making loans which, except for the rate of interest,[1] would fall under Section 5(a) (i.e., a rate *not* in excess of 8%), the loans in question being made to non-corporate business organizations in an amount not greater than $5,000?[2]

(a) Is a lender under Section 5 required to be licensed if his loans are made exclusively to corporations?

2. Is the licensing requirement of Section 5 applicable to persons doing business under other laws such as (a) the Maryland Retail Installment Sales Act (Code Article 83, Sections 128-153), (b) the Retail Credit Accounts Law (Code Article 83, Sections 153A-H), (c) the Uniform Small Loan Law (Code Article 58A, Sections 1-28), (d) the Secondary Mortgage Law (Code Article 66, Sections 39-70), and (e) laws relating to the transactions of credit unions (Code Article 11, Sections 135-162)?

3. Do the loan disclosure provisions of Section 10 apply to the activities conducted under the laws referred to in Question 2?

4. Is the license requirement of Section 5 of Chapter 453 limited by the use of the phrase "lending under this section" to lenders who charge more than 8% interest?

5. Must the "agreement in writing" referred to in Section 5(a) of the Act be signed prior to the execution of the "contract of indebtedness"?

Preliminary to answering the specific questions, we think it would be appropriate to discuss our view of the position of Chapter 453, now codified as Maryland Code Article 49, Sections 1-11, with respect to other preexisting Maryland laws, since the question of interrelationship with and possible repeal of other laws by implication pervades the whole area. Usury laws in Maryland appear to have been first enacted as early as 1704 and the general usury provisions

have uniformly been contained in Article 49 of the Code at least since 1888. The usury laws and the attitude of the courts from the earliest times reflected an idea that the charging of interest itself constituted a form of evil which should be suppressed. See *Plitt v. Kaufman,* 188 Md. 606, at 610. As commerce became more complex and the use of credit and money as a commodity came to be a commercial necessity, this State, along with most others, passed specific laws permitting the charging of compensation for loans or extensions of credit in excess of the general usury rate but limited the effect to certain designated areas of commerce and imposed rather stringent formal requirements on the transactions permitted. Commercial establishments had also seized upon exceptions (e.g., time sales) to the application of the general usury rules, and the dealings of merchants and lenders with members of the general public who were newly achieving a substantial level of income but were lacking in business acumen created an atmosphere for imposition on the unwary which required legislation. See *Associated Acceptance v. Bailey,* 226 Md. 550.

Thus, in 1941 our Legislature passed the Retail Installment Sales Act to regulate strictly the amount of money which might be earned by sellers and finance companies on sales of goods and to regulate the formalities of transactions with specific emphasis on disclosure to purchasers. In that same year finance companies themselves were required to be licensed and their dealings with the general public were regulated with specific emphasis on their dealings in retail installment sales. See Code Article 83, Sections 128-153 and Sections 154-165. Previously, as early as 1918, the General Assembly had enacted legislation regulating the small loan business, requiring the licensing of lenders but permitting the charging of interest in excess of 6% per annum for loans under the amount of $300. Also, in 1945 the legislature added to the laws covering loan transactions the Industrial Finance Law (Code Article 11, Sections 163-205), covering loans of $1,500 or less, requiring licensing of lenders and permitting rates of interest at 6% in advance plus service charges, which together exceed the standard

rate of 6% per annum. Credit unions have been authorized under State law since 1929. The general rate of interest for those organizations has been 1% per month on unpaid balances on the loans they are permitted to make. The Secondary Mortgage Law, again requiring licensing and regulating the relationships between lender and mortgagor, was introduced into the law in 1967 (Code Article 66, Sections 39-70) and again permitted interest in excess of the general usury rate but applied specific regulations as to the conduct of business.[3]

With this background of prior legislative enactments, which is not necessarily exclusive, it may be seen that the provisions of Article 49 of the Maryland Code, which related to interest and usury generally did not, in fact, cover the whole field of loan or interest situations but gradually became more restricted to areas not specifically covered by other laws. One questions then whether the Legislature by the enactment of Chapter 453, described as an act to repeal the existing sections of Article 49 and to enact new sections in lieu thereof "to stand in the place of the sections so repealed, generally to revise the laws of Maryland relating to interest and usury", specifically intended to repeal or amend the prior laws in the same field which were not mentioned in Chapter 453 and whether the language of the body of the act accomplishes the same result by necessity. For sake of simplicity we shall hereafter refer to Chapter 453 as the Act.

As you know, repeal by implication is not a favored doctrine and, in the absence of an express reference to an earlier statute, an implied repeal cannot be held to exist unless the language of a later statute is irreconcilably inconsistent with the language of the earlier one so that the two cannot stand together. If the legislative language can be reconciled, then repeal by implication is to be avoided. An exception to this rule applies in cases in which the legislature is undertaking to deal with a whole subject matter previously contained in earlier statutes. When it is clear that a later act covering a whole subject is intended as a substitute for preexisting legislation, then the later act may

operate as a repeal of the existing legislation even though there is no repugnancy in express terms. The rule that implied repeal is not favored is inapplicable to the latter situation. 20 M.L.E., *Statutes*, Sections 53, 54, 55.

We think that the Act in this case specifically repealing provisions of the interest and usury law which had for years occupied a special position in the commerce of this State in companionship with collateral enactments, enacting new sections "to stand in the place of the sections so repealed" and failing to contain a declaration of legislative intent to repeal any laws which may be inconsistent does not, in fact, cover a whole subject matter or disclose an intent to repeal other specific prior legislative enactments, such as those mentioned above.[4] It is noteworthy that the phrase in the title of the Act "generally to revise the laws of Maryland relating to interest and usury" is merely a generalization for purposes of making the title sufficiently broad to advise of its content and that the body of the Act itself contains no such phraseology.

The definition of the term "interest" in Section 1(A) of the Act is "any compensation imposed directly or indirectly *by a lender* for the extension of credit for the use of forbearance of money, including but not limited to loan fees, service and carrying charges, discounts, interest, time-price differentials, investigators' fees and any amount payable under a point, discount, origination fee or other system of additional services" (emphasis supplied) with the express intention to prohibit "discounting or add on or devices of a similar nature". The general language is broad enough to indicate some conflict with practically every other pre-existing interest regulation statute. However, that definition of the term "interest" is restricted to charges imposed "by a lender" and "as used in this article".

We think that the terminology used is limited to the actual lending of money which is specifically dealt with in the Act and that references to service and carrying charges, time-price differentials, investigators' fees and add on devices were intended to cause the definition of "interest",

as applied to loan situations, to embrace every conceivable compensation to lenders who had previously disguised interest charges by the use of nomenclature more appropriate to the laws relating to charges on time sales and regulated loans under the Small Loan Law or the Industrial Finance Law. It seems to be a hallmark of a usurer to disguise the reality by the employment of inapt but impressive verbiage, and such a practice is particularly effective when the terminology seized upon is legitimate in itself even though it is correctly applied to different situations. Even the provisions of Section 5 of the Act which apply to unsecured loans and permit an interest rate not in excess of 12% per annum simple interest, which is the closest parallel to the loan laws collateral to Article 49, cannot be said to be intended to repeal the collateral laws. Under subsection (b) of Section 5, requiring licensing, the terms of the Industrial Finance Act (Article 11, Sections 169-191) are adopted to establish the licensing and examination procedures to which a lender is subject. The same subsection exempts altogether a "credit union or licensee under any Maryland lending provisions in any other article of the Code". It is inconceivable that the legislature would have incorporated or predicated exemptions upon those provisions of the collateral laws by reference while at the same time intending their repeal. It is also most doubtful that the legislature intended the scant provisions of Section 5 as a substitute for the detailed regulations then existing with regard to the operation of credit unions (Article 11, Sections 135-162), industrial finance companies (Article 11, Sections 163-205) and small loan companies (Article 58A, Sections 1-23), the law pertaining to each of those businesses having been enacted in detail to cure then-existing evils or to provide a special source of regulated, cooperative credit within special groups.[5]

There is also no conflict with the acts regulating retail sales since the original evil which gave rise to those acts came into being because of the distinction between a loan of money and the charging of interest thereon as opposed to a sale situation in which the price of goods may be greater for a delayed payment than for spot cash. See *Roth-*

man v. Silver, 245 Md. 292; *Falcone v. Palmer Ford, Inc.*, 242 Md. 487. There would still appear to be a distinction between sales and loans, the effect of the Act being merely to make clear that a *lender* may not charge interest in the guise of a time-price differential, etc. and there being no effect on bona fide vendors.

A closer question exists with regard to the Secondary Mortgage Law because the Act does operate very explicitly in the area of mortgages secured by real estate and a rather obvious conflict exists between the interest provisions of the Act and the interest provisions of the Secondary Mortgage Law. We think, however, that one can distinguish between a law which relates to interest and usury in the general sense and one which relates to the charging of interest in a specific situation, such as the Secondary Mortgage Law, in which the lender is in a position of exposure greater than that of the ordinary mortgage lender. We think it significant that the Secondary Mortgage Law came into being as recently as 1967 and that the same legislature which enacted Chapter 453 also passed a bill (Chapter 44 of the Acts of 1968) which made a minor correction in Section 48, Article 66 of the Secondary Mortgage Law.

On the whole, therefore, it is our feeling that to conclude that the Legislature intended the repeal of any of the laws relating to charges for loans or extensions of credit collateral to the areas regularly covered by Article 49, particularly in view of the drastic impact on industries and members of the public dealing in the specific canalized areas covered by those laws, would be not only entirely impractical but legally unnecessary. If the Legislature had intended such a scope for Chapter 453, it would not have left that matter to construction or inference. Since we are unable to appreciate any direct and irreconcilable conflicts with preexisting laws, we think that the Act should be considered as limited in its scope to those previously unregulated areas which the earlier Article 49 covered and which the Act now covers, and no repealing effect other than that expressed in the body of the Act should be attributed to it.

Turning to your specific questions, we have the following views:

1. Is a license under Section 5(b) required for the business of making loans which, except for the rate of interest, would fall under Section 5(a) (i.e., a rate *not* in excess of 8%), the loans in question being made to noncorporate business organizations in an amount not greater than $5,000?

Section 5(a) of the Act provides:

> "Interest may be charged on loans not secured by a mortgage or deed of trust on real property or on loans not fully secured by negotiable stocks, bonds or bank deposits where the borrower is required to repay the indebtedness in equal or substantially equal monthly, or other periodic, installments, at a rate not in excess of twelve per cent (12%) per annum simple interest on the unpaid balance of the loan under an agreement in writing between the lender and the borrower. If interest on loans under this section is precomputed, (1) the required written statement between lender and borrower shall state the agreed upon and equivalent per cent per annum simple interest rate not exceeding a .2% variance from the actual interest rate which the precomputed charges cannot exceed, and (2) if, by reason of repayment of the loan prior to maturity, the agreed upon per cent per annum simple interest rate is exceeded, such excess shall be refunded to the borrower or credited on any balance owing by the borrower."

Subsection (b) provides for the mandatory licensing of any "person engaged in the business of making loans for a consideration *under this section*" (emphasis supplied). The question raised is whether the licensing requirement is applicable to persons who charge not more than 8% interest as permitted under Section 3 of the Act.

We think that the licensing requirement is applicable only

to lenders who make the types of loans described in Section 5(a) and who, under the terms of Section 5, charge more than the maximum 8% interest permitted by Section 3. The specific licensing provisions of subsection (b) apply to "any person engaged in the business of making loans for a consideration *under this section,* which includes any person making more than five loans *hereunder* per year" (emphasis supplied), exclusive of certain recognized institutions. Obviously, the only distinction between generally unsecured loans and those made under Section 5 is the availability under Section 5 of a permissible rate of interest in excess of 8% per annum simple interest on the unpaid balance as permitted by Section 3. A person making a loan within the interest rate permitted by Section 3 would have no benefit of the terms of Section 5 and could not be said to be making that loan under Section 5 even though it might be unsecured or secured to an extent less than that offered by a mortgage or deed of trust on real property or an assignment of negotiable stocks, etc.

(a) Is a lender under Section 5 required to be licensed if his loans are made exclusively to corporations?

It would further appear that, if a person is in the business of making loans exclusively to corporations, even though they might be of the variety set forth in Section 5, he is not required to be licensed under subsection (b) since the benefit of the increased interest rate has been made the criterion for licensing and since it appears that loans to corporations are not within the scope of the interest limitations of any part of the Act. *B. F. Saul Co. v. West End Park North, Inc., supra.* Such a lender could not be said to be making loans under Section 5. The corporate lender need not rely on Section 5 to defend his charging of an interest rate in excess of 8% nor need he observe Section 5 with regard to the maximum interest rate of 12%.

2. Is the licensing requirement of Section 5 applicable to persons doing business under other laws such as (a) the Maryland Retail Installment Sales Act (Code Article 83, Sections 128-153), (b) the Retail Credit Accounts Law

(Code Article 83, Sections 153A-H), (c) the Uniform Small Loan Law (Code Article 58A, Sections 1-28), (d) the Secondary Mortgage Law (Code Article 66, Sections 39-70), and (e) laws relating to the transactions of credit unions (Code Article 11, Sections 135-162)?

The licensing provisions of Section 5 are specifically inapplicable to a "credit union or licensee under any Maryland lending provisions in any other Article of the Code, which is organized under the laws of this State or otherwise is qualified to do business in this State". Subsection (b) itself then answers the question as to the need for licensing of lenders operating under the Uniform Small Loan Law and the Secondary Mortgage Law and the laws relating to credit unions. As we have noted above, we think that the laws relating to retail installment sales and retail credit accounts are not repealed by the Act and that persons who extend credit under those laws are not truly lenders under the Act. We feel, therefore, that the licensing provisions are inapplicable to those two classes of persons. Even assuming that they were properly classified as being in the lending business, they would be exempt under the general provisions quoted above.

3. Do the loan disclosure provisions of Section 10 apply to the activities conducted under the laws referred to in Question 2?

We think that for the reasons previously given the loan disclosure provisions of Section 10 do not apply to activities conducted by the entities and under the laws referred to in Question 2. Such entities, however, simply because they are exempt in the areas of their principal activities, are not exempt as to those lending activities not specifically regulated by the laws pertaining to them but covered by the Act. As to those activities they must, as any other lender, comply with all the terms of the Act. The exemption from licensing under Section 5(b) merely excuses them from submitting to dual regulation and it would be an untenable extension of Section 5(b) to maintain that an institution which makes the type of loan described under

Section 5(a) is excused from the specific requirement of Section 5(a) to give the "required written statement" set forth in Section 10 of the Act, simply because it is otherwise exempt in its other activities.

4. Is the license requirement of Section 5 of Chapter 453 limited by the use of the phrase "lending under this section" to lenders who charge more than 8% interest?

The answer to this question is covered in the answer to Question 1.

5. Must the "agreement in writing" referred to in Section 5(a) of the Act be signed prior to the execution of the "contract of indebtedness"?

It appears that the "agreement in writing between the lender and the borrower" mentioned in Section 5 may be the contract of indebtedness and it is not necessary to execute a separate instrument prior to the execution of a contract of indebtedness. There is a considerable contrast between the language of Section 5(a) and the language of Section 3 in which it is specified that the agreement therein mentioned be a separate instrument and be executed prior to the execution of a contract of indebtedness. Absent any legislative mandate as to the formalities of loans made under Section 5, we see no basis for a construction that the agreement must be separate from the contract. We do think, however, that the interest rate must be disclosed in a written agreement when the loan is made and that through the office of the disclosure statement the effect of any precomputation on actual yield to the lender must be disclosed so that the borrower is capable of fully understanding the amount he is paying for the use of the lender's money.

We trust that this fully answers the questions which have

been presented and that, if you are in need of any further assistance in this matter, you will not hesitate to call.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

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[1] See question No. 4.

[2] The question assumes that persons making "commercial loans" under Section 7 of the Act need not be licensed. For reasons hereafter stated, we think this assumption is appropriate.

[3] An article entitled "Limits on Interest Rates in Maryland", 27 Md. L. Rev. 252, discusses the charging of interest and compensation for credit under the acts other than the "General Usury Statute" and provides a comparison chart at pp. 270-271.

[4] In *B. F. Saul Co. v. West End Park North, Inc., supra,* the Court of Appeals observed that a statute which excludes corporations from the protection of the usury laws (Maryland Code Article 23, Section 125) would have deprived the parties of standing to test the interest provisions of the Act. This, we think, indicates a restrictive view on the part of the Court toward the effect of the Act on the whole subject matter of interest and usury.

[5] The Legislative Council recommended, and the 1968 legislature enacted, several bills regulating interest and charges contemporaneously with the Act. See Special Committee Reports to the General Assembly of 1968 by the Legislative Council, pp. 104, 110 (Industrial Finance and Small Loans), Acts of 1968, Chapters 439, 228 and 13.

BOND ACTS

EXPENSE ALLOWANCE FROM "PROCEEDS OF SALE" IS OVER AND ABOVE THE PREMIUMS REQUIRED TO BE DEVOTED TO EXPENSES OF SALE BY CODE ARTICLE 15A, SECTION 7A—EXPENSES IN EXCESS OF PREMIUMS MAY BE PAID FROM ACTUAL PROCEEDS WITHIN THE ALLOWED AMOUNT—ACCRUED INTEREST PAID AT TIME OF SALE TO BE RETAINED BY COMPTROLLER AND IS NOT DISTRIBUTABLE AS PART OF THE "PROCEEDS OF SALE".

February 19, 1968.

Mr. Bernard F. Nossel.

You have recently presented to us questions concerning the definition of the term "proceeds of sale" as employed in the various Bond Acts passed by the Legislature pursuant to Maryland Constitution Article III, Section 34. The specific questions were whether the proceeds of sale include the premiums paid by brokers and accrued interest, which are in addition to the face amount of the bonds issued. The definition of the term is also essential to a determination of the amount which may be spent for expenses of sale. The standard Bond Act will authorize the expenditure of a stated amount of money out of the proceeds of sale to cover expenses, and the question exists whether this sum is intended to be exclusive of any expenditure of the premium received so that the total expenses which might legally be paid, if incurred, would be the allotted sum plus the amount of the premium.

The following is an example of our concept of the facts involved in the typical issue, although the figures are probably not realistic.

Principal amount of
bond issue $10,000,000.00

Accrued interest received because the issuance is subsequent to the initial accounting date	10,000.00	
Premium paid by broker	10,000.00	
Total receipts by State		$10,020,000.00
Expenses of sale		23,000.00
Net receipt by State		$ 9,997,000.00

Under the circumstances of the above sale, assuming that the sum of $20,000.00 was allocated in the Bond Act for expenses, it is our opinion that the following results will obtain.

1. The accrued interest would be retained by the Comptroller to be applied, together with other funds available for the purpose, to the payment of interest on the bonds issued. We do not believe that the sum received, because the interest on the indebtedness contracted has already partly matured, can be properly classified as proceeds of sale. Bond bills are essentially appropriation measures. The creation of the debt to provide the money to pay the appropriation, whether it be a grant or a loan, is of a stated sum which the Legislature might reasonably expect to be produced by the sale. When the bonds are sold after some interest has matured, the failure of the Comptroller to retain the accrued interest payments would cause the State to be indebted for a sum greater than the face amount of the bonds. We understand that practical circumstances require the sales to be conducted in this manner, but the factual result must be confined to the legislative authority for the issuance and the total State debt authorized may not be exceeded.

2. The sum of $10,000.00 received as premium is required by Code Article 15A, Section 7A to be deposited in a premium and expense account for each bond issue. The expenses of the sale of any issue of general obligation

bonds are to be charged to each such account on a pro rata basis. We believe that this item is in addition to the authorized expenditure "from the proceeds of sale" on account of expenses contained in any Bond Act.

The use of the term "proceeds of sale" in both Section 7A and in the standard General Obligation Bond Act presents some difficulty. The reference in Section 7A to "that part of the proceeds of sale . . . which represents premiums earned as a result of such sale" would seem to indicate that the legislature recognizes the total proceeds of sale to include the premium. If this were the case, the effect would be to limit the authorized expenses in any Bond Act to the stated sum even though it may be less than the premium received and the actual expenses may be greater than the premium received. The actual treatment of the premium under Section 7A, however, demonstrates a clear legislative understanding to the contrary. If it were considered that the proceeds of sale of a standard Bond Act included the premium, then it would seem that any excess of the premium over expenses would have to be devoted to the purposes of the particular Act. The terms of Section 7A providing for the deposit of the premiums in special accounts and the devotion of any excess over actual expenses to the State's Annuity Bond Fund Reserve Account to be applied to reducing all the outstanding bonded indebtedness of the State demonstrate the legislative intent that the term "proceeds of sale" as used in the various Bond Acts does not include premiums received.

3. The deficiency in the premium-expense account of $13,000.00 must be made up out of the authorized expenses of sale and deducted from the principal of the bond proceeds. In cases in which the premium is insufficient to cover expenses and the authorized loans are exactly equal to the face amount of the bonds, obviously, some adjustment must be made to carry out the terms of the various appropriations made in any Bond Act. The steps to be taken may differ according to the specific terms of any Act. For example, in the General Construction Loan Acts the expenditures of funds require the approval of the Board of

Public Works. It would seem that in such cases the Board would have the initiative to make whatever adjustment is necessary. Further, it would be unnecessary to make any adjustments if the proposed expenditures should fail to materialize or, when brought to fruition, require the expenditure of less money than originally anticipated.

In the case of the School Construction Bond Acts, it would seem clear that only the net proceeds of sale, after the deduction of the expenses, are available for financial assistance to the subdivisions. The distribution of the net proceeds becomes an administrative matter dependent upon the requests received for financial assistance and the eligibility of the subdivisions making the requests. Inasmuch as there is no certainty in the particulars of the distribution of the proceeds to the subdivisions and the theoretical possibility exists that such requests might not even be received, the deduction of expenses from the principal amount authorized would certainly do no violence to the legislative scheme for these bonds. Bonds issued to raise money to make grants should present no problem since it is obvious that the grant cannot exceed the net proceeds of sale.

Addressing this analysis to the illustration set out above and skipping administrative requirements for deposits and withdrawals to and from the Treasurer and the principal accounts, the result would be that the Comptroller would deduct from the net proceeds of $9,997,000.00 the sum of $10,000.00 received as accrued interest and only $9,987,000.00 would be available for the purposes of the payments authorized under the Act.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

CLERKS OF COURT

RECORDATION TAX—APPLIES TO PROPERTY LIENS GIVEN IN CONJUNCTION WITH REAL ESTATE TRANSACTIONS PURSUANT TO SECTION 9-204 (4) (A) OF UNIFORM COMMERCIAL CODE.

January 2, 1968.

Mr. Frank W. Hales.

You have asked our opinion as to whether the recordation tax is payable under the following circumstances. A financing statement which by its terms covered "equipment, farm products, livestock, poultry, bill(s) obligatory and Deed of Trust" was recorded in your office on October 5, 1967, no recordation tax being paid on the financing statement. On the same date a Deed of Trust between the same parties named on the financing statement, covering the same items as the financing statement, and referring specifically to the land on which the farm was situated, was presented for record. The Deed of Trust recites that the grantor is indebted to the beneficiary in the amount of $19,438.82 plus an open account and further recites that the Deed of Trust is given to secure "all indebtedness to the beneficiary now existing or hereafter arising within a period of five years in amounts not exceeding in the aggregate outstanding at any one time the sum of $35,000.00 and in amounts not exceeding $11,000.00 on open account within said aggregate limit". You inquire as to what recordation taxes would be due on the Deed of Trust inasmuch as it covers the same items as the financing statement.

In our view, the recordation tax is payable computed on the existing indebtedness of $19,438.82 referred to in the Deed of Trust and on any additional indebtedness, including amounts payable on open account, extant as of that date or actually incurred thereafter. The prior or simultaneous recordation of the financing statement in the chattel records covering the same items as the Deed of Trust would not appear to render the Deed of Trust non-taxable.

It appears that no tax was paid on the financing statement because of a view that it was exempt from tax as a crop lien taken in crops and other chattels under the principles of our Opinion in 49 Opinions of the Attorney General 479, 494. We need not here consider whether an exemption for this crop lien is provided by Article 81, Section 277 (a) or whether the crop lien exemption is limited to the classes of crop liens (mortgages to federal agencies) formerly defined by Code 1957, Article 21, Section 52, prior to its repeal by Chapter 538 of the Acts of 1963. Cf. 24 Opinions of the Attorney General 988. We think it clear that even if the financing statement here is exempt, that the deed of trust covering the real estate is not entitled to exemption under Article 81, Section 277 (h) or (i), or otherwise. In our view, the deed of trust covering the real estate is not a supplemental instrument securing the debt, but rather is the primary security for the indebtedness in question, it being apparent that the deed of trust on the realty supplied the primary security for the advance. The exemption from recordation tax accorded crop liens by Chapter 277 of the Acts of 1939 was intended "to encourage and assist the making of loans of this type" (25 Opinions of the Attorney General 615) as a last resort for farm debtors during the depression years. Cf. 2 Gilmore and Black, *Security Interests in Personal Property*, Section 32. The loans to be encouraged by this exemption were the conventional crop liens known at the time of its enactment —liens limited by statutory enactment to crops grown on the land within one year or less, highly limited in value, and generally given as security only after the land itself had been mortgaged to the hilt, as a means of raising the limited capital necessary to the harvest of an extant crop. We think it clear that the crop lien exemption from recordation tax does not extend to the very different crop liens subsequently authorized by enactment of Section 9-204 (4) (a) of the Uniform Commercial Code (Article 95B of the Maryland Code), as enacted by Chapter 538 of the Acts of 1963, which provides that "a security interest in crops which is given in conjunction with a lease or a land pur-

chase or improvement transaction evidenced by a contract, mortgage or deed of trust may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction" without regard to the one-year limitation. Since enactment of this provision in 1963, inclusion of a crop lien in mortgage transactions involving farm real estate has become increasingly conventional. Where, as here, such a lien incidental to a mortgage or deed of trust covering real estate is given, we think it clear that the consideration advanced on the basis of the security of the crop lien cannot be divorced from and is ordinarily a small fraction of the consideration advanced on the basis of the underlying real estate transaction. The crop lien exemption, a dispensation to harassed farm debtors, cannot be held to be effective to exonerate such conventional real estate transactions from recordation tax.

Accordingly, we think it clear that, pursuant to the provisions of Article 81, Section 277 (k) the tax here is payable on the sum of $19,438.82 recited in the deed of trust plus any existing open accounts or subsequent advances increasing the total amount of indebtedness secured. In the event of subsequent advances, the debtor is under the obligation imposed by Article 81, Section 277 (k) to report and pay the recordation tax from such advances, to the extent that they increase the outstanding indebtedness beyond the amount upon which tax has previously been paid.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

CLERKS OF COURT—RECORDATION TAX—CHATTEL MORTGAGE BETWEEN CORPORATE LICENSEE OF TAVERN AND SELLER OF REAL PROPERTY UPON WHICH TAVERN IS LOCATED IS NOT A SUPPLEMENTAL INSTRUMENT EXEMPT FROM RECORDATION TAX UNDER ARTICLE 81, SECTION 277 (i) OF THE MARYLAND CODE BECAUSE THE ALLEGED PRIOR RECORDED INSTRUMENT (REAL PROPERTY MORTGAGE) WAS ENTERED INTO BY A DIFFERENT MORTGAGOR (THE INDIVIDUAL PURCHASER OF THE TAVERN PROPERTY).

February 20, 1968.

Mr. Charles C. Glos.

You have asked our opinion as to application of the recordation tax to a transaction involving an individual purchase of a tavern property who gave a real property mortgage to the seller of the property, stamps in the amount of $132.00 being placed on the deed but not on the purchase-money mortgage. At the same time, a corporation in whose name the license for the operation of the tavern on the property was placed gave a chattel mortgage to the seller of the real property, stamps in the amount of $132.00 being placed on the chattel mortgage. A claim for refund in the amount of $132.00 has been filed with respect to the latter stamps on the apparent basis that the chattel mortgage was a supplemental instrument exempt from the recordation tax under Article 81, Section 277 (i) and that the real property mortgage was exempt as a purchase-money mortgage under Article 81, Section 277 (a).

In our opinion, the fact that the chattel mortgage here in question was not given by the same person as the original mortgage precludes it from being exempt as a supplemental instrument. In 49 Opinions of the Attorney General, page 461, we referred to an instrument given by a corporation closely related to the original corporate debtor as, ". . . evidenc(ing) the creation of an entirely new debt arrangement involving a completely different debtor." It is true that in that case the new mortgage was given in substitu-

tion for and not in addition to, the original mortgage. However, our opinion in 49 Opinions of the Attorney General, page 503, makes clear that this difference does not defeat the tax in the present instance. In the latter opinion, we held with respect to a third party's instrument guaranteeing the debt of another party that, "The fact that the 'debt secured' does not represent either a borrowing by the mortgagors or their primary obligation is irrelevant. The statute attaches the tax to this instrument because it secures a debt, regardless of whose debt it may be." We think it clear that whether the corporate obligation here is viewed as creating a new debt obligation, or merely guaranteeing a pre-existing one, the difference in parties, under the principles of the two aforementioned opinions, precludes it from being deemed merely supplementary in character.

We conclude, therefore, that the tax applies and that no refund is due.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

CLERKS OF COURT—UNCLAIMED FUNDS—UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT SUPERSEDED ARTICLE 17, SECTION 44 WITH RESPECT TO PERIOD FOR DISPOSITION OF UNCLAIMED FUNDS.

March 18, 1968.

Mr. Frank W. Hales, Clerk.

You have asked our opinion as to whether the enactment by Chapter 611 of the Laws of 1966 of the Uniform Disposition of Unclaimed Property Act as Article 95C of the Code supersedes the provisions of Article 17, Section 44 of the Code with respect to the disposition of unclaimed funds deposited in your office in connection with court proceedings or subject to order of court. You have indicated that you have received from the Comptroller remittance forms for use under Article 95C. While repeals by implication are not favored, we think it clear that the express provision of Article 95, Section 8 relating to intangible property held for the owner by any court or public officer is sufficient to supersede the provisions of Article 17, Section 44 particularly in view of Section 2 of the 1966 Act, which declares that "all laws or parts of laws, public general or public local, inconsistent with the provisions of this Act are hereby repealed to the extent of any such inconsistency."

The declared purpose of Chapter 611 of the Laws of 1966 was to provide a uniform procedure for distribution of unclaimed property and we note that property subject to Article 17, Section 44 is not among the classes of property exempt from operation of the new act by reason of Article 95C, Section 25.

Accordingly, it is clear that Article 95C, Section 8 controls and that you should comply with the directions of the Comptroller.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

CLERKS OF COURT—MARRIAGE LICENSE—MAY BE ISSUED TO GROOMS UNDER 21 YEARS OF AGE WITHOUT PARENTAL CONSENT WHERE CERTIFICATE OF PREGNANCY IS PRESENT.

August 16, 1968.

Mr. I. Theodore Phoebus.

You have asked our opinion as to whether a marriage license may be issued in a situation in which the groom is nineteen years of age, the bride is over eighteen years of age and the couple has presented a certificate of pregnancy from a duly licensed physician, but the groom lacks parental consent. You inquire as to whether issuance of a marriage license is barred under these conditions by the inability of the groom to secure parental consent.

Until enactment of Chapter 573 of the Acts of 1967, issuance of a license was barred. See 49 Opinions of the Attorney General 292 (1964). Chapter 573 of the Acts of 1967 amended Article 62, Section 9 (a) of the Maryland Code to provide that "A male under the age of 18 years or a female under the age of 16 years may marry without parental or guardian's consent, where required, upon presenting a certificate from a licensed physician stating that he has examined the female and positively ascertained that she is pregnant or has given birth to a child." The language of this enactment is clear and if there were any doubt as to its purpose, it would be removed by the statement in the Legislative Council Report accompanying the Bill (Maryland Legislative Council Report to the General Assembly of 1967, Vol. I, p. 169) that "Males between 18 and 21 * * * may marry if they have parental consent or without such consent upon presentation of a certificate of pregnancy." Accordingly, we consider that our opinion at 49 Opinions of the Attorney General 292 has been legislatively overruled and that a license may issue in the present case upon presentation of an appropriate physician's certificate.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

CLERKS OF COURT—AFFIDAVIT OF DISBURSEMENT—MUST CERTIFY THAT DISBURSEMENT WAS MADE AT OR PRIOR TO THE FINAL EXECUTION OF THE DEED OF TRUST BY THE BORROWER—AFFIDAVIT OF DISBURSEMENT MAY BE MADE BY AN AUTHORIZED AGENT.

August 23, 1968.

Mr. Robert H. Bouse
and
Delegate Victor L. Crawford.

You have asked this office two questions relating to the effect of Chapter 718 of the Acts of 1968 (House Bill 736), which amends Article 21, Section 30 of the Code relating to conveyancing. The first question relates to the meaning of the words "final and complete execution of the deed of trust" in Article 21, Section 30B as amended, which provides "(n)o purchase money deed of trust involving land any part of which is situated in Maryland, shall be valid either as between the parties or as to any third parties unless such deed of trust contains or has endorsed upon it at a time prior to recordation, the oath or affirmation of the party secured by such deed of trust stating that the amount of the loan which said deed of trust has been given to secure was paid over and disbursed by the party secured by the deed of trust to either the borrower or the person responsible for disbursement of funds in the closing transaction or their respective agent at a time no later than the final and complete execution of the deed of trust, provided, however, that this subsection shall not apply where a deed of trust is given to a seller in a transaction in order to secure payment to him of all or part of the purchase price of said property." It has been suggested that the antecedent of this phrase is the phrase "a time prior to recordation" in the same section.

We are of the opinion that the phrase in question refers to the final execution of the deed of trust by the borrower and that it does not operate to permit the required affidavit,

and the disbursement of funds underlying it, to be deferred until an indeterminate "time prior to recordation". Execution is completed upon delivery of the instrument and recordation, which may be delayed for some length of time, is no part of the "execution". *Meise v. Tayman,* 222 Md. 426. To read the Act in the fashion contended for would be to substantially vitiate its purpose as legislation directed against the problems arising from deferred disbursements in real estate transactions. See 71 MD. STATE BAR ASSN. TRANSACTIONS 40-41 (1966); 73 MD. STATE BAR ASSN. TRANSACTIONS 52 (1968) both of which refer to the "settlement date" as the date of affidavit, as to the background of this legislation. Accordingly, our advice to you is that the language in Article 21, Section 30B refers to the final execution by the borrower.

The second question presented relates to whether the provisions of Article 21, Section 31 apply with respect to the affidavit of disbursement newly required by Article 21, Section 30B as well as the affidavit of consideration required by Article 21, Section 30A. The provisions of Article 21, Section 31 allow the various parties to make the required affidavit through an authorized agent. Article 21, Section 31 was not repealed and re-enacted at the time the requirement of an affidavit of disbursement was added to Article 21, Section 30. Notwithstanding this fact, we are of the opinion that Article 21, Section 31 applies to the newly required affidavit of disbursement as well as to the previously required affidavit of consideration. We are of the opinion that if the Legislature had intended a different result it would have modified the categorical reference to Article 21, Section 30 contained in Article 21, Section 31.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

CLERKS OF COURT — RECORDATION TAX — LEASES — WHEN LEASE "MERELY CONFIRMS, CORRECTS, MODIFIES OR SUPPLEMENTS" A PRIOR LEASE, NO ADDITIONAL TAX ASSESSED.

December 20, 1968.

Mr. Vaughn J. Baker, Clerk.

A lease has recently been received for record by your office. The lease is for a term of twelve years and covers a tract of land improved by an industrial plant which contains approximately 92,000 square feet of office space. The annual rental on this lease is $49,350, which gives rise to a Maryland recordation tax of $1,085.70 under Sections 277 (g) and (q) of Article 81 of the Maryland Code.

The taxpayer has requested a credit, to be applied against this amount for the amount of recordation tax ($311.85) paid upon a lease received by your office for record on March 1, 1963 between Lessor and Lessee. This lease was for a term of fifteen years, covered the same tract of land as the recent lease and an industrial plant containing approximately 60,000 square feet of office space at an annual rental to be determined by formula. Because the rent was indeterminate, recordation taxes were based upon the assessed value of the tract at that time ($28,350), capitalized at 10 per cent. Maryland Code, Article 81, Section 277 (g). The industrial plant is apparently the same one covered by the subject lease except that a recent addition has added 32,000 square feet of space. The present Lessee is a wholly-owned subsidiary of the original Lessee and the performance of the obligations of present Lessee under the subject lease have been guaranteed by the original Lessee. You have requested our opinion on the propriety of the requested credit.

There is no basis in the statutes for the proposed credit. It is our opinion that the taxpayer, in order to accomplish his purposes, must assert that there is a sufficient identity between the two leases to relieve the subject lease from

further recordation taxes. The relevant section of the Maryland Code is Article 81, Section 277 (i) which exempts from recordation tax an instrument which "merely confirms, corrects, modifies or supplements an instrument previously recorded, if there is no actual consideration paid or to be paid for the execution of such supplemental instrument." We have considered the subject lease in relation to the original lease and it is our opinion that subsection (i) does not exempt the subject lease from recordation tax. We find that the subject lease does considerably more than supplement or modify the original lease: the identity of the Lessee has been changed; the annual rent has been increased and a firm rental figure has been established; the amount of the demised space has been increased; the term of the lease has been reduced; and a guarantee of performance has been appended to it.

Although no previous opinions of this office have construed this specific subsection, a similar conclusion has been reached with respect to the comparable subsection (subsection h) which deals with supplemental instruments "securing a debt". The exemption has been denied under that subsection when the latter instrument was "a *substitution* for the former . . ." Opinion dated February 20, 1968 to Charles C. Glos, Chief Deputy Clerk, Circuit Court for Baltimore County (53 Opinions of the Attorney General 77); 49 Opinions of the Attorney General 461. Cf. 49 Opinions of the Attorney General 511.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Assistant Attorney General.*

CLERKS OF COURT—RECORDATION TAX—CHANGES EFFECTED BY CHAPTER 494 OF THE LAWS OF MARYLAND OF 1968 WITH RESPECT TO LEASES WITH INDETERMINATE RENTALS.

December 30, 1968.

Mrs. Marjorie S. Holt, Clerk.

Your recent letter raises certain questions about changes in the method of determining Maryland recordation tax on leases [Article 81, Section 277 (g)] brought about by Chapter 494 of the Laws of Maryland of 1968.

The lease in question was offered for record after July 1, 1968, the effective date of Chapter 494. The lease is for 15,000 square feet of property in a shopping center, which property is assessed for $32,500. The rent cannot be determined because the minimum of $33,750.00 annually may be upset if it is exceeded by 4% of annual gross sales at the drug store outlet to be built upon the leased property.

The new statutory language reads as follows:

> ". . . Where the average annual rental cannot be determined, the tax shall be based upon either (i) the minimum average annual rental ascertainable from the terms of the lease plus 5% thereof, the whole to be capitalized at 10%, plus the actual consideration, other than rent, paid or to be paid, or (ii) the assessed value of the property covered by the lease multiplied by one and one-half, whichever is the greater. The provisions of this section shall not apply to leases of personal property."

By computing the tax by the alternative techniques, it is seen that the tax is either $2,481.50 ($33,750 "minimum average annual rental ascertainable" plus 5% = $35,437.50 which capitalized at 10% = $354,375.00, taxable at $3.50 for each $500 or fractional part thereof) based upon the rental figure or $343.00 ($32,500 assessed value multiplied by one and one-half equals $48,750, taxable at $3.50 for

each $500 or fractional part thereof) based upon the assessed value of the property covered by the lease.

Because the tax based upon the capitalized minimum rent is greater than the tax based upon the accelerated assessed value, your office should impose a tax of $2,481.50 upon the subject lease.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Assistant Attorney General.*

CLUBS

PUBLIC AND PRIVATE—THE CHANGE IN AN ESTABLISHMENT FROM GENERAL PUBLIC TO PRIVATE CLUB USE DOES NOT ABROGATE THE PROVISIONS OF THE BALTIMORE COUNTY CODE RELATING TO THE OPERATION OF BILLIARD AND POOL ROOMS.

March 6, 1968.

Honorable Samuel T. Green, Jr.

In your recent letter you state that an establishment presently open to the general public intends to incorporate as a private club for profit. You further state that this establishment, by operating as a private club, intends to circumvent the provisions of Sections 18-2 and 18-3 of the Baltimore County Code relating to the operation of billiard and pool rooms.

Sections 18-2 and 18-3 read, in pertinent part, as follows:

Sec. 18-2. Billiard or pool rooms—Hours of operation.

> "No person operating or having the control of any billiard or pool table for profit, or who has control of any room or rooms wherein is kept, used or operated for profit any billiard or pool table of any kind whatsoever, shall allow any person or persons to play on or use any pool or billiard table or tables between the hours of 2:00 A.M. and 7:00 A.M. . . ."

Sec. 18-3. Billiard or pool tables—Persons under 18 not to use.

> "No person operating any billiard or pool table for profit, or who has the control of any room wherein is kept, used, or operated for profit any billiard or pool table, shall allow any person under the age of eighteen years to play on or use any such billiard or pool table. . . ."

You request our opinion as to the following questions:

1. By incorporating as a private club and charging dues to its members, does the club still operate pool tables for profit within the meaning of the County Code, if no extra charge to members or guests is made when they play pool?

2. If charges, whether they be called dues or fees, are made on a basis proportionate to the amount of use by a given person of the tables, would this be operating pool tables for profit?

3. Would those sections of the County Code dealing with permitting persons under eighteen to play on pool tables be applicable under a private club situation?

4. Are the police empowered by law to inspect the premises of a private club without specific probable cause, on the basis of the standard waivers contained in their trader's license?

As to questions 1 and 2, the sole issue is whether the pool tables are operated for profit. The fact that this club may devise a system wherein members are permitted to play pool without an additional assessment of dues, or that members would be assessed dues in accordance with their use of the tables, is not determinative of the issue and would not preclude a finding that the pool tables were, in fact, operated for profit.

As to question 3, Sections 18-2 and 18-3 do not make a distinction between a public establishment and a private club. Therefore, if it is determined that the pool tables are being operated for profit, the provisions of the law with respect to the hours during which pool may be played and the age of the persons who may play, are applicable. See *Germania v. State,* 7 Md. 1 (1854); *Schmetzer v. State,* 63 Md. 420 (1885). Cf. *People v. Morse,* 215 N.Y.S. 2d 997 (1960).

As to question 4, we cannot give you a definitive answer in the absence of specifics. The power the police now have, however, to inspect premises because of waivers contained

in trader's license, would not be abrogated merely because of a change in the establishment from general public to private club use.

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

CONSTITUTIONAL LAW

BUDGET BILL—EXCLUSION OF FUNDS WHICH IN PREVIOUS BUDGETS WERE DESIGNATED TO THE MARYLAND HOSPITAL COMMISSION DOES NOT VIOLATE THE CONSTITUTION AND/OR LAWS OF THIS STATE.

February 7, 1968.

Mr. Robert Montgomery, Jr.

You have asked for our opinion as to whether the proposed treatment of certain funds in the Budget would violate the Constitution and/or laws of this State. The funds, which in previous budgets have been designated to the Maryland Hospital Commission, would not be included in the primary budget. Legislation would be introduced before, or simultaneously with, the Budget Bill which would transfer the functions now performed by the Hospital Commission to the Health Department. Budget lines for the Health Department would not indicate in any one place the funds which previously had been designated to the Commission.[1]

There are both constitutional and statutory provisions which must be reviewed in connection with the particular budget procedure which you propose. This opinion is limited to an analysis of their applicability to the specific question posed in your letter, and extends no further.

The Budget Bill and Supplementary Appropriation Bills are defined and limited by Article III, Section 52 of the Constitution of Maryland. The Court of Appeals, in the recent case of *Panitz v. Comptroller of the Treasury*, 247 Md., 501, 508, summarized Section 52 generally as follows:

> "The Governor must prepare and submit to the Legislature a budget containing a complete plan of estimated income and proposed expenditures for the ensuing fiscal year, including specified mandatory appropriations such as those for the General Assembly, the judiciary and the servicing of the

> State debt. The Legislature cannot increase any of the appropriation items set out in the budget (other than those for the judiciary and the General Assembly) but it can strike out or reduce items therein other than those for the State debt, the judiciary, the provisions made by law for the establishment and maintenance of the public schools, and the payment of salaries required to be paid by the Constitution. After the Budget Bill has finally been acted upon by both houses, additional appropriations may be made by a majority of the Legislature. . . ."

Subsection (4) of Section 52 lists the mandatory appropriations which the Budget shall embrace, and then provides in subsection (4) (g) that each budget shall embrace an estimate of all appropriations "for such other purposes as are set forth in the Constitution or laws of the State."

The statutory provision with which we are concerned was enacted by the Legislature in Chapter 60 of the Laws of 1964 and is contained in Article 15A, Section 21A of the Code of Maryland. It provides as follows:

> "In the preparation and submission of the budget bill and of any supplements thereto, except as by law they may specifically be authorized so to do, the Director and the Governor shall not change the language or provisions of this Code or of other statutory law of this State."

Thus, the proposed treatment of these funds must be viewed against Article III, Section 52 (4) (g) of the Maryland Constitution and Article 15A, Section 21A of the Code of Maryland.

First, we must decide whether the Constitution or the laws of the State require the Budget Bill to contain an appropriation for the Hospital Commission; and second, we must decide whether the failure to make such an appropriation would produce a change in the language of any statute.

As to the Constitution, we find nothing which would

require the Governor to make an appropriation to the Commission. Section 52 (4) prescribes certain appropriations which the Governor must make, e.g., the judiciary, principal and interest on State debts, public schools. The fact that the Constitution specifically singles out certain branches, obligations and institutions of the State government which must receive an appropriation strongly implies to us that the Constitution does not require an appropriation for a commission—in this case the Maryland Hospital Commission—which is not mentioned in the Constitution. Further support for this conclusion may be found in the fact that Section 52 is so designed that the Legislature may pass a supplementary appropriation in those instances where the Governor has failed to make an appropriation to an agency or institution which the Legislature believes should receive one.

In *Panitz, supra,* the Court of Appeals quoted a statement made by Dr. Horace Flack of the Department of Legislative Reference in describing the provisions for supplementary appropriation bills, as follows:

> "In order to meet the objection, however, that the Governor might misuse his power, either by starving objects which the Legislature deems worthy or by trade with individuals or localities, the Committee thought that the power of initiation of financial legislation should be left with the Legislature, subject to but two restrictions: first, such power not to be exercised until after the budget is finally disposed of by both branches of the Legislature; second, that such appropriations must be made by a separate bill for each single work or object. The Committee were of the opinion that this would adequately protect the budget system and yet keep it free from executive abuse." 247 Md. 501.

Thus, it appears that the Constitution, and more specifically Article III, Section 52, would not require the Governor

to make an appropriation for the Maryland Hospital Commission in the Budget which he presents to the Legislature.

As to the question of whether State law requires an appropriation for the Commission, we must look at the Act which created the Commission, which is contained in Chapter 138, Section 7 of the Laws of 1964 and is codified in Article 43, Sections 568A-G of the Maryland Code. It is interesting to note that, unlike many of the other State commissions and boards, the Maryland Hospital Commission does not have a source of revenue which is to be set apart from the general treasury as a special fund for the particular purpose of defraying the costs of its operation. Instead, the Commission's appropriation is made out of general funds.

The Commission is composed of seven members who serve without compensation. The Commission has the duty and responsibility of examining applications from voluntary non-profit hospitals for loans to be made from State funds and then making recommendations to the Board of Public Works concerning these applications. The only reference in the Act to the Budget is contained in Section 568A (d), which simply provides that "[t]he Commission shall have such staff, officers and employees as may be provided for in the Budget from time to time." We do not read subsection (d) as making it mandatory that the Budget contain funds for the Commission's staff, officers and employees. We construe the words "from time to time" as used in this subsection to mean "occasionally", or "at intervals", or "now and then". See *Upshur v. Baltimore City,* 94 Md. 743, 749. We conclude, therefore, that there is nothing in the Act which requires the Governor to make an appropriation to the Commission in the Budget which he presents to the Legislature. And, since there is nothing in the Act which could be construed as a legislative mandate to the Governor to provide funds in the Budget for the Commission, we need not decide at this time whether the Governor's failure to do so would violate the Constitution or laws of the State.

The next question we must answer is whether the failure

to make an appropriation to the Commission would effect a change in the language or provisions of Article 43, Sections 568A-G. Taking the most literal view of the proscription in Article 15A, Section 21A, we do not believe that failure to make an appropriation to the Commission would effect a change in any of the language or provisions of Article 43, Sections 568A-G. The argument might be made that by failing to make an appropriation to the Commission, the Governor is, in effect, legislating and nullifying the provisions of Sections 568A-G. We believe that such an argument could be resisted by the fact that the Commission members serve without compensation[2] and that they could still discharge their duties and responsibilities. Furthermore, if the Legislature believed that the Commission required an appropriation for a staff and other expenses, it could provide for same by a supplementary appropriation, as previously alluded to.

For the reasons stated above, it is our opinion that there is nothing in the Constitution or laws of Maryland which would require the Budget, as presented by the Governor to the Legislature, to contain an appropriation for the Maryland Hospital Commission.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

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[1] For the fiscal year beginning July 1, 1967, the Maryland Hospital Commission received a general fund appropriation in the Budget of $36,380.00 (Ch. 199, Laws of 1967, p. 401) and a general fund appropriation in the Supplemental Budget of $1,000.00 (Ch. 199, Laws of 1967, p. 483).

[2] If the law provided for salaries for the Commissioners, an appropriation would have to be made, because Article III, Section 52 (4) (e) of the Constitution provides that the Budget Bill shall contain an appropriation "for the salaries payable by the State and under the Constitution and laws of the State".

CONSTITUTIONAL LAW—UNDER TERMS OF ARTICLE III, SECTION 52 (4) THE GOVERNOR IS REQUIRED TO INCLUDE IN HIS BUDGET ALL FUNDS FOR WHICH THE LEGISLATURE HAS MADE MANDATORY PROVISION BY STATUTE.

February 8, 1968.

Honorable Harry Hughes
and
Honorable William Houck

You have asked our opinion on several questions concerning the Executive Budget and the power of the Legislature pertaining thereto.

Your first question relates to Article 77, Section 260, which comes under the heading "General Assembly Scholarship Awards". You also ask us to advise concerning Article 77, Sections 284G and 284H, which come under the heading "State Scholarship Board". Additionally, you have referred us to Article 77, Section 165, under the heading of "State Colleges", which provides for waiver of tuition fees at State Colleges for students who obligate themselves to teach in the public schools of the State.

You have stated that the Budget, as submitted by the Governor, does not contain sufficient appropriations for the Senatorial and Delegate scholarships authorized under Section 260, et al., nor for the General State Scholarships or Educational Scholarships authorized by Sections 284G and 284H. No provision is made in the Budget for tuition fees at State Colleges for those students qualifying for tuition waiver under Section 165.

The statutory provision relating to the funding of the General Assembly Scholarships is contained in Section 268, which says, in pertinent part, "[f]unds for the granting of all awards to be granted according to provisions of this subtitle *shall* be placed in the budget from year to year . . ." (Emphasis Supplied). Section 284G (f), referring to General State Scholarships, stipulates that "[f]unds for the

granting of scholarships *shall* be included in the budget from year to year . . ." (Emphasis Supplied). Similarly, Section 284H (f) provides that "[f]unds for the granting of scholarships in education *shall* be included in the budget from year to year, to be administered by the State Scholarship Board." (Emphasis Supplied).

We are of the opinion that since these Acts specifically state that "[f]unds . . . shall be included in the budget from year to year", there is no room for discretion, and the Governor must include them in his budget as mandatory appropriations. It is immaterial, in our view, whether such appropriation be in the original, or a supplemental budget, so long as it is in a budget submitted to the General Assembly.

In *Panitz v. Comptroller*, 247 Md. 501, the Court of Appeals discussed Article III, Section 52 of the Constitution of Maryland, relating to the Budget. The Court said:

> "The Governor must prepare and submit to the Legislature a budget containing a complete plan of estimated income and proposed expenditures for the ensuing fiscal year, including specified mandatory appropriations such as those for the General Assembly, the judiciary and the servicing of the State debt."

Section 52 (4) lists seven mandatory categories of appropriations which the Budget shall embrace, the last of which is:

> "(g) for such other purposes as are set forth in the Constitution or laws of the State."

It is noteworthy, in this connection, that Article 15A, Section 21A of the Code of Maryland stipulates that:

> "In the preparation and submission of the budget bill and of any supplements thereto, except as by law they may specifically be authorized so to do, the Director and the Governor shall not change the language or provisions of this Code or of other statutory laws of this State."

In a recent opinion addressed to Mr. Robert Montgomery, Jr., Legislative Officer of the Governor's Office, we advised that the Governor was not required to make an appropriation to the Maryland Hospital Commission in the Budget. Our opinion in that instance was based primarily on the fact that the Act in question, Article 43, Sections 568A-G, did not contain a legislative mandate to the Governor to provide funds in the Budget for that Commission. Here, as above noted, we find that there is a legislative mandate, and we are of the opinion that that mandate falls within the provision of Section 52 (4) (g) of Article III of the Constitution, as an item required by the laws of this State to be included within the Budget.

No such mandate appears to exist, however, in Section 165, which provides for "waiver" of tuition at State Colleges for students who obligate themselves to teach in the public schools of this State. That section, in our opinion, merely requires tuition free status for such students, and we do not believe that the provisions of that section can be construed as compelling the Governor to provide in the budget funds for the implementation thereof.

We have been advised by the Governor that he recently announced publicly that if he is required by the Constitution to include the funds in the Budget for these mandatory educational programs, he proposes to do so by submitting a supplemental budget. In view of this, it does not appear that there is any need to answer your question as to what the Legislature may do should the Governor fail to include such funds in his Budget.

You have asked us one further question relating to the authority of the General Assembly on this matter. You put that question as follows:

> "It is apparent that the executive budget has not provided adequate funds for certain mandated scholarship programs, and has provided funds which may be excessive in certain other programs; i.e., the loan fund. It is possible for the Legislature

> to reassign these funds provided that the total amount of the budget is not thereby increased?"

We believe that the answer to this question is in the negative, since the Court of Appeals in *Panitz, supra,* has stated:

> "The Legislature cannot increase any of the appropriation items set out in the budget (other than those for the judiciary and the General Assembly) but it can strike out or reduce items therein other than those for the State debt, the judiciary, the provisions made by law for the establishment and maintenance of the public schools, and the payment of salaries required to be paid by the Constitution. After the Budget Bill has finally been acted upon by both houses, additional appropriations may be made by a majority of the Legislature . . . ".

Since this opinion obviously concerns matters of great interest to the Governor, we are forwarding a copy of this letter to him. We will be most happy to discuss these questions further with you, or the Governor.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—NO REQUIREMENT EXISTS BY CONSTITUTION OR STATUTE FOR THE FORMAL, VERBATIM NEWSPAPER PUBLICATION OF THE PROPOSED CONSTITUTION BEFORE THE VOTE OF THE ELECTORATE FOR RATIFICATION OR REVOCATION.

March 7, 1968.

Hon. H. Vernon Eney, President.

By letter of February 12, 1968 you have posed three questions relating to the necessity of publishing, by formal, verbatim advertisement, the proposed Constitution which will appear on the ballot on May 14, 1968. We are pleased to respond to your inquiry.

Your first question was whether a formal, verbatim advertised publication of the Constitution is required by the terms of Chapter 4, Laws of Maryland 1967, or by any other law, or by the provisions of the existing Constitution.

Chapter 4 of the Laws of Maryland 1967, provides for the publication of the whole Constitution in such manner and at such times ". . . as will allow the people of Maryland an opportunity to become informed before voting on May 14, 1968". You have advised us that 10,000 copies of the Constitution have been distributed throughout Maryland, and that the text of the Constitution proper has been printed in two major newspapers in the Baltimore Metropolitan area, and several other newspapers in the various parts of the State. You further advised us that 100,000 reprints of the newspaper edition have been distributed and that your office has ordered an additional 100,000 for general distribution. Further, you advise us that one newspaper has arranged to publish a tabloid section containing the full text of the Constitution and will distribute 155,000 copies of that section in the public schools.

Additionally, one private enterprise has arranged to obtain 250,000 reprints of that newspaper page for wide distribution throughout the State. It would appear that the

aforesaid steps are completely in keeping with the intentions of the Legislature, as set out in Chapter 4 of the Acts of 1967.

In further response to your inquiry, be advised that we have examined the provisions of Section 23-1 of Article 33 of the Annotated Code of Maryland. This section provides that:

> "Whenever a proposed Constitution or constitutional amendment or other question is to be submitted for popular approval to the voters of the State or local subdivisions thereof, the Secretary of State shall certify the same to the boards on or before the fourth Monday in the month of July. Thereupon the board shall include the same in the publication provided for in Section 8-5 of this article . . . ".

We do not construe this section to require verbatim publication of the document, but, rather, to require the publication of the question that will appear on the election ballot. This, we are advised, is the procedure that has been invariably followed by the election boards of this State under this and the antecedent section of the law.

The present Constitution, in Article XIV, Section 1 thereof, requires that amendments to the present Constitution must:

> "[B]e published by order of the Governor, in at least two newspapers, in each County, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for four weeks immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection. . . ."

In view of the fact that the new Constitution is not submitted as an amendment or amendments to the present Constitution, and further, in view of the fact that the Constitution was not initiated by the General Assembly, we are of the opinion that this section of the present Constitution has no application to the adoption by the voters of an entirely new Constitution.

Section 2 of Article 14 deals with the time and manner for calling a Constitutional Convention in this State. That section does not contain the requirement for publication of a document adopted by such a convention, which further leads us to the conclusion that formal, verbatim publication is not required.

In answer to your first question, therefore, please be advised that we find no requirement under the Constitution or laws of this State for formal advertisement of the Constitution adopted by the Constitutional Convention on January 10, 1968.

In view of our opinion that no such publication is required, no answer is required to your second question as to how or who should make publication.

Your third question asked us to discuss the duties of the Convention under the provisions of Section 14 of the Acts of 1967, which directs the Convention to ". . . provide for the publication of the whole Constitution in such manner and at such times after the Constitution is proposed by the Convention as will allow the people of Maryland an opportunity to become informed before voting on May 14, 1968 . . .".

Please be advised of our view that the activities of your office in making available copies of the Constitution as discussed in answer to your first question, appear to us to be in full compliance with the mandate of Section 14 of Chapter 4.

Because of the importance of the questions you have presented, we are forwarding copies of this letter to the

Governor, the President of the Senate, and the Speaker of the House. We believe that it might be of interest to those officers of Government to be aware of our views, while the Legislature is in session.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

CONSTITUTIONAL LAW—ARTICLE III, SECTION 30: WHERE GOVERNOR AFFIXED SIGNATURE TO BILLS WHICH HE HAD INTENDED TO VETO, RATHER THAN SIGN INTO LAW, SIGNATURE WAS A NULLITY AND BILLS DID NOT THEREBY BECOME LAW—GOVERNOR REMAINED FREE TO EITHER SIGN THE BILLS INTO LAW, OR VETO THE SAME.

May 10, 1968.

Mr. David J. Markey.

By letter of May 8th you have advised us of the following set of facts:

> "On May 7, Governor Agnew signed 326 bills and 40 resolutions. Prior to the signing ceremony, the Governor decided to veto thirty-eight bills, among them House Bills 714, 765, 802 and 942. During the signing of the bills, the four above mentioned were placed in the wrong stack inadvertently and were signed by the Governor. As stated above, the Governor had decided to veto the measures for varying reasons."

You ask us the legal status of a bill signed inadvertently by the Governor, if he had decided not to sign the measure and instead veto it. You further ask if he may proceed according to his original intention and disapprove the bill.

In 1905 the Court of Appeals of Maryland ruled on a similar set of facts. In that case, Governor Warfield signed a bill by inadvertence under a misapprehension as to what the paper being signed was. Immediately after affixing his signature and before the bill left the executive chamber, Governor Warfield discovered his mistake and erased his name. Suit was brought to compel the Governor to deliver the bill as a signed document to the Clerk of the Court of Appeals, as required by Article III, Section 30 of the Constitution of Maryland.

In that case, *Commissioners of Allegany County v. Warfield*, 100 Md. 516, Judge Fowler said, for a unanimous Court:

> "We . . . have no difficulty whatever, under the facts of this case, in holding that the Governor never did approve the bill as contemplated by the Constitution, and that the placing of his signature to the bill was absolutely null and void, in so far as it affords any evidence of his approval thereof."

Accordingly the Court affirmed the opinion of the chancellor below, holding that the bill had never in fact become law. See also *Nowell v. Harrington*, 122 Md. 487 and *State v. Holder*, 23 So. 645, wherein it was held that the signature of the chief executive was not valid and did not serve to cause a bill to become law where that signature was affixed solely for the purpose of causing only part of the matter in the bill to be effective. In those cases the court found that the executive never having intended that all of the matter set out in the bill should become law, the bill failed notwithstanding his approval of a part thereof.

In view of the express holding of the Court of Appeals in *Allegany v. Warfield,* we have no difficulty in finding that the bills about which you inquire have not, in fact, become law, since it was never the intention of the Governor to affix his signature thereto. Our thinking in this regard is bolstered by the fact that the bills remain in the Governor's custody, as in the Allegany case, and have not as of now been delivered to the Clerk of the Court of Appeals.

We advise you, therefore, that the signature of the Governor erroneously affixed to these bills may be erased, or otherwise deleted, and that the Governor may either veto these bills, or sign them if he wishes, as if they had never, in fact, had his signature affixed thereto.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

CORRECTIONAL SERVICES, DEPARTMENT OF

AUTHORITY TO CONSENT TO EMERGENCY MEDICAL TREATMENT, INCLUDING SURGERY, ON BEHALF OF PRISONERS WHO ARE MINORS—PROCEDURE TO FOLLOW BEFORE EXTENDING CONSENT IN SUCH CASES.

April 16, 1968.

Hon. F. E. Terrinoni.

You have requested our advice concerning the Department's authority with regard to emergency medical matters involving prisoners who have not reached their majority. The customary departmental procedure in such cases, as related by your letter, is to obtain written parental or guardian consent prior to performing surgery upon minor prisoners, regardless of the emergency nature of the required treatment. You indicate that this procedure is often cumbersome and time consuming and that it may frequently delay needed medical care. Accordingly, you seek our opinion respecting the legal necessity for the obtention of such prior consent and the proper procedure to follow if the same has been withheld by parents or guardians.

As you are doubtlessly aware, the Department is charged with the mandate of providing prisoners committed to its custody with reasonably necessary and essential medical services and treatment. See *Thompson v. Blackwell, et al.,* 374 F. 2d 945 (5th Cir., 1967) ; *Stiltner v. Rhay,* 371 F. 2d 420 (9th Cir., 1967) ; *Edwards v. Duncan,* 355 F. 2d 993 (4th Cir., 1966) ; *Basista v. Weir,* 340 F. 2d 74 (3rd Cir., 1965) ; *Hughes v. Noble,* 295 F. 2d 495 (5th Cir., 1961) ; *Coleman v. Johnston,* 247 F. 2d 273 (7th Cir., 1957) ; *Cullum v. California Department of Corrections, et al.,* 267 F. Supp. 524 (N.D. Cal., 1967) ; *Beckett v. Kearney,* 247 F. Supp. 219 (N.D. Ga., 1965) ; *Haigh v. Snidow, et al.,* 231 F. Supp. 324 (S.D. Cal., 1964) ; *Threatt v. State of North Carolina,* 221 F. Supp. 858 (W.D. N.C., 1963) ; and *Redding v. Pate,* 220 F. Supp. 124 (N.D. Ill., E.D., 1963).

In discharging this mandate, correctional authorities are vested with a wide degree of latitude, and, accordingly, judgmental decisions concerning medical matters are ordinarily not reviewable by the courts. *Hirons v. Director,* 4th Cir., Memorandum Decision, decided September 19, 1967; *Darey v. Sandritter, et al.,* 355 F. 2d 22 (9th Cir., 1965); *Snow v. Gladden,* 338 F. 2d 999 (9th Cir., 1964); *Evans v. Holljes,* D. Md., Civil Action No. 18898, January 30, 1968; and *Kensler v. Commissioner of Correction,* D. Md., Civil Action No. 18726, January 15, 1968. We note, however, that in the first *Hirons v. Director* case, 351 F. 2d 613, 614 (4th Cir., 1965), the Court acknowledged that ". . . deprivation of medical treatment seriously endangering [a prisoner's] physical well being . . ." raises a question of constitutional dimension sufficient to justify intervention and review by the federal courts. The statutory authority upon which such federal judicial review is usually premised is the Civil Rights Act of 1871, which contains both civil and criminal sanctions for violations of rights secured by the Constitution and laws of the United States.

It is quite conceivable that your failure to promptly provide emergency surgical services to minor inmates because of the lack of prior parental or guardian consent might be construed as violative of the federal law above noted. Under such circumstances, the departmental official or officials directly involved would be rendered subject to potential civil and criminal prosecution, particularly where unfortunate medical consequences flowed from his or their dilatory conduct.

Accordingly, unless some overriding legal consideration clearly negatives any authority you may otherwise possess to stand in the place of a minor prisoner's parent or guardian in emergency medical situations, it is evident that you must furnish such persons with needed medical care even in the absence of prior consent. Our examination of the applicable authorities has not disclosed any legal impediment barring you from granting authorization for the performance of emergency surgery upon minor inmates and we have further concluded that you are enjoined by law

to extend such authorization when appropriate medical crises arise.

Article 27, Section 698 of the Annotated Code of Maryland (1967 Replacement Volume, 1967 Supplement) provides, in pertinent part:

> "Whenever it appears to the Department that a prisoner in any institution under its control is ill, and that the facilities of the institution are inadequate to provide treatment for such illness, the Department may temporarily remove the prisoner to any place within the State where adequate treatment may be obtained. The Department may direct the temporary removal of such prisoner for a definite period of time, or from time to time, to a place where adequate treatment for the illness of the prisoner may be obtained . . . provided that any such order shall direct the return of such prisoner to the jurisdiction of the Department as soon as the state of his health will permit . . . "

This statutory directive makes no distinction between surgical and non-surgical medical treatment. Nor does it prescribe any necessity for the obtention of parental or guardian consent in cases involving underage inmates. In the absence of such restrictions, we are of the belief that the statutory command to remove prisoners to places within the State where "adequate treatment" may be obtained, when the same is not available within institutional confines, evidences a clear legislative intent to impose a burden upon the Department to secure appropriate medical treatment, surgical or otherwise, for all of its prisoners whenever medical necessity dictates the need therefor.

We recognize, of course, that when an adult prisoner in full command of his faculties has specifically declined to submit to certain medical treatment, a peculiarly vexatious legal problem is thereby occasioned. Such persons may be compelled to submit to required treatment when they are suffering from contagious diseases. See *Jacobson v. Massachusetts,* 197 U. S. 11 (1905). The law appears unsettled,

however, in regard to the propriety of forcibly imposing treatment upon non-consenting adults in other medical cases. Should the situation develop where an adult prisoner has refused needed medical care, whether suffering from a contagious disease or from some other malady, we recommend that the matter be brought to our immediate attention in order to allow the expeditious prosecution of appropriate legal proceedings to establish the validity of imposing declined treatment under the particular circumstances of that case.

With respect to prisoners who are still in their minority, however, the problem is not nearly so troublesome. Such persons are generally held incapable of giving legal consent and it must necessarily be obtained from the parent or guardian. Where the latter persons are not readily available, however, and an emergency situation is present, the requirement of obtaining such consent is relaxed. As noted in *Sullivan v. Montgomery,* 279 N.Y.S. 575 (1935), which involved a twenty year old minor who had fractured his ankle playing baseball:

> "While the courts are not entirely in harmony upon the question of consent to the administration of an anesthetic, the better reasoning supports the proposition that if a physician or surgeon is confronted with an emergency which endangers the life or health of the patient, or that suffering or pain may be alleviated, it is his duty to do that which the occasion demands within the usual and customary practice among physicians and surgeons in the same locality. Many persons are injured daily in our city, and emergency cases constantly arise. To hold that a physician or surgeon must wait until perhaps he may be able to secure the consent of the parents, who may not be available, before administering an anesthetic or giving to the person injured the benefit of his skill and learning, to the end that pain and suffering may be alleviated, may result in the loss of many lives, and pain and suffering which might otherwise be prevented.

> I do not believe that those who have devoted their lives to humanity will wantonly administer an anesthetic or fail to obtain the consent of parents before administering an anesthetic where such consent may be reasonably obtained in view of the exigency; it would be altogether too harsh a rule to say that under the circumstances disclosed by the testimony in the instant case, the defendant should be held liable because he did not obtain the consent of the father to the administration of the anesthetic; as the defendant was confronted with an emergency, and as he obtained the consent of his patient, I hold that the consent of the father was not necessary."

In accord, see *Luka v. Lowrie,* 171 Mich. 122, 136 N.W. 1106 (1912).

You will note that in *Sullivan* the consent of the minor was obtained in the absence of parental authorization. Although considerable question surrounds the legal efficacy of a child's consent, we nevertheless believe the securing of the patient's consent to be a prudent policy to follow where recourse to the parents and guardians or to the courts is too cumbersome under the prevailing circumstances.

Instances may arise where minor inmates and their parents may refuse required medical care, particularly blood transfusions, on religious principles. It is now firmly established, however, that compulsory medical treatment of children for any serious illness or injury may be ordered by the courts, regardless of religious considerations to the contrary. The leading authority is *Prince v. Massachusetts,* 321 U. S. 158, 166-167 (1944), wherein the Supreme Court discussed the unique relationship between the State and children:

> "Acting to guard the general interest in youth's well being, the state as 'parens patriae' may restrict the parents' control. . . . Its authority is not nullified merely because the parent grounds

> his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the . . . child . . . to ill health or death . . ."

See also *Craig et ux v. State*, 220 Md. 590, 155 A. 2d 684 (1959) and *Levitsky v. Levitsky*, 231 Md. 388, 190 A. 2d 621 (1963).

Of further interest is the doctrine of "implied consent", by which an unconscious patient, youth or adult, is held to impliedly consent to reasonable and necessary treatment in emergency medical situations. We are not aware, however, of any Maryland case adopting the "implied consent" rule.

As heretofore noted, we are of the opinion that you possess both the power and the duty to authorize emergency treatment, including surgery, for minors committed to your custody, regardless of the fact that parental or guardian consent is not timely obtainable. We further believe your authority to render consent in emergency cases extends even to situations where the parents and/or the minor have specifically declined proffered treatment. But we wish to impress upon you the wisdom of exhausting all other available avenues in either instance before you consent to treatment.

We are mindful that surgical operations are clearly technical batteries, and it is not unlikely that your authorization for the same without ample justification could result in unfortunate legal consequences. Accordingly, we have taken the liberty of preparing the following guidelines for emergency medical matters involving minor prisoners, and we trust they will receive your careful consideration.

If a physician concludes that emergency treatment, including surgery, is required in order to save the child's life, or to prevent more serious injury, the Department should:

> (a) Make a reasonable attempt to notify the parents or guardian of the situation and obtain

their consent for treatment where time and circumstances permit;

(b) In the absence of such consent and where time is not a critical factor, notify this office of the existence of the emergency in order to allow opportunity for referral to the courts for obtention of judicial consent;

(c) In the event recourse to (a) and (b) is not feasible under the circumstances, secure the consent of the minor patient before instituting appropriate medical measures;

(d) If the emergency treatment may not be delayed without danger to life or likelihood of serious discomfort to the minor prisoner, the Department may abandon the foregoing guidelines and consent on his behalf.

FRANCIS B. BURCH, *Attorney General.*

MORTON A. SACKS, *Assistant Attorney General.*

CORRECTIONAL SERVICES, DEPARTMENT OF—COURT'S REFERENCE IN SENTENCE ORDER TO NON-FORFEITURE OF WORK RELEASE PRIVILEGES AND EARNED "GOOD TIME" CREDITS HAS NO BINDING EFFECT—SUCH A COMMENT BY THE COURT IS MERELY A RECOMMENDATION TO THE DEPARTMENT OF CORRECTION.

May 10, 1968.

Commissioner Joseph G. Cannon.

You have requested our interpretation of the legal effect of certain provisions contained in a sentence order, wherein reference is made to non-forfeiture of "work release privilege" and accrued "good time" credits. The Order in question was issued by the Circuit Court for Prince George's County and was imposed as a result of a conviction for escape.

Your letter indicates that the prisoner was received at the Maryland House of Correction on June 2, 1965, to serve a sentence of two years dating from April 9, 1965. On February 5, 1966, while on a work release assignment, the inmate escaped, and he was subsequently returned to the institution on August 5, 1967.

The prisoner was convicted of escape in the Circuit Court of Prince George's County on November 9, 1967, and was later sentenced to a three year term commencing upon the trial date. This latter term was thus to run concurrently, in part, with the time remaining to be served on the original sentence. The Court further ordered that, upon expiration of the original term, the balance of the new sentence would be suspended.

Pertinent language from the Order filed by the Court in imposing the sentence on the escape conviction appears below:

> "(a) that said Defendant * * * is not to forfeit and lose any work release privileges;

"(b) that the said Defendant * * * is not to forfeit or lose any 'good time' which he has earned and accrued prior to February 5, 1966, or which he has earned and accrued subsequent to August, 1967, and

"(c) upon the expiration of the sentence presently being served by the Defendant, said three (3) year sentence imposed herein shall be suspended in its remainder, and the Defendant is to be placed on probation under the supervision of the Department of Parole and Probation for the remainder of said sentence."

In an effort to clarify the Court's intentions in regard to provisions (a) and (b) of the above Order, we requested a transcript of the sentencing proceeding. An examination of the same has disclosed that in referring to non-forfeiture of work release privileges and earned credits the sentencing judge used the expression, "so far as the Court is concerned". It is therefore apparent, and we have so confirmed by telephone conversation with the judge in question, that the Court recognized the functions of work release and good time credits to be administrative and not judicial in nature, and merely intended his comments concerning these matters to be regarded as recommendations to the Department of Correction.

This approach is in accordance with our view of the applicable law. The "good time" credits statute, Article 27, Section 700 of the Maryland Code (1967 Replacement Volume), provides in pertinent part:

"(a) Each prisoner in any of said institutions is entitled to a diminution of the period of his confinement under the following rules and regulations:

"(b) For each calendar month commencing on the first day of the month next after his arrival at the institution, *during which he is not guilty of a violation of the discipline or any of the rules*

> *thereof* and labors with diligence and fidelity, he shall be allowed a deduction of five days from each month of the period of the commitment or sentence.
>
> "(e) For each and every violation of the rules and discipline of the institution . . . the person herein confined shall not only forfeit all gained time in the month in which such delinquency occurs, but according to the aggravated nature or frequency of his *offense, the Department may deduct a portion or all of his gained time for good conduct* under subsection (b) of this section . . ."

The cited statute clearly vests the Department with the authority to exercise its sole discretion in the deduction of earned good credits, taking into consideration the elements of aggravation and frequency. Similar statutory provisions have consistently been construed to limit the authority to determine whether or not a prisoner's conduct has been such as to justify forfeiture of earned credits exclusively to the person or body specified in the law, in this case the Department of Correction. See discussion in 72 C.J.S., Section 21 (h).

Accordingly, we are of the opinion that only the Department is empowered with the authority to make a determination regarding possible deduction of the prisoner's "good time" credits, and that part of the sentence order relating to non-forfeiture of such credits may be treated as surplusage.

To a like effect we believe the Court's reference to non-forfeiture of "work release privileges" in its sentence order has no binding legal efficacy. Section 700A of Article 27, Maryland Code (1967 Replacement Volume), clearly confers exclusive jurisdiction upon the Commissioner of Correction to approve or disapprove application for participation in the work release program after the same have first received the recommendation of the prisoner's warden or superintendent. Moreover, the Commissioner alone has

statutory authority to adopt a "work release plan" for any prisoner and he is further vested with the power to revoke such a plan for any reason after approval has been granted. See subsection (b) of Section 700A, *supra.*

We think it apparent that by the enactment of the "work release law" the Legislature intended its administration, including the selection of participants for this special program, to be the exclusive province of the Department and Commissioner of Correction. The latter obviously possess, by virtue of continuing close contact and observation of penal inmates, the fullest opportunity to evaluate the potential successful adjustment on work release of prospective participants.

Although we hold provisions (a) and (b) of the said Order to be without binding legal effect, we nevertheless believe that they merit your consideration in arriving at a determination concerning possible deduction of the prisoner's earned credits and/or his future participation on work release. We believe the Court's evaluation of criminal offenders, as indicated in the "good time" and "work release" provisions of the sentence order can be of material assistance to you in determining the action to take in such matters.

Lastly, it is observed that the Board of Parole and Probation is vested with the duty and authority to grant a parole when, in its opinion, ". . . the interests of the State and of [the] prisoner would be best subserved by [his] release on parole, and there is a reasonable probability that, if . . . released, he will remain at liberty without violating the law . . ." Article 41, Section 124 (b) of the Maryland Code (1965 Replacement Volume). Further, under subsection (a), the Board must give parole consideration to every State prisoner (excepting those serving life terms) whenever service in confinement of one-fourth of the maximum term has occurred. Accordingly, we call to your attention the possibility that the prisoner may lawfully be placed on parole prior to the time the Court's probation directive, as set forth in provision (c) of the

sentence order, will take effect. Should these circumstances develop, he will remain on a parole status until the expiration of his initial term and then continue to remain under the supervision of the Department of Parole and Probation until his subsequent term expires, but during this latter period he shall be regarded as a probationer, with all the rights, privileges and duties attendant thereto.

FRANCIS B. BURCH, *Attorney General.*

MORTON A. SACKS, *Assistant Attorney General.*

CORRECTIONAL SERVICES, DEPARTMENT OF—COMPUTATION OF "GOOD TIME" CREDITS—INMATES MAY NOT EARN "GOOD TIME" CREDITS UNTIL AFTER THEIR ARRIVAL AT A DEPARTMENTAL FACILITY.

May 17, 1968.

Commissioner Joseph G. Cannon.

You have requested clarification of the "good time" credits statute, Article 27, Section 700 (a) and (b) of the Annotated Code of Maryland (1967 Replacement Volume), which provides in pertinent part:

> "(a) Each prisoner in any of said institutions is entitled to a diminution of the period of his confinement under the following rules and regulations:
>
> "(b) For each calendar month commencing on the first day of the month *next after his arrival at the institution,* during which he is not guilty of a violation of the discipline or any of the rules thereof and labors with diligence and fidelity, he shall be allowed a deduction of five days from . . . the commitment or sentence." (Emphasis supplied).

More specifically, you have indicated that, under the Department's existing policy, inmates are credited with good conduct time based upon the commencement date of their sentences rather than upon their arrival date at a correctional institution. Your inquiry focuses upon the legality of this practice under the statutory prescription above noted.

Our understanding of the application of the existing departmental policy is that it results in the award of credits in accordance with the following illustration. Assuming an inmate was sentenced on May 1, 1968 to a term of three years dating from January 1, 1968, he would have been

credited with three months of earned "good time" deductions (fifteen days) upon his receipt by the Department of Correction on the first stated date.

We believe this method of computing "good time" deductions to contravene the terms of the statute. Accordingly, we urge that you discontinue the policy at the earliest practicable time of allowing such credits for time served before an inmate is entrusted to your custody.

The statutory mandate is quite clear in directing that such credits may be earned only after an inmate's *arrival* at a departmental facility. Further, the statute specifies that an inmate is not even entitled to earn "good time" during his first month in institutional confines, but rather must await the month *next after* his arrival before becoming eligible for such deductions. Since an inmate may not earn these credits during his first month under the Department's jurisdiction, it logically follows that he is not entitled to deductions for a period prior thereto.

Implicit in the statutory language prescribing the deduction of five days "from . . . the commitment or sentence" is the term "balance". It is evident that by the enactment of Section 700 (b) the Legislature intended credits for good behavior to be deducted from the "balance" of the "commitment or sentence" remaining to be served, and not from such portion of a backdated sentence as may not have been served under the Department's jurisdiction.

The basic purpose underlying statutes of this nature is to encourage prison discipline. In this regard, it would appear unlikely that prison discipline would be enhanced by allowing credits for time served beyond the confines of a penal institution under your jurisdiction and control. Moreover, the right to earn "good time" is purely statutory and may be earned only in the manner and under the circumstances defined thereby. An exhaustive discussion of these legal principles may be found in 72 C.J.S., Prisons, Sections 21 *et seq.*

In 35 Opinions of the Attorney General 162, our predecessors were called upon to construe application of the

cited provisions (then codified in Article 27, Section 700 of the Annotated Code of Maryland (1939 Edition)) in regard to instances where prisoners are declared to be insane and, as a result thereof, are transferred from penal institutions to State hospitals which care for and treat insane persons. It was therein held:

> "Inasmuch as time deducted from a sentence by reason of good behavior is a benefit conferred by the State and is entirely dependent upon statute . . . it follows, in our opinion, that Section 770 . . . does not authorize the reduction of any part of a sentence which is served in a hospital for insane persons, notwithstanding the fact that persons, while undergoing treatment at said hospitals, are guilty of no violations of the rules thereof and that they perform the tasks which are assigned to them."

It is apparent that since the statute does not permit the conferral of good behavior credits upon an inmate who has been committed to your custody, and then removed to a State hospital, it may not be employed to confer this benefit upon prisoners for any period prior to having entered within your jurisdiction and control.

FRANCIS B. BURCH, *Attorney General.*

MORTON A. SACKS, *Assistant Attorney General.*

CORRECTIONAL SERVICES, DEPARTMENT OF—MARYLAND PENITENTIARY AND MARYLAND HOUSE OF CORRECTION ARE CORRECTIONAL INSTITUTIONS—ELIGIBILITY FOR FEDERAL DONABLE COMMODITIES.

June 19, 1968.

Honorable Frederick E. Terrinoni.

You have advised that the Department of Correction is presently engaged in the process of attempting to establish the eligibility of the Maryland Penitentiary and the Maryland House of Correction for participation in the donable foods program administered by the U. S. Department of Agriculture. In determining whether these institutions qualify for participation in the program, you have been requested by the federal authorities to secure an opinion from this office regarding the legal status of the respective facilities, i.e., whether they are "penal" or "correctional" in nature. The request apparently arises from the fact that public institutions which are non-penal and non-educational in character are deemed eligible to receive certain food commodities free of charge under the Commodity Distribution Program of the Department of Agriculture.

To a considerable extent the answer to your inquiry necessitates a conclusion based on factual characteristics rather than one based on purely legal principles. The terms "penal" and "correctional" are often used interchangeably as applied to institutions for the confinement of criminal violators, and in this context statutory and judicial references to the one are usually intended to encompass the other.

Nevertheless, some distinction can be drawn in reviewing the essential nature of institutions for the confinement of offenders. Black's Law Dictionary, 4th Edition, defines "penal" as ". . . inflicting a punishment; containing a penalty, or relating to a penalty". The same authority defines "correction" as ". . . discipline . . . for the purpose of curing . . . faults . . .".

In the broadest sense, therefore, it may reasonably be said that all institutions for the confinement of criminal violators are penal in nature, or at least possess an important penal attribute, since inherent in the very fact of confinement and segregation from the general public is a notion of punishment.

With the advancement of penalogical thought and progressive correctional philosophy, however, it has become increasingly evident that rigid reliance upon the punitive aspect of incarceration has not proved entirely effective, and accordingly the emphasis has gradually shifted to an ever increasing stress upon the correctional and rehabilitative opportunities which accompany imprisonment. To a marked degree, recent times have seen the thrust of criminal administration and the structure of institutions established for the confinement of offenders reoriented from the goal of "inflicting a punishment" to that of "curing . . . [the] faults" which gave rise to criminal behavior.

This reorientation of purpose is most evident in Maryland. Significant changes in the operation of the Maryland Department of Correctional Services have followed on the heels of the Report of the Commission to Study the Correctional System of Maryland, which was submitted to Governor Spiro T. Agnew on March 13, 1967. This Report incorporated valuable studies of our correctional system by task forces of the American Correctional Association and the National Council on Crime and Delinquency.

These innovating changes have extended throughout Maryland's correctional system and have tended to effect substantial operational improvements, geared to a more productive discharge of the rehabilitative function, in all of the institutions under the Department's jurisdiction and control, including the Penitentiary and the House of Correction.

By way of example, we are aware that the Department's Industries operation, which was at one time almost exclusively oriented to meeting production quotas and alleviat-

ing idleness, is now concentrating heavily upon vocational on-the-job training programs and trades' instruction. Inmates of the Maryland Penitentiary and the Maryland House of Correction are among the leading beneficiaries of this reorientation, since many industrial shops and programs are located at these correctional facilities. The appointment of a Director of Education for the entire correctional system has likewise resulted in the adoption and implementation of many innovative academic programs for the betterment of inmates confined in the institutions in question and in other departmental facilities. Numerous other changes further attest to the diligent strides which have been made by the Department of Correctional Services in discharging its responsibility to rehabilitate offenders committed to its charge, and they clearly reveal that this concern has become foremost in motivating the Department's actions.

It should be noted that the reorientation of purpose is not something that occurred suddenly, but rather was of a gradual and developmental nature. In fact, due recognition of the shift in focus from penal to correctional was given to the Maryland Penitentiary and Maryland House of Correction several years ago, with the passage of Chapter 85 of the Laws of 1964, codified in Section 689 (a) of Article 27 of the Annotated Code of Maryland (1967 Replacement Volume). This provision deleted the term "penal" from the description of institutions under the Department of Correction (now Department of Correctional Services) and inserted the terms "correctional and reformatory" in its stead. The first two enumerated institutions under the said statutory description are the Maryland Penitentiary and the Maryland House of Correction, thus clearly disclosing a legislative acknowledgment of their essentially correctional character.

In 48 Opinions of the Attorney General 82, it was held that the Maryland Institution for Men and the Maryland Institution for Women, now known respectively as the Maryland Correctional Institution—Hagerstown and the Maryland Correctional Institution for Women—Jessup,

were non-penal, rehabilitory institutions. In arriving at this conclusion, we stated:

> "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 psycho-therapy, 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." (p. 88).

We are satisfied that the above description applies today with equal force to both the Penitentiary and the House of Correction.

Based upon both the statutory language of Article 27, Section 689 (a), *supra,* and the practical implementation of that language by the introduction of corrective and rehabilitative programs now functioning, you are advised that, in our opinion, the Maryland Penitentiary and the Maryland House of Correction are "correctional" rather than "penal" in nature.

FRANCIS B. BURCH, *Attorney General.*

MORTON A. SACKS, *Assistant Attorney General.*

CORRECTIONAL SERVICES, DEPARTMENT OF—STATE USE INDUSTRIES—REVOLVING FUND—CAPITAL ASSET—PURCHASE REQUIREMENTS FROM—WHOLESALE MARKET RATES—BID SPECIFICATIONS—USE OF BRAND NAMES—PURCHASE OF FINISHED GOODS BY.

November 15, 1968.

Mr. Linwood G. Roher.

You have asked our opinion on a number of questions concerning interpretations of Section 681 of Article 27 of the Annotated Code of Maryland. We will consider the questions you raised *seriatim.*

The first question concerns an expenditure made from the State-Use Industries revolving fund for panelling the office of the Industries General Manager, the Display Room, and the office headquarters. Apparently, the State Auditor has objected to this expenditure from the revolving fund and bases his objection on the provisions of subsection (c) of Section 681 which provides, in pertinent part:

> "[B]ut (except as herein otherwise provided) in equipping the penal and reformatory institutions with plants, machinery, and necessaries, the Department of Correction shall not utilize monies from the so-called State-Use Industries Fund for any of the permanent, semipermanent, or long-time construction projects or assets which are generally included in the phrase 'capital' assets, expenditures, or projects. Notwithstanding the provisions of the preceding sentence, the Department of Correction may establish and utilize a revolving fund . . . the revolving fund may be used for the purchase of capital assets and also for general operating expenses, and an accurate detailed statement shall be made and transmitted to the Comptroller from time to time of all receipts and disbursements from this revolving fund."

Panelling is certainly in the nature of a permanent capital improvement, and, as such, could not be considered a

"general operating expense". Though the cost for such work may be a capital expenditure, we are of the opinion that the performance of work could not be classified as the *purchase* of a "capital asset". Thus, we believe that the expenditure for panelling of the offices should not have been made from the State-Use Industries revolving fund.

The second question that you raised concerns the obligation of cities and counties to purchase their requirements from the Department of Correction. The applicable statutory language concerning this question is also found in subsection (c) of Section 681. This provision reads in part as follows:

> "The Department of Correction as funds are made available may equip the penal and reformatory institutions of the State of Maryland under its jurisdiction, hereinafter called 'producing institutions,' with such plants, machinery, and necessaries as will permit them adequately to supply all goods, wares, merchandise, and produce required to be purchased by the needs of the State, its political subdivisions, and by State-aided, owned, controlled, or managed public or quasi-public institutions and agencies, hereinafter called 'consuming institutions,' as may be feasible. . . . All of the consuming institutions shall purchase their requirements of the same from the Department of Correction exclusively except products such as the Department of Correction in writing notifies the Department of Budget and Procurement cannot be furnished by the penal or reformatory institutions of the State, or such as their perishable nature may render impracticable for such institutions to furnish;".

This office has previously interpreted the forerunner of this section to require consuming institutions to purchase their needs from the Department of Correction. 33 Opinions of the Attorney General 96. This interpretation would still hold true today. Further, you will note from that part of

Section 681 (c) quoted above that "political subdivisions" are included within the term "consuming institutions". There is no doubt that both cities and counties constitute "political subdivisions" of this State.

You have asked us to define the phrase "wholesale market (or equivalent) rates" as used in subsection (d) of Section 681. The sentence in which that phrase is used is as follows:

> "The Department of Correction may publish and distribute to the Department of Budget and Procurement a schedule of prices for the purchase of all such products, provided that such prices may not exceed the wholesale market (or equivalent) rates for similar products manufactured, produced, or mined elsewhere in the State of Maryland."

It is clear to us that under the above quoted sentence, the State-Use Industries price need only not exceed the highest wholesale price for similar goods quoted by private manufacturers.

The last question raised in your letter concerns the bid specifications used by various consuming institutions. It appears that for convenience, these institutions designate the item they wish to purchase by reference to a brand model number "or equivalent". You have advised us that in some instances the State-Use Industries have been unable to comply with the specifications of the consuming institution, or in other instances have been unable to determine the exact specifications because of a lack of the designated brand's catalogue, or the failure of the catalogue to give specifications for items shown.

As we have already noted above, all consuming institutions are required to purchase their needs from the State-Use Industries, "except products such as the Department of Correction in writing notifies the Department of Budget and Procurement cannot be furnished by the penal or reformatory institutions of the State". The quoted language makes it obvious that the General Assembly anticipated that there would be items requested by certain consuming

institutions that would not be available through the State-Use Industries, and, therefore, provided that in such instances, the consuming institution did not have to purchase such goods from the Department of Correction. This being so, we believe that the consuming institutions are at liberty to set the specifications for their needed items, and are obligated to purchase these items from the Department of Correction only when the items made by the State-Use Industries meet these specifications, or are "equivalent".

As to the designation of specifications by reference to a brand or trade name serial number, we find nothing in the law concerning State-Use Industries which prevents consuming institutions from designating their specification in the manner most convenient and practicable for them, so long as the specifications contain enough detailed information, or refer to a readily available source of such information, as will permit all who are interested in bidding to do so.

Finally, in a meeting with you to discuss your requested opinions, you verbally requested that we advise you on the right of the State-Use Industries to purchase finished goods for resale to consuming institutions. Our review of Section 681 convinces us that the purpose of the law was to create a market for goods manufactured by persons confined to State penal institutions. We can see no justification in the law for State-Use Industries purchasing finished goods from private industry, and reselling them to consuming institutions at a higher price. While we recognize that in certain instances State-Use Industries will not be able to meet commitments to consuming institutions, and might wish to purchase finished goods to satisfy their commitments, we believe that this would not be consistent with the purpose of the State-Use Industries law, and when State-Use Industries cannot meet commitments to consuming institutions, those institutions should then fulfill their needs from private industry through their own regular channels.

FRANCIS B. BURCH, *Attorney General.*

S. LEONARD ROTTMAN, *Assistant Attorney General.*

MUNICIPAL COURT OF BALTIMORE CITY—POLICE DEPARTMENT—BAILIFFS AND SECURITY GUARDS FOR MUNICIPAL COURT TO BE APPOINTED AS PROVIDED IN MARYLAND CODE, ARTICLE 26, SECTION 126—NO REQUIREMENT FOR POLICE DEPARTMENT TO FURNISH SAME.

February 15, 1968.

Mr. Edward J. McCabe.

Your recent letter advises that Chief Judge I. Sewell Lamdin is concerned about providing bailiffs and security guards for the Municipal Court of Baltimore City when the court moves into its new quarters. Judge Lamdin states that five courtrooms will be operated in the new building which will be open seven days a week around the clock for the transaction of court business, including jail release arrangements, posting of bail bonds and collateral, and payment of fines. At times, large amounts of cash will have to be kept on the premises pending deposit in bank. You have asked us to advise you regarding the responsibility of the state and city to furnish bailiffs and security guards for the court.

The answer to your inquiry may be found in Maryland Code (1966 Replacement Volume), Article 26, Section 126, which is the mandate of the Legislature for the staffing of the Municipal Court. The terms and conditions of the appointment of a chief clerk, and his powers and duties are set forth in subsection (a). The personnel of the Criminal Division are described in subsection (b) and the Traffic Division in subsection (c). Subsection (b) provides for a deputy clerk of the Criminal Division, and then goes on to say:

> "There shall also be in said division at least seven assistant clerks, and such other or additional employees all at such salaries, as may be provided in the State budget from time to time . . .".

Clerical and other positions are likewise provided for the Traffic Division in subsection (c). The appointment of the personnel of both Divisions of the Municipal Court is the duty of the chief clerk with the approval of the chief judge. Under the statute, their duties are such as may be assigned to them by the chief clerk.

We believe that the mandate of the statute authorizes and directs the chief clerk, with the approval of the chief judge, to appoint a sufficient number of employees to fully and effectively operate the Municipal Court, their salaries to be paid by an appropriation of the General Assembly. We have not been furnished with the work specifications of bailiffs and security guards in the Municipal Court. Our opinion assumes that they perform such functions as are commonly understood to be theirs and that they are necessary to the efficient operation of the court. The conclusion follows therefore that their appointment is to be made by the chief clerk with the approval of the chief judge, and they are to be paid as provided in the State budget and to be subject to the classified service as provided in Section 126.

We have found no authority requiring the Baltimore Police Department to service the needs of the Municipal Court for bailiffs and security guards. The Police Commissioner is, by statute, authorized to assign police personnel to organizational subdivisions of the Department. The discretion is conferred upon him to make such assignments of personnel as will best serve the interests of the public and the Department. Section 532 (d), Chapter 203, Laws of Maryland 1966. This does not diminish or otherwise affect the responsibility the police now have in connection with the custody of prisoners, and their duty to respond to the requirements of the court for police service and protection in the same manner as other public agencies and the public generally.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

COURTS—PEOPLE'S COURT—CONSTITUTION ARTICLE IV, SECTION 41B—LEGISLATURE MAY NOT REDUCE THE TERM OF JUDGES IN OFFICE.

March 11, 1968.

Honorable Leonard S. Jacobson.

You have forwarded to us a draft of a bill which would create a new court titled "District Court", to operate in Baltimore County, which would supplant the trial magistrates system, Housing Court and People's Court for Baltimore County. You ask several questions with regard to this bill, one of which is whether a constitutional amendment is necessary to the establishment of the court.

We are of the opinion that the bill, as drawn, would not be valid. Section 2 purports to abolish the People's Court of Baltimore County and to provide for the election of two resident judges of the District Court for each of seven districts at the general election in November, 1968. The judges are to take office on the first Monday in May, 1969, and the judges of the People's Court will at that point cease to serve. This provision is in violation of Section 41-B of Article IV of the Constitution since it would have the effect of reducing the term of office of several of the People's Court judges now serving whose terms extend through 1971. Title 23, Code of Public Local Laws of Baltimore County, Acts of 1957, Chapter 608.

In view of this infirmity, our answer to your first question is affirmative. We think it unnecessary to comment on your remaining questions at this point.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

COURTS—CRIMINAL JURISDICTION—COLLECTION OF COSTS—ARTICLE 26A, ANNOTATED CODE OF MARYLAND (1966 REPLACEMENT VOLUME), CHAPTER 455 OF THE ACTS OF 1968—DISCRETIONARY POWERS—INCLUSION OF COSTS IN COMPUTING PERIODS OF CONFINEMENT PURSUANT TO ARTICLE 38, SECTION 4 OF THE ANNOTATED CODE OF MARYLAND (1965 REPLACEMENT VOLUME).

August 5, 1968.

Hon. William H. McGrath.

Your letter of June 25, 1968, has been forwarded to me for reply.

In examining the problem concerning the collection of costs which you set forth, pursuant to Article 26A, Chapter 455 of the Acts of 1968—Criminal Injuries Compensation Act—(hereinafter called the "Act"), I have read the Act as well as *Kelly, et al. v. Schoonfield,* No. 19482, filed May 28, 1962, in the United States District Court for the District of Maryland.

It is my opinion that the word "shall" as used in the "Act" is directory only and the Court [any Judge or Trial Magistrate with criminal jurisdiction] may impose the $5.00 cost upon anyone convicted, within the purview of the "Act", after July 1, 1968; or in the alternative suspend this cost pursuant to Article 27, Section 639, Annotated Code of Maryland (1967 Replacement Volume).

In the *Kelly* case a Federal three judge panel held that an individual person cannot be jailed for mere non-payment of costs. This ruling was held applicable in cases where the State had included costs in computing time to be charged under Article 38, Section 4, Annotated Code of Maryland (1965 Replacement Volume). Judge Thomsen, in his opinion, stated *inter alia*:

> ". . . the requirement that any time be served in default of the payment of costs when not applied

> *to all persons sentenced,* whether to be fined or to be imprisoned, or both, runs afoul of the equal protection clause of the United States Constitution."

A careful reading of that opinion seems to indicate that the three judge panel has set forth a proscription against an invidious discrimination in the application of court costs. That proscription is bottomed on the finding that the Courts in Baltimore City and adjoining counties had uniformly added costs in those cases where individual defendants were *fined,* and ignored costs where the individual defendants were jailed. This resulted in persons committed to jail in default of fines to serve additional time for court costs, whereas persons sent directly to jail were allowed to escape the requirement to serve time for costs.

In our view the *Kelly* case does not hold that an individual cannot be jailed for non-payment of costs, but rather prohibits a discriminatory policy in the imposition of costs —one not based on a rational distinction. Therefore, it is our opinion that so long as costs under the Act are reasonably imposed without an irrational application; the assessment of costs are not only proper, but an individual defendant may be jailed for non-payment pursuant to Article 38, Section 4. In addition thereto it would also appear that unpaid costs should: (a) be taxed and embraced in the original judgment of the case. See Maryland Rule 604; and (b) constitute a lien against the judgment debtor. (In the Circuit Courts, see Article 26, Section 20; and in the Magistrate Courts and Courts of the various Justices of the Peace, see Maryland Rule 620 a, b.)

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Assistant Attorney General.*

COURTS—CRIMINAL JURISDICTION—DISCRETIONARY POWER TO MAKE ORDERS AND IMPOSE TERMS AS TO COSTS—CRIMINAL INJURIES COMPENSATION ACT—CHAPTER 455, LAWS OF MD. (1966 REPLACEMENT VOLUME).

August 5, 1968.

Honorable James F. Stewart.

Your letter of June 28, 1968, has been forwarded to me for reply.

Your comments pertaining to the obvious error in Paragraph 17 of Chapter 455 (S. B. 4), hereinafter called the "Act", are quite correct. In our opinion the costs to be levied and collected under the "Act", are to be derived solely from violations of Article 27 of the Annotated Code of Maryland; and exclusive of Article 66½ (the Motor Vehicle Act) as well as Article 66C (the Natural Resources Act). See Paragraph 2 of the Act.

I have been advised by Dr. Carl N. Everstine, Director, State Department of Legislative Reference, that this error will be corrected in the next legislative session by the submission of a remedial Bill. In the interim I would suggest that the Judges of your Circuit exclude penalties under Article 66C.

The entire purpose of the "Act" would seem to be frustrated if the Court were given the discretion of suspending these costs. However, Article 27, Section 639, Annotated Code of Maryland (1967 Replacement Volume) gives courts of criminal jurisdiction the power to "make such orders and impose such terms as to costs . . . as may be deemed proper". Paragraph 17 of the "Act" specifies:

> ". . . there shall be imposed as additional cost, in the case, in addition to any other costs required to be imposed by law, the sum of $5.00."

It is clear that the Legislature did not intend to treat, other than by manner of collection, the imposed sum of

$5.00 as anything other than an additional cost, subject to the discretionary powers of Article 27, Section 639, *supra*. Therefore, it is our opinion that the word "shall", as used in the "Act" is directory rather than mandatory. This conclusion follows in large measure from the ostensible legislative intent as derived from the character and purpose of the "Act" and from the consequences of a contrary construction, namely, the apparent conflict with Article 27, Section 639, *supra*; see also *State of Maryland v. McNay*, 100 Md. 623, 632.

FRANCIS B. BURCH, *Attorney General.*

BERNARD L. SILBERT, *Assistant Attorney General.*

COURTS—PEOPLE'S COURT—PRINCE GEORGE'S COUNTY—COURT HAS AUTHORITY TO SUSPEND OR REDUCE ITS ORIGINAL SENTENCE IN ANY CASE WITHIN THIRTY DAYS AFTER JUDGMENT HAS BEEN PRONOUNCED, AS LONG AS NO APPEAL IS PENDING AT THE TIME OF THE REVISION.

September 30, 1968.

Honorable Richard E. Painter.

In your recent letter, you state that your Court has been confronted with the following problem:

> "A defendant appears before this Court on a motor vehicle or criminal charge and a trial is held and, as a result of the trial, the defendant is found guilty and sentenced by this Court. Within the time prescribed by statute, the defendant appeals the conviction of the People's Court to the Circuit Court. However, on or before appeal day in the Circuit Court, the defendant dismisses his appeal in writing and thereafter, in proper person or through counsel, petitions the People's Court, after the dismissing of the appeal in the Circuit Court, for reconsideration of sentence."

You ask our opinion as to whether the People's Court, under the above stated facts, has jurisdiction to reconsider its original sentence.

Although Article 52, Section 99 (a) of the Annotated Code of Maryland (1968 Repl. Vol.) provides that the judges of the People's Court for Prince George's County shall have power to suspend or reduce any sentence within thirty (30) days after judgment has been pronounced, this revisory power is without legal force or effect during the pendency of an appeal.

In *Bullock v. Director,* 231 Md. 629, 633, the Court of Appeals stated:

> "After the appeal has been perfected, this Court is vested with the exclusive power and jurisdiction over the subject matter of the proceedings, and the authority and control of the lower court with reference thereto are suspended."

See cases cited in Footnote 3, page 633, *Bullock v. Director, supra.* Of like import, see *State v. Jacobs,* 242 Md. 538.

It is well established that the filing of an appeal does not irrevocably strip the trial court of its revisory power, but only suspends action thereon. See *Duffin v. Warden,* 235 Md. 685, 686, where the Court of Appeals said:

> "Even if it is assumed that the filing of the direct appeal stayed further proceedings on the motion for reduction of sentence during the pendency of the appeal (c.f. *Bullock v. Director,* 231 Md. 629), the only effect was to temporarily suspend action thereon."

In *Tiller v. Elfenbein,* 205 Md. 14, the Court of Appeals, while reaffirming prior decisions which held that a trial court lacks authority to entertain a motion to revise a judgment if an appeal is pending, said, at 21:

> "We hold that, unless the appeal is dismissed when the motion comes on for hearing, the appellant must elect between his motion and his appeal. If the appeal is dismissed before the hearing, as in the instant case, the motion stands for hearing as though no appeal has been entered."

See also *Gilliam v. Moog Industries, Inc.,* 239 Md. 107.

Although the cases referred to do not involve appeals from the People's Court, the rationale which undergirds these decisions, nevertheless, applies. Therefore, in answer to the question posed by you, it is the opinion of this office that the People's Court of Prince George's County has authority to suspend or reduce its original sentence in any

case within thirty (30) days after judgment has been pronounced, as long as no appeal is pending at the time of the revision.

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

COURTS—PRINCE GEORGE'S COUNTY—CHIEF ADMINISTRATOR OF THE PEOPLE'S COURT.

October 9, 1968.

Honorable William H. McGrath.

In your recent letter, you requested this office to render an opinion relative to the validity of the appointment of a Chief Administrator of the People's Court of Prince George's County. In order to obtain more facts surrounding this appointment and the duties of the Administrator, you kindly forwarded to this office a resume and copies of letters in which you and Judges Painter and Waldron requested the County Commissioners to make such an appointment.

Section 108 (16) of Article 52 of the Annotated Code of Maryland (1964 Replacement Volume and 1967 Cumulative Supplement), relating to the People's Court of Prince George's County, provides as follows:

> "At the expiration of the term of office of the present clerks of the trial magistrate courts for Prince George's County, and every four years thereafter, *there shall be appointed by each judge a chief clerk. There shall be three chief clerks who shall be employed for the People's Court . . .*".

It then sets out in detail the duties of the chief clerks and provides for appointment of additional clerical help and personnel in the following manner:

> ". . . The County Commissioners of Prince George's County shall provide such additional clerical help and personnel as may be necessary to carry out the administrative work of said court. All clerical help and personnel, with the exception of the three chief clerks, the deputy clerk for the community magistrates, and the justices of the peace, are to be employed under and paid in accord-

ance with the merit system regulations effective in Prince George's County . . .".

This section also provides that each judge shall be the department head of the court over which he presides.

According to your letter, the appointment of the Chief Administrator of the People's Court of Prince George's County was made on October 16, 1967, by the County Commissioners, but the appointee continues to act as chief clerk in one of the courts now in operation in Hyattsville and has not performed any of the duties or functions of chief administrator.

In 1968, the Legislature, by passing Chapter 654 (House Bill 232), repealed and re-enacted, with amendments, the aforementioned Section 108 (16). In the main, it provided for a Chief Judge who shall be the department head of the People's Court with the duty of appointing three (3) clerks of the court. The Act eliminated the designation "Chief" in referring to these clerks, but it did not change their duties and functions. The Act did not provide for a chief clerk of the court.

For the purposes of this opinion, since the appointment of the chief administrator was made in 1967, it is necessary that we analyze the aforementioned Section 108 (16) in the status in which it existed in 1967. At that time, the statute provided for three chief clerks appointed by each judge of the court over which he presided. There was no provision for a chief clerk or administrator of the People's Court for Prince George's County. The statute expressly provided for the appointment of the chief clerks by each of the judges for a term of four years, but the appointment of additional clerical help and personnel was vested in the County Commissioners. These latter appointments were employed under the merit system regulations existing in the county at the time of their appointments.

It is apparent from the title assigned to the post and the contemplated duties and functions of the office that the "Chief Administrator" does not fall into the category of

"additional clerical help and personnel." This office would obviously assume the magnitude, and be comparable with, an "office manager" or "chief clerk" (as described in the statute relating to the People's Court of Montgomery County—Section 108 (15)). It would considerably stretch the senses to describe such an office as "clerical help and personnel." In helping this office to reach its conclusion that the creation of the office of chief administrator of the People's Court of Prince George's County, and the appointment of an individual to this newly created office, was invalid, it was necessary to examine some of the fundamental elements of statutory interpretation. In Sutherland's *Statutory Construction,* Section 4908, page 393, it is said:

> "In case the legislative intent is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases. Thus, when two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word."

In *Chayt v. Zoning Appeals Board,* 177 Md. 426, this rule was applied by the Court of Appeals when it said, at page 433:

> " 'To the language of the act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together they are understood to be used in their cognate sense, express the same relations and give color and expression to each other.' *Perkins v. Barr,* 126 Md. 91, 95, 94 A. 533, 534; *Lewis v. Fisher,* 80 Md. 139, 30 A. 608; *American Casualty Insurance Company's Case,* 92 Md. 535, 34 A. 778, 38 L.R.A. 97."

An examination of the Section 108 (16) reveals that the Legislature did not provide for the appointment of a chief

administrator (nor was the office created in the 1968 Act when the Chief Judge was named the department head of the People's Court, and the designation of "chief" eliminated when describing the clerks); furthermore, the only powers given to the County Commissioners in this regard related to the appointment by them of "additional clerical help and personnel necessary to carry out the administrative work of the Court." Applying the rules of interpretation referred to herein to this language, one must come to the conclusion that "personnel" is restricted by the associated words of "clerical help." A reasonable interpretation of this expression in the Act, and one which the Legislature undoubtedly intended, was to vest in the County Commissioners the power to appoint minor clerical help and personnel in the category of filing clerks, typists, receptionists, and the like, rather than one of a superior nature as Chief Administrator whose duty it was to exercise executive and ministerial judgments.

In *Casualty Ins. Co.'s* case, 82 Md. 535, the Court of Appeals held, in interpreting the insolvency act, wherein certain priorities were created for the payment of wages of clerks, persons rendering mere clerical service, servants or employees, that an insurance adjuster was not an employee in the restricted sense used in the Act. The Court said, p. 567: "The statute did not mean by employees persons rendering services of a higher degree than clerks." The same issue was discussed in *Perkins v. Barr*, 126 Md. 91, where the court adopted the following advice:

> " 'A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive; *specialia generalibus derogant. Black Intro.*, sec. 3; *Sandiman v. Breach,* 7 B. & C. 96; *Reg. v. Cleworth,* 4 Best & S. 927; *Kitchen v. Shaw,* 6 A. & E. 729; *Branwell v. Pennock,* 7 B. & C. 536; *Williams v. Golding,* L.R. 1, C.P. 69; *Broom's Max.* 625; *Smith v. People,* 47 N.Y. 337, Allen, J., 90 N.Y., *supra.*' "

In *Bean v. Jennings,* 2 S.E. 245 (N.C.), the court had before it a document signed by the Secretary of State of that State per the signature of a clerk. The court, in ruling the document invalid, discussed the duties of the Secretary as described in the statutory authority creating the office, and went on to point out that there was no statutory provision for an assistant or deputy or clerk, so designated. He was allowed, however, a stipulated sum of money for "clerical assistance . . . in the discharge of the duties of his office." The learned judge ruled:

> "Plainly, he may employ such 'clerical assistance' as he may need from time to time, sometimes more, at others less, as occasion and his convenience may require, and such assistance he can change or dispense with at his convenience and pleasure, having in view the public need."

We feel that the legislative intent in the instant matter was best described as in that case. By providing for "additional clerical help and personnel", appointed by the County Commissioners, it did not intend these appointments to be of a superior rank than the chief clerks appointed by the judges. Furthermore, it is obvious that the Legislature did not intend the chief clerk to be covered by the merit system.

FRANCIS B. BURCH, *Attorney General.*

HENRY J. FRANKEL, *Assistant Attorney General.*

COURTS—PEOPLE'S COURT JUDGES—REMOVAL OF—GOVERNOR DOES NOT HAVE AUTHORITY TO REMOVE FROM OFFICE A JUDGE OF THE PEOPLE'S COURT FOR PRINCE GEORGE'S COUNTY—NOR DOES HE HAVE EXPRESS OR IMPLIED AUTHORITY TO SUSPEND SUCH A JUDGE PENDING INVESTIGATION.

November 13, 1968.

The Honorable Spiro T. Agnew.

In your recent letter you state that you have been requested to investigate the conduct of a member of the People's Court for Prince George's County. You request our opinion as to your authority:

1. To suspend this person pending investigation.

2. To remove this person from office.

The constitutional source for the establishment of the People's Courts is Article IV, Section 41B of the Constitution of Maryland, which reads, in relevant part:

> "The General Assembly shall have power by law to establish a People's Court . . . and to prescribe from time to time to alter (1) the number, qualifications, tenure, and method of selection of the Judges of any such Court, and their powers, duties and compensation . . . and (4) all other matters relating to such Court."

It is manifest that no express power to suspend or remove a People's Court Judge is granted the General Assembly, or embodied in this constitutional provision. It also appears, although not wholly free from doubt, that no implied power is granted the General Assembly to prescribe, by law, for the suspension or removal of a People's Court Judge.

Chapter 675 of the Acts of 1961 (now codified as Article 52, Sections 25B, 98A, 99, 119K, and 125A of the Mary-

land Code, 1968 Replacement Volume), which established the People's Court for Prince George's County, is silent with respect to the suspension or removal of judges. Therefore, the authority, *vel non,* of the General Assembly to prescribe by law for such a contingency is not presented.

Although Chapter 675 invested the judges of the People's Court with all authority, powers, and jurisdiction theretofore vested in the justices of the peace designated as trial magistrates for the County, the judges of said Court are not trial magistrates designated as People's Court Judges, and they do not come within the ambit of the trial magistrate system.

The trial magistrate system was created by legislative enactment (Chapter 720 of the Acts of 1939, codified as Article 52, Sections 97-124), whereas the People's Court for Prince George's County was established by constitutional authority, although its jurisdiction and powers are purely statutory. *Good v. State,* 240 Md. 1. Therefore, Section 97 (b) of Article 52, which empowers the Governor to remove a trial magistrate from office, is clearly inapplicable to the People's Court Judges for Prince George's County.

The People's Court is a constitutional court and the authority for suspending or removing a judge of that Court must emanate from the Constitution. *Humphrey v. Walls,* 169 Md. 292. See Article 33 of the Declaration of Rights, which provides:

> ". . . Judges shall not be removed, except in the manner, and for the causes provided in this Constitution."

Section 15 of Article II of the Constitution contains the general provision that the Governor "may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years." It is apparent that this section only applies to such offices as the Executive has the power to fill by original appointment for a term of years. Accordingly, judges who are required

to stand for election by the people are not embraced therein. *Cantwell v. Owens*, 14 Md. 215.

Since the People's Court Judges for Prince George's County do not stand for election by the people, but are appointed by the Governor with the advice and consent of the Senate for a period of ten years (Article 52, Section 98B), it is, perhaps, arguable that these judges, as distinguished from judges who are elected to office by the people, are subject to removal for incompetency or misconduct under Article II, Section 15, of the Constitution.

Sections 4A and 4B of Article IV of the Constitution provide for the creation of a commission on judicial disabilities and the removal of a judge by the General Assembly after a hearing by the Commission. Section 4B (a) reads as follows:

> "A judge of the Court of Appeals, of the Circuit Courts for the Counties, of the Supreme Bench of Baltimore City, of the Orphans' Courts and all other judges elected or subject to election, and those appointed if the full term of the particular office is for not less than four years, (including a judge holding office on the date of adoption of this Amendment) may, in accordance with the procedure described in this section, be removed for misconduct in office, persistent failure to perform the duties of his office or conduct which shall prejudice the proper administration of justice. . . . The Commission may, after such investigation as it deems necessary, order a hearing to be held before it concerning the removal or retirement of a judge. If, after hearing, the Commission finds good cause therefor as aforesaid, it shall recommend to the General Assembly the removal or retirement, as the case may be, of the judge."

It is clear that the members of the People's Court for Prince George's County are judges within the purview of the above quoted constitutional provision. It is equally clear

that this constitutional provision, with its specific and express direction as to the removal of judges, takes precedence over the general powers of the Governor to remove civil officers contained in Article II, Section 15. See 8 Opinions of the Attorney General 443.

In answer to the questions posed by you, therefore, it is the opinion of this office that you do not have authority to remove from office a judge of the People's Court for Prince George's County. We are also of the opinion that you do not have expressed or implied authority to suspend this judge, pending investigation. *Cull v. Wheltle*, 114 Md. 59. The only procedure for the removal of such an officer is that authorized by Sections 4A and 4B of Article IV of the Constitution, as above set forth.

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

COURTS—MUNICIPAL COURT OF BALTIMORE CITY, HOUSING DIVISION, HAS ORIGINAL AND EXCLUSIVE JURISDICTION TO TRY ALL VIOLATIONS OF WEIGHTS AND MEASURES LAWS—ART. 14, BALTIMORE CITY CODE (1966 ED.)

November 20, 1968.

Charles E. Moylan, Jr., Esq.

In your recent letter, you state that certain merchants have been arrested for alleged violations of the weights and measures law under Article 14 of the Baltimore City Code. You also state that there is a difference of opinion among the judges of the Municipal Court of Baltimore City with respect to their jurisdiction in these cases, because the statute, Article 26, Section 109 (a) (41) of the Annotated Code of Maryland, refers to Article 15, instead of Article 14 of the Baltimore City Code as relating to weights and measures.

You ask our opinion as to whether the Municipal Court of Baltimore City has jurisdiction over weights and measures offenses.

Section 109 (a) of Article 26 of the Annotated Code of Maryland (1966 Repl. Vol.) provides that the Municipal Court:

> "[S]hall have jurisdiction to hear, try and determine the case of every person who may be charged with the commission, in the City of Baltimore, of any one or more of the offenses hereinafter set forth. . . . All references to 'City Code' are to Flack's Baltimore City Code (1950 Edition). . . . All references are to such statutes as amended prior to June 1, 1961, and as said statutes may be hereby or hereafter amended, repealed and re-enacted, modified or changed."

The offenses in question are set forth under Section 109 (a), as follows:

"(41) Inspections, weights and measures violations under City Code, Article 15 . . .".

An examination of Article 15 of Flack's Baltimore City Code (1950 Ed.) discloses that that article relates to laws governing inspections, weights, and measures in Baltimore City.

In 1966, Flack's Baltimore City Code (1950 Ed.) was recodified and, in the process, Article 2, entitled "Art Museums", was omitted. As a consequence, the number of each subsequent article was advanced, thereby changing the number of the weights and measures article from 15 to 14.

It is clear that it was the intent of the Legislature to adopt and incorporate, by reference, the existing laws governing weights and measures as embodied in Article 15 of Flack's Baltimore City Code (1950 Ed.), and all subsequent amendments, modifications, and changes thereto. Therefore, the change in the numerical designation of the adopted weights and measures article from 15 to 14 did not defeat or impair the jurisdiction conferred upon the Municipal Court of Baltimore City by the reference statute, i.e., Article 26, Section 109 (a) (41).

The rule generally obtains that a mistaken reference in a statute to a number in another statute will be disregarded, if the real intent of the Legislature is manifest. See Annot., 5 A.L.R. 996 (1920) and cases cited therein.

In answer to the question posed by you, it is the opinion of this office that the Municipal Court of Baltimore City, Housing Division, has original and exclusive jurisdiction to try all violations of weights and measures laws, under Article 14 of the Baltimore City Code (1966 Ed.).

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

DENTAL EXAMINERS, MARYLAND STATE BOARD OF

CLOSED PANEL DENTAL PLAN—GROUP DENTAL CARE—ADVERTISING—ILLEGAL PRACTICE OF DENTISTRY—FEE SPLITTING—UNION HEALTH AND WELFARE FUND.

February 19, 1968.

Maryland State Board of Dental Examiners.

You have referred to us and asked our advice concerning an Agreement between the Trustees of the Retail Store Employees Local Union #400 and Subscribing Employers Health and Welfare Fund (hereinafter called "Trustees" and "Fund", respectively) and certain dentists. The Agreement provides for the establishment of a program of dental services for beneficiaries of the Fund (such program being hereinafter referred to as the "Plan"). The dentists who are parties to the Agreement are referred to in the Agreement as "partners" or "partnership" and they act as administrators for the Plan (we shall refer to them as "Administrators"). The Agreement is one that is presently in effect and covers the members (and their dependents) of Local 400, many of whom live in Montgomery and Prince George's Counties, and who are employed by contributors to the Fund (we shall hereinafter refer to such member-employees and their dependents as "Beneficiaries"). We also understand that other similar dental service plans are now in effect and that other unions may, in the future, wish to negotiate agreements similar to the one here being considered.

We find that the Agreement provides substantially as follows:

The Administrators agree to provide specific dental services to all Beneficiaries, some of which services will be rendered without cost to the Beneficiaries and some rendered at a set fee. The services to be provided by the Administrators at no cost are:

Oral examination.
General prophylaxis, including deep scaling.
Stannous fluoride and sodium fluoride treatment.
X-Rays in connection with all services as required by professional dental standards.

Anesthesia, as required by professional dental standards for each type of covered service.

Fillings, all surfaces. Restorative material is to be used as needed for strength (not for cosmetic purposes) according to professional dental standards and will include synthetic porcelain, plastics, and silver amalgam.

Routine extractions, routine oral surgery, and interim emergency care only for dental maladies not covered by the above list of regular procedures.

The services to be provided by the Administrators at a set fee, together with the fee for each service, are as follows:

SERVICE	FEE
1. Crown and Bridge	
a. cast gold, acrylic combination	$ 60.00
b. porcelain, fused porcelain	55.00
2. Simple repair of prosthetic appliances	10.00
3. Full denture (upper and lower)	130.00
4. Full denture (single, either upper or lower)	65.00
5. Partial denture (upper or lower)	70.00
6. Reline	20.00
7. Reconstruction of dentures	25.00
8. Nesbit (one tooth partial)	35.00
9. Porcelain jacket	55.00
10. Acrylic jacket	55.00
11. Inlay	40.00
12. Space maintainer (for children)	25.00
13. Fees for complicated surgery, including impaction and the treatment of endodontal dis-	

> ease including root canal and therapy and resection, are to be arranged on consultation between the patient and the surgeon according to the surgeon's established fee schedule less a group reduction factor of 20%.

The Administrators are responsible for providing waiting, examination, operatory, and laboratory facilities, including necessary dental equipment. They are to see a Beneficiary for an initial appointment within a specified time period and to provide services thereafter within specific intervals, provide the Trustees with a list of hours during which their services will be available, keep their offices open for services to Beneficiaries at convenient hours and allow sufficient time to meet the demands of the Beneficiaries, and provide sufficient professional and staff personnel to provide the required services for Beneficiaries.

The services of all dentists participating in the Plan and the facilities used by them are subject to general standards, set forth in the Agreement, and to general inspection by the Trustees. In the event that a Beneficiary, Trustee, or any authorized representative of the Fund believes that a dentist participating in the Plan has failed to perform his obligation under the Agreement, the matter is to be referred to the Board of Trustees. If the matter cannot be resolved there, it is to be referred to final and binding arbitration, as provided in the Agreement.

The Fund is to supply the Administrators with a monthly list of eligible employees. The Administrators are to supply the Fund with monthly reports listing the Beneficiaries treated, services provided, the number of dental hours provided each Beneficiary, fees charged in cases where a charge is made, and a record of broken appointments.

The Agreement specifically provides that the Administrators are "independent contractor(s), not an agent or employee of the Fund". The Administrators are obligated to obtain both general liability and malpractice insurance in specified amounts to cover services by the Administrators and their agents.

The Administrators are to be compensated for all services performed pursuant to the Agreement at a rate based on a fixed sum per month times the number of employees qualified for benefits under the Plan that month. In the event the compensation paid produces a rate per hour for services performed above or below rates specified in the Agreement, either the Fund's monthly payment per person is to be adjusted, or the type or volume of services are to be adjusted so that payments to the Administrators are within the maximum and minimum rates specified.

In our consideration of this matter, in addition to reviewing the Agreement aforesaid, we attended a meeting of the members of the Dental Board, the dentists currently administering the Plan, representatives of both Local 400 and the employers who are participants in the Fund, and attorneys for the Fund. Subsequent to that meeting we were provided with a statement setting forth the typical administrative routine for the operation of the Plan. It appears that in practice the Plan works as follows:

The Trustees of the Fund advise the Administrators of the population distribution of Beneficiaries of the Fund. The Administrators must then seek enough dentists to efficiently handle the projected case load in locations convenient to home and work of the Beneficiaries. The Administrators and other participating dentists provide offices and facilities for carrying out the program. Any licensed dentist in the community may become a participating dentist in the program. Actual participation by a dentist is subject to agreement being reached between the Administrators and the participating dentist as to hours of availability and rate of compensation to be paid to the dentist who is actually to perform the dental service.

The Administrators provide central examining rooms, which in practice are the offices of the Administrators. Initially, a Beneficiary will go to a central examining room. After determining eligibility, the Beneficiary will be given an examination by an Administrator. An evaluation of the treatment required will be made, and the Beneficiary is

then advised of what appointments are available at various dentists participating in the Plan and the Beneficiary selects the dentist and the time for having the dental work done. The Administrator forwards, by mail, any x-rays and a summary of his examination to the participating dentist selected by the Beneficiary. The participating dentist performing the services has discretion to enlarge upon or modify the treatment suggested by the Administrator, based upon his professional judgment, after beginning the actual treatment of the Beneficiary. This change is subject to review by the Administrator when the treatment is radically different from that initially suggested. Upon completion of treatment, the Beneficiary's record is returned to the Administrator and he, in turn, makes payment to the treating dentist.* The payment made to the treating dentist is based upon the rate of compensation agreed upon by him and the Administrator. This phase of operation of the Plan does raise a question of "fee splitting" and we will consider this hereinafter.

It is obvious to us that to fully treat this subject matter, we must consider the Plan from the aspect of the Fund's participation in procuring dental services for Beneficiaries of the Plan, and from the aspect of the participating dentists in connection with the Plan. Our consideration of the problems presented will, of course, concern primarily the provisions of Article 32 of the Annotated Code of Maryland. All references to Code Sections hereinafter made shall relate to Article 32. We first consider the role of the Fund.

Section 1 provides that "it shall be unlawful for any person to engage in the practice of dentistry . . . unless such person shall have obtained a license . . .". The practice of dentistry is defined by Section 17 to mean any person:

> "(a) who is a manager, proprietor, or conductor of, or an operator in, any place in which any dental service or any dental operation is performed within the mouth of any person; or (b) who for a fee, salary, or other remuneration or

> reward, paid or to be paid to himself or to another, or gratuitously or otherwise, performs any such service or operation; or (c) who diagnoses or treats, or attempts to diagnose or treat, any disease, lesion, malocclusion, or malposition of a tooth, gum or jaw, in any person, mechanically, medicinally, or otherwise; or (d) who attempts to perform in the mouth of any person any operation incident to the repair or replacement of a tooth or teeth; or (e) who publicly or privately applies to himself the title 'Dentist' or uses the letters D.D.S. or D.M.D. or Dr., or any other titles or letters in connection with his name which, in any way, represent him as being competent or ready to perform any dental service or any dental operation in any human mouth; or (f) who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce, or repair oral prosthetic appliances (known also as 'plates'), bridges, or other substitutes for natural teeth, to the user or prospective user thereof . . . ".

In our opinion, the Fund does not perform any act or service which is defined by Section 17 to constitute the practice of dentistry.

Neither the Fund nor the Trustees seek or receive from the Beneficiaries a fee or compensation in any manner for supplying dental care. The function of the Fund, in this respect, is to pay a licensed dentist (or dentists), the Administrators of the Plan, for providing dental care and services.

Section 25 (b) makes it unlawful for any person not duly registered and licensed to practice dentistry:

> "To solicit or advertise, directly or indirectly, by mail, card, newspaper, magazine, telephone directory, periodical, pamphlet, radio, television, display, or in any other manner to the *general public* to construct, supply, reproduce, or repair

prosthetic dentures, bridges, plates, or other appliances to be used or worn as substitutes for natural teeth or for the regulation of natural teeth." (Emphasis supplied).

Since Beneficiaries of the Fund are persons who are members (or their families) of Local 400, any solicitation for use of the dental services provided by the Fund is limited to such persons and, therefore, does not extend to the "general public". This being so, it cannot be said that the operation of the Plan violates the provisions of Section 25 (b).

We now turn our attention to the dentists who now, or may in the future, participate in the Plan.

Since, to our knowledge, all of the dental services performed under the Plan are done by dentists duly licensed to practice in the State of Maryland, there is no violation of Section 1. We note also that all of the dentists who are currently participating in the Plan are practicing under their own names and actually perform their services in their own private dental offices, which are maintained in their own names.

Although the Agreement refers to the Administrators as "partners" and to their association as a "partnership", it appears that, in fact, the Administrators are not partners and, though they work together in administering the Plan, they each maintain separate and distinct offices for the practice of dentistry.

Section 11 sets forth various grounds for revocation or suspension by the Board of the license of a dentist. Subsection (f) concerns one who has practiced or offered to practice dentistry under any name other than his proper name, or has permitted, directly or indirectly, any unregistered or unlicensed dentist to practice dentistry under his or her direction. As noted above, there is no evidence in the matter we are here considering that the dentists involved have violated the provisions of subsection (f).

The other subsections of Section 11 which we believe to be pertinent are subsections (g), (j), which merely refer to Section 12, and (k). These provisions all deal basically with prohibitions on advertising by dentists. Subsection (g) concerns the employment or use by dentists of advertising solicitors or free public press agents. Subsection (j), by reference to Section 12, prohibits broadly all advertising by dentists. There are, however, certain exceptions to this prohibition, relating mostly to the use of personal professional cards, signs indicating the location of a dentist's office, etc. Section (k) authorizes action by the Board against licensed dentists where they have been found guilty of dishonorable or unprofessional conduct. Subparagraph (2) of subsection (k) refers to advertising professional superiority or the performance of professional services in a superior manner, and advertising prices for professional services. Although fee splitting will hereinafter be more fully explored, we note here that fee splitting, as such, is not mentioned in subsection (k). It is, however, prohibited by the Principles of Ethics established by the American Dental Association and, thus, might run afoul of this subsection.

Considering the question of advertising, we have had called to our attention notices of the dental services offered in messages directed to members of the Union. These messages take the form of written communications to Union members and radio announcements sponsored by the Union. The general import of the radio announcements is to give public information about the benefits secured by the Union for its members and, obviously, is intended to encourage others who are eligible to join the Union to do so. Of the announcements brought to our attention, none specifically mentioned the name, or any specific identifying characteristic, of the dentists who participate in the Plan. We do note, however, that in some instances the notices refer in general to these dentists, though without naming them, as young dentists who are above average in practicing their skills. Unquestionably, this practice is, at the very least, subject to criticism and we recognize that left uncurtailed,

it could ultimately constitute a violation of the provisions of Section 12. At the present time, however, it appears to us that as to the dentists participating in the Plan, not only were they free of any responsibility for the placing of the notices, but, in fact, they were unaware of the notices themselves.

The only references to fees for professional services are set forth in the Agreement. As far as we know, the fees themselves have not been made the matter of any notice to Union members. Obviously, these fees must be brought to the attention of the members when specified services are being considered. A mention of fees in such cases, however, certainly could not be deemed to be advertising.

Black's Law Dictionary 74 (4th ed. 1951) defines "Advertise" as "to give notice to, inform or notify, give public notice of, announce publicly, notice or observe" and "Advertising" as "notice given in a manner designed to attract public attention".

We note that the Dental Practices Act refers not only to advertising, but also to the use of advertising solicitors and free public press agents. We believe, however, that this does not materially expand upon the meaning or interpretation of the provisions of the Statute, since "advertising solicitor" could only mean solicitors of advertising or solicitors who advertise, and "free public press agents" would be press agents who obtain free publicity for the dentist. See *Rust v. Missouri Dental Bd.*, 155 S.W. 2d 80 (1941) wherein the Court ascribed to these terms, as used in a Missouri statute prohibiting advertising by dentists, the meanings referred to above.

In *Planned Parenthood Committee v. Maricopa County*, 375 P. 2d 719, 723 (1962), the Supreme Court of Arizona reviewed advertising by the Committee in the light of a State statute prohibiting advertising medicine or means to produce abortions or prevent conception. The court defined "advertise" as "The act or practice of bringing anything, as one's wants or one's business, into public notice, as by paid announcement in periodicals, or by handbills, placards,

etc., as to secure customers by advertising." The Committee circulated various articles and pamphlets concerning its activities. The court ruled that these items would not constitute advertising and, in so doing, said:

> "Articles and press releases in newspapers and periodicals, including editorials, commentaries and informational articles on matters of current public interest are not 'advertising' as defined above and therefore are not within the proscription of the statute. . . .
>
> "The exhibits in this case include a number of leaflets and pamphlets that Planned Parenthood has distributed, sometimes by the use of display racks in hospitals or clinics. Some of these give information in a general way about the purposes of the Planned Parenthood organization. Others describe the dangers of overpopulation, uncontrolled procreation, and abortion. Such literature is obviously not advertising of any medicine or means to prevent conception, or the offer of assistance in accomplishing such purpose, and therefore is not prohibited by the statute. Some of the literature deals principally with sex relations in marriage and touches on contraception only in a general way, stating that it is desirable, that safe methods are available, and that the Planned Parenthood organizations will assist in selecting a doctor who would give the reader advice on the subject. One is a reprint of a popular woman's magazine story in which two methods of contraception are discussed in rather specific detail, but without reference to brand names of contraceptive devices or preparations. We think none of the materials thus far discussed fall within the category of 'advertising' and therefore that the statute does not prohibit the distribution of such items."

We believe that the dissemination of information con-

cerning the Plan by the Union to its members does not fall within the meaning of the term "advertise". Such notices and announcements are more in the nature of circulations of news and information of services available to members of the Union, than they are advertising of a dentist. In this respect, we take particular note of the fact that in none of the items called to our attention were the names of the dentists who participate in the Plan mentioned. Also, the Maryland Statute seems to make clear that the advertising contemplated is advertising to the general public. Since the written matter giving notice of the availability of dental services has been distributed only to Union members and apparently will be limited to this class, such items could not be considered public advertising. As to the radio announcements, as we indicated previously, the announcements were advertisements for the Union and the mention of the availability of dental services did not benefit or advertise the dentists themselves, but advertised and gave notice of the work of the Union for its members.

Considering the question of fee splitting, it is our understanding of the Plan that the Administrators are paid a sum based on the formula mentioned above. This sum is to compensate the Administrators for all of their services to the Plan, both administrative and professional, and to pay the cost of providing the administrative staff and professional personnel needed to operate the Plan. In this respect, the Administrators are acting in a non-professional capacity, i.e., establishing agreements with dentists who participate in the Plan, scheduling appointments and disbursing Fund proceeds to dentists for services performed, which could be done by a non-professional, as by an employee of the Fund.

We believe that the administrative program set up by the Fund and the Administrators does not constitute fee splitting, in that the dentists, who also serve as administrators of the Plan, do not divide the fees they receive for professional services rendered with other dentists. Also, of

course, the Trustees of the Fund are aware that the Administrators compensate the other dentists who participate in the Plan from the proceeds received from the Fund. In an advisory opinion rendered by the American Dental Association, it was opined that an arrangement whereby a dentist who provided dental care to a veteran at the expense of the Federal Government and did not disclose to the veteran a Veterans' Administration approved arrangement between the general practitioner and a specialist, did not constitute fee splitting.

In conclusion, upon a review of the entire Plan presented to us and its current operation, we cannot find that there has been a violation of the Dental Practice Act by either the Fund, the Administrators, or the other dentists who participate in the Plan. As we have previously noted, because of the nature of certain notices put out by the Union concerning the Plan, we recognize that the Dental Practice Act may be violated in the future, should notices and announcements concerning the Plan change so as to constitute "advertising" by or for the dentists participating in the Plan. This, of course, can only be determined by future developments.

In reviewing this Plan, we have also given consideration to the provisions of the insurance laws of this State. As initially presented to us, the Plan appeared to put the Administrators in the position of insurers. Subsequently, however, the Plan was amended and as it now stands, we do not find any conflict between the Plan and the State insurance laws.

FRANCIS B. BURCH, *Attorney General.*

S. LEONARD ROTTMAN, *Assistant Attorney General.*

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*Since the Administrators of the Plan are paid a fixed sum (with certain possible exceptions as noted) and also control the treatment prescribed, which directly affects the "profit" retained by them, careful attention should be paid to insure that not only are the services performed of the highest professional standards, but also that all necessary treatments are prescribed.

EDUCATION

LABOR NEGOTIATIONS—CONSTITUTIONALITY OF LEGISLATION WHICH MAKES BINDING UPON LOCAL BOARDS MEDIATED SETTLEMENTS WITH RESPECT TO WAGES OR OTHER CONDITIONS OF EMPLOYMENT.

February 26, 1968.

Honorable Royal Hart.

Senate Bill 165 (hereinafter called "the Bill"), title "Public Education", subtitle "Teachers' Associations", provides a method by which public school employees may form associations for the purpose of obtaining exclusive recognition by local boards of education and negotiate with regard "to all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment". [Section 175 (h) (1)].

You have asked our opinion with respect to the constitutionality of subsection 175 (i) of the Bill, which, in relevant part, provides:

> ". . . If a majority of all public school employees voting in such election shall vote to accept the report of the panel, the conditions so accepted shall be binding upon the public school employer beginning the next fiscal year."

We understand this provision to relate to a mediated settlement of an employment dispute upon which a local board of education and a teachers' association have reached an impasse. The condition of employment mediated is thereafter put to a vote by the teachers' association and, when a majority of its members agree, the mediated condition thereafter becomes binding on the local board as of the next fiscal year.

Subsection 175 (b) provides:

> "Public school employees shall have the right to form, join, and participate in the activities of

> employee organizations of their own choosing for the purpose of being represented as to all matters of employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment. An employee organization may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership."

Subsection 175 (i) would apparently make binding upon the local board mediated settlements concerning conditions of employment which cover, among other things, wages and hours. To the extent that these matters are by law vested in other executive agencies and legislative bodies, such mediated conditions, if made binding upon the local board, would in our opinion improperly and unconstitutionally delegate those powers.

At the State-wide level the budget-making process in Maryland is controlled by specific provisions of the Maryland Constitution. The Governor submits his annual budget to the General Assembly, which may ultimately reduce the appropriations with the limitation that neither branch may fail to fund those programs required by law. Article III, Section 52, Maryland Constitution. With respect to salaries established by law, we have said that a minimum salary provided by law must be included in the executive budget. 33 Opinions of the Attorney General 293 (1948). With respect to the salaries of professional and instructional staff of the several State Colleges which are not provided by law but which are included in the budget of the Board of Education (now the Board of Trustees of the State Colleges), we have said that the Governor may reduce those amounts in his budget requests. 37 Opinions of the Attorney General 117 (1952); 44 Opinions of the Attorney General 155 (1959).

The General Assembly, in Article 77 of the Maryland Code, has established a different fiscal scheme with respect to principals' and teachers' salaries in the political sub-

divisions. Section 106 (b)-(h) establishes a minimum salary schedule for principals and teachers. Subsection 106 (i) provides:

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

Subsection 106 (j) provides:

> "The county commissioners of each county and the mayor and city council of Baltimore shall levy sufficient funds to meet the schedule of salaries herein established."

Section 203, in relevant part, with respect to the Board of School Commissioners of Baltimore City, provides:

> "[The board] shall have power to . . . fix the salaries [of teachers] subject to the approval of the mayor and city council . . .".

We are of the opinion that subsection 106 (j), requiring that local subdivisions levy sufficient funds to meet the schedule of salaries therein established, is mandatory only to the extent of the salary schedules established in Section 106 (b)-(h) and that, as to increases recommended by the local boards as provided in subsection 106 (i), granting these increases lies within the ultimate province of the governing body of the political subdivision. Subsection 106 (i), in our opinion, is referable only to salaries in excess of the minimum schedule established by Section 106 (b)-(h) because this construction of subsection (i) permits effect to be given to Section 203, which provides that teachers' salaries for Baltimore City are subject to the approval of the Mayor and City Council.

The City Solicitor of Baltimore City has similarly said that the Ordinance of Estimates, which is the City's executive budget prepared and introduced into the City Council

by the Board of Estimates, may be reduced by the City Council but departmental reductions by the Council may affect only such items which are not required by law to be funded. 56 Opinions of the City Solicitor 211 (1963). The minimum salary schedule provided by law under Section 106 (b)-(h) would be a mandatory appropriation under both the opinions of this office and the opinions of the City Solicitor.

In *Mugford v. City of Baltimore,* 185 Md. 266 (1945), the Court of Appeals, with respect to contracts between a municipal agency and its employees covering working conditions, said:

> ". . . To the extent that these matters are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at all times subject to change or revocation in the exercise of the same discretion. . . ." 185 Md. at 270.

While the Court of Appeals in *Mugford* dealt principally with the common law with respect to strikes and collective bargaining agreements by and with municipal employees, the above-quoted statement in *Mugford* was, in our opinion, referable to a problem of constitutional dimensions. While the common law prohibitions may be changed by statute, as this Bill attempts to do, provisions which offend constitutional rules may be changed only by an amendment to the Constitution. We are of the opinion that legislation which makes binding upon local boards mediated settlements with respect to wages in excess of the minimum statutory schedule offends the fiscal scheme established by the General Assembly in Article 77.

In *Norwalk Teachers' Ass'n v. Board of Education,* 138 Conn. 269, 83 A. 2d 482 (1951), the Supreme Court of Errors, responding to the question of whether a local board of education may enter into collective bargaining with teachers with respect to salaries and working conditions, said:

> ". . . Any salary schedule [which is agreed upon in any collective bargaining agreement] must be subject to the powers of the board of estimate and taxation [because of the provision that] 'The salaries of all persons appointed by the board of education * * * shall be as fixed by said board, but the aggregate amount of such salaries * * * shall not exceed the amount determined by the board of estimate and taxation * * *' . . ." 83 A. 2d at 486.

In *State v. Johnson,* 278 P. 2d 662 (Sup. Ct. Wash., 1955), where a charter amendment provided that an impasse between the city commissioners and firemen with respect to wages, pensions and working conditions shall be submitted to a board of arbitration whose decisions shall be binding upon the council and the firemen, the Supreme Court of Washington held that this charter amendment was an unlawful delegation of authority to the board of arbitrators because of the budgetary scheme and home rule provisions established by the Washington Constitution. The Court said:

> ". . . If the firemen have any complaint regarding working conditions, wages, or pensions, they take the matter up with the council, the legislative body of the city. The council is limited in its expenditures by the city budget. It must consider the ability of the citizens, through taxation, to pay increased wages. At the same time it may be confronted with the possibility that if it does not grant an increases in wages, some or all of the firemen might quit, with the result that the citizens might be left with inadequate fire pro-

> tection. The concern of the legislative body is the welfare and protection of the people of the city. A problem such as this requires the exercise of discretion.
>
> "Can the legislative body abdicate its responsibility and turn it over to a board of arbitrators whose decision will be binding upon the legislative body and the firemen? Clearly it has no legal right to do so. The theory of delegation of authority is that the person or group, to whom authority has been delegated, acts for and as the agent of the person or group delegating such authority. That is not the situation here. Here the council would be stepping out of the picture entirely and the arbitration board would be performing a function which, by law, is the responsibility of the council."

We are of the opinion that granting salary increases above the minimum schedule provided by Article 77, Section 106 (b)-(h) is a matter which is ultimately the responsibility of the legislative bodies of the local subdivisions. To the extent that local boards of education are permitted to enter into binding agreements with respect to wage increases above such minimum amounts, under subsection 175 (i), such a delegation of that responsibility, in our opinion, renders that subsection constitutionally invalid. The result we reach here with respect to wages, in our opinion, is equally applicable to other conditions of employment which may be legislatively vested in other branches of government within the local subdivisions.

While we have taken this opportunity to examine the legislative prerogatives with respect to public employee labor relations with particular emphasis upon such legislation as it affects teachers' salaries under the relevant provisions of the Code, the result reached in this opinion, in our judgment, is, in any event, consistent with our prior opinion with respect to the propriety of the Baltimore City Police Commissioner entering into collective bargaining agreements with a labor union, dated March 9, 1967, a

copy of which is attached hereto. That opinion makes it clear that the controlling language of the *Mugford* case makes such agreements against public policy.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

EDUCATION—SCHOLARSHIPS—BUDGET—LEGISLATURE MAY STRIKE OR REDUCE BUDGET ITEM RELATING TO SCHOLARSHIP FUNDS.

February 29, 1968.

Honorable Harry R. Hughes.

This is in reply to the inquiry in your letter of February 21, 1968, as to the ability of the Legislature to reduce the items in this year's budget for scholarship funds.

Maryland Code Article 77, Section 284H (f) provides that funds for the granting of scholarships in education shall be included in the budget from year to year. You note that the program has fallen into disuse and the usual budget item far exceeds the needs of the scholarship program.

The restrictions on the ability of the Legislature to strike out or reduce items in the budget are contained in the Constitution, Article III, Section 52 (6). Under that subsection the General Assembly is prohibited from any amendment of the budget which would affect the obligations of the State under Article III, Section 34 (relating to debts contracted by the State and the pledging of its credit), the provisions of laws for the establishment and maintenance of public schools and the payment of salaries established in the Constitution. The General Assembly is specifically permitted to arrange the items for its own support, to increase items relating to the judiciary and, generally, to strike out or reduce (but not increase) budget items not falling within any of the prohibited categories. The law relating to the scholarship fund falls within none of the prohibited areas since it is not truly a part of the laws "for the establishment and maintenance of a system of public schools" and, particularly, in view of the fact that the existing provision of law does not require the funding of a specific amount of money in any event. There is no reason, in our view, why the Legislature cannot reduce the budget items relating to scholarships.

We are not able to anticipate the practical steps that apportionment of the diminished appropriation within the scholarship program will require, but we are of the opinion that, whatever that result may be, the power of the General Assembly to reduce the appropriation is not affected by it.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

EDUCATION—STATE SUPERINTENDENT OF SCHOOLS HAS AUTHORITY TO INVESTIGATE CONDITIONS IN CHURCH-SPONSORED EDUCATIONAL INSTITUTIONS.

April 19, 1968.

Dr. James A. Sensenbaugh.

You have inquired whether or not any State agency has authority to investigate conditions in church-sponsored educational institutions. On November 30, 1962, this office rendered an unpublished opinion with respect to this question, which we wish to restate in full.

"Ordinarily, such investigations would be the responsibility of the Department of Education and its operating head, the State Superintendent of Schools. However, Section 25 of Article 77 of the Annotated Code of Maryland, which gives the State Superintendent of Schools authority to inspect and approve or disapprove private educational institutions, specifically excepts from its operation such private schools as are operated by bona fide church organizations.

"On the other hand, Section 24 of Article 77 empowers the State Board of Education to prescribe the minimum requirements for issuing all certificates, diplomas, and academic, collegiate, professional or university degrees. The same section further provides:

> ' . . . nor shall any public or private educational institution issue any certificate, diploma or academic, collegiate, professional or university degree without having first obtained the assent of the State Board of Education and approval of said Board of the conditions of entrance, scholarship, and residence upon which said certificate, diploma or degree is issued.'

"This authority is not so limited as to exclude church-sponsored schools from its operation and we must and do

conclude that it applies to all institutions purporting to grant such certificates, diplomas, or degrees. Since the assent of the State Board of Education is a condition precedent to the granting, the failure to obtain that assent could well be sufficient justification for the Board to order an institution to cease granting such certificates, diplomas, or degrees. However, it is fundamental that, like any power of an administrative agency or board, this power is one which should not, and we are certain will not, be exercised arbitrarily. The statute provides as indicated above that the Board must be satisfied as to the conditions of entrance, scholarship, and residence of the certificate-granting institution. This implies that the Board has the authority to investigate those conditions.

"With the above in mind, it will be of interest to you to know that after conferring with this office Dr. Thomas G. Pullen, State Superintendent of Schools, who is also the Chief Executive of the State Board of Education (Article 77, Section 20, Annotated Code of Maryland) personally visited the Truth for Youth School in Hagerstown, Maryland, on Monday, November 12, to discuss with the Principal certain phases of the operation of the school and to make a quick inspection of the building and equipment. In addition, Dr. Pullen has requested Mr. W. Theodore Boston, Assistant State Superintendent in Certification and Accreditation, to make an official visit to the school in order to make the study necessary to present information to the Board of Education concerning the conditions of entrance, scholarship, and residence upon which that school issues certificates. Such information will necessarily include approvals (or disapprovals) by local health and fire departments relating to the conditions of residence. In pursuance to this, application forms have been sent to the school as the preliminary step in securing the necessary review.

"We wish also to call to your attention the fact that under Section 231 of Article 77 every child residing in the State, between the ages of 7 and 16 years, must attend

the public day schools in the city or county in which the child resides unless it can be shown that the child is elsewhere receiving regularly thorough instruction during the period in question in the studies usually taught in the public schools to children of the same age. Certain criminal penalties are provided for parents and others violating or inducing non-compliance to these provisions."

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

EDUCATION—SEPARATE CERTIFICATION FOR SPECIAL EDUCATION FUNDS REQUIRED UNDER ARTICLE 77, SECTION 241 (b) AND (c).

May 24, 1968.

Dr. James A. Sensenbaugh.

You have inquired whether separate certification should be required of local boards of education when they apply to the State Department of Education for Special Education Funds in excess of $600 under the provisions of Article 77, Section 241 (b) and (c) of the Annotated Code of Maryland (1965 Replacement Volume, 1967 Supplement).

Subsection (b) provides:

> "Wherever the City of Baltimore or any of the counties of the State inaugurate a special program of instruction under standards, rules and regulations of the State Board of Education, to meet the needs of any child whose handicap is physical or mental and whose needs are not met by ordinary school facilities, the city or counties so providing the same shall receive, toward the cost of teachers, special equipment, nursing, therapeutic treatment, and transportation, an amount not to exceed six hundred dollars ($600.00) per child except in special cases where a child requires therapy or services in addition to special instruction the State Board of Education shall determine the amount of reimbursement to the city or county for such therapy, services, and instruction for such child and such amount may exceed six hundred dollars ($600.00), to be paid by the State of Maryland out of a special fund to be appropriated for such purpose in the State public school budget. The State Superintendent of Schools shall ascertain the respective amounts the City of Baltimore and the counties shall receive from the State under this section, and when such

amounts are so ascertained the State Superintendent of Schools shall certify the same to the State Comptroller."

Subsection (c) provides:

"In the City of Baltimore or in any county in the State which does not provide such special classes or special instruction for the education of mentally or physically handicapped children, and such mentally or physically handicapped children attend a school within or outside of the State of Maryland providing appropriate instruction or receives appropriate special instruction approved by the State Board of Education, the board of education in the City of Baltimore or county in which the parents of such child resides, provided such parents are bona fide residents of the State of Maryland, will be reimbursed by the State of Maryland not to exceed six hundred dollars ($600.00) for each such mentally or physically handicapped child each school year through the appropriated funds in the public school budget to assist in paying the tuition and/or fees incident to the instruction of each said handicapped child; except that in special cases where the child requires extensive therapy or services in addition to special instruction the State Board of Education shall determine the amount of reimbursement and such amount may exceed six hundred dollars ($600.00)."

We believe that subsection (b) contemplates that local boards of education may establish a basic program of special education under standards, rules and regulations of the State Board of Education to meet the needs of any child whose handicap is physical or mental and whose needs are not met by ordinary school facilities. This basic program may provide special equipment, nursing and therapeutic treatment and transportation for the pupil. For each pupil entered in the basic program the State

Board of Education is authorized to reimburse the city or county in an amount not to exceed $600 upon proper certification of the actual per pupil cost of this basic program.

Subsection (b) additionally authorizes reimbursement to the city or county in an amount in excess of $600 per pupil when it is certified to the State Board of Education that a pupil requires therapy or services in addition to the basic program of special education established by the city or county.

Subsection (c), we believe, provides for instances where a basic special education program does not exist in the resident political subdivision of the parent of the mentally or physically handicapped pupil and the parent seeks that program in an adjoining county or city or outside the State of Maryland. Under these circumstances subsection (c) authorizes reimbursement in an amount not to exceed $600 per pupil for the tuition and/or fees incident to such basic special education program upon proper certification to that effect. Where any of these pupils require extensive therapy or services in addition to the basic special education program, the State Board of Education may authorize reimbursement in an amount which exceeds the $600 per pupil limitation for the basic program.

The Department should require separate certification as to amounts which exceed $600 under either subsection (b) or (c).

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

EDUCATION—STATE BOARD OF EDUCATION MAY NOT PROMULGATE BYLAWS WHICH ESTABLISH FURTHER CONDITIONS UPON MANDATED STATE AID TO LOCAL BOARDS OF EDUCATION.

May 27, 1968.

Mr. J. Jerome Framptom, Jr.

You have inquired whether the State Board of Education may properly adopt the following two bylaws.

1. *Provisional Certificates*

If a local unit employs or continues to employ a teacher who has failed to comply with the provisional certificate regulation, no State aid toward the salary of that teacher will be allowed.

2. *Assignment out of Field*

An applicant who qualifies for a Standard Professional Certificate and is assigned to teach in another area for which he does not qualify may be issued the Standard Professional Certificate and remain out of his field for two years. If such assignment is continued beyond two years, there shall be established by the State Board of Education a financial penalty which would lower the State aid to the county. The teacher would remain on the Standard Professional Certificate.

These two bylaws would deny part of the State aid to a political subdivision provided for in Article 77, Section 220 (b) of the Code (1965 Replacement Volume, 1967 Supplement) under the situations outlined in each proposed bylaw.

Section 220(b) employs the mandatory word "shall" with respect to State aid. The only statutory requirement for eligibility is that contained in Section 220(b)(4). In order to be eligible the political subdivision must "levy an annual tax for public schools sufficient to provide an amount equal to 1.228 per cent of the sum of the adjusted

assessed valuation of real property and net taxable income for each of the several counties and Baltimore City, exclusive of the amount levied for debt service or capital outlay for public schools."

If the political subdivision imposes the levy provided for in Section 220(b)(4), subsection (b) of Section 220 requires that the political subdivision's share of State aid be paid. It is our view that any further conditions for eligibility must be achieved by a legislative change.

While it is true that the State Board of Education may establish regulations to enforce the various provisions of Article 77 which pertain to the schools under its jurisdiction, the regulatory authority has limited scope and the Board may not establish further conditions in cases where there is an express, unqualified statutory provision controlling a particular situation.

The Court of Appeals in *Metcalf v. Cook,* 168 Md. 475 (1935), considering the appropriateness of a particular bylaw of the State Board of Education, said that bylaws of the State Board are permissible only where statutory discretion is reposed in the Board with respect to a particular subject matter covered by statute. Discretion is said to be vested in the Board where the legislature has used the word "may", but the use of the word "shall" leaves no discretion in the Board with respect to statutory subject matter.

For these reasons we believe that additional conditions for State aid eligibility under the provisions of Section 220(b) may not be the subject matter of bylaws of the Board and, therefore, we do not believe that the proposed two bylaws set out above may legally be adopted by the Board.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

EDUCATION—NO APPEAL LIES TO THE STATE BOARD OF EDUCATION FROM THE STATE SUPERINTENDENT'S DETERMINATION THAT AN IMPASSE DOES NOT EXIST WITHIN THE MEANING OF ARTICLE 77, SECTION 175 (I).

July 16, 1968.

Mr. J. Jerome Framptom, Jr.

You have inquired whether there is any provision for an appeal to the State Board of Education from a ruling of the State Superintendent of Schools made in connection with his responsibilities conferred under the provisions of Chapter 483 of the Acts of 1968, codified as Section 175 (i) of Article 77 of the Annotated Code of Maryland. That new subsection permits a teacher association to request the State Superintendent of Schools to determine whether an impasse exists in negotiations conducted under the Act.

We have been advised that the State Superintendent of Schools formally determined that an impasse did not exist between the Teachers Association of Anne Arundel County and the Board of Education of Anne Arundel County, and issued his opinion on the matter. From the State Superintendent's adverse opinion the Teachers Association of Anne Arundel County has filed an appeal to the State Board of Education.

Chapter 483 of the Laws of 1968 does not provide for an appeal to the State Board of Education from the State Superintendent's determination of whether or not an impasse exists. The only provision of Article 77 which relates to appeals to the State Board of Education from the action of the State Superintendent is Section 25 (b), revocation or denial of a certificate of approval for the operation of a private school or educational institution. That subsection is not relevant here.

Since there is no affirmative provision in Chapter 483 or anywhere else in Article 77 permitting an appeal to the

State Board of Education from the decision of the State Superintendent of Schools as to whether or not an impasse exists, we are of the opinion, and therefore advise you, that the legislature evidently intended that the decision of the State Superintendent of Schools in such matters shall not be reviewable by the State Board of Education.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

EDUCATION—THE NECESSITY FOR SEPARATE LIBRARY FACILITIES IN A COMMUNITY COLLEGE AS A REQUISITE TO ACCREDITATION IS WITHIN JUDGMENT OF STATE DEPARTMENT OF EDUCATION.

October 7, 1968.

Honorable Mary L. Nock.

You advise that the establishment of a community college is being considered in the 16th Senatorial District. You ask our opinion whether, in lieu of the community college building its own library facilities, use by the community college of the library facilities of Salisbury State College would entitle the community college to obtain State and federal funds.

A regional community college is defined in Article 77, Section 301(b) as a community college established for and supported by two or more counties. Such a college can be established only with the approval of the State Board of Education. (After June 30, 1969, the approval of the State Board for Community Colleges is required). Article 77, Section 300A(a). Minimum standards for the institution are fixed by the State Department of Education until June 30, 1969, and thereafter by the State Board for Community Colleges. Article 77, Section 300(h). As can be seen, establishment and accreditation are within the purview of the State Department of Education and the State Board of Education.

The Maryland Standards for Community and Junior Colleges, promulgated by the State Department of Education, provide in part as follows:

> "The institution must provide library facilities adequate to the effective realization of its stated educational objectives. In judging the adequacy of the library facilities, the State Department of Education will consider the extent to which the library is actually used by both students and faculty mem-

> bers; the number, the variety, the up-to-dateness, and the suitability of the books, periodicals, and newspapers; the professional training of the members of the library staff; the effectiveness of the administration of the library; the sufficiency of the space set aside for quiet study and leisure-time reading; the accessibility of materials for reference, collateral study, and general reading; the amount of the annual appropriation for new books; and the method by which new books are selected."

Whether utilization of the library facilities of another institution will be sufficient compliance with the above-quoted standard is not a legal question but is a matter of administrative policy. This regulation does not absolutely require the community college to maintain a separate and independent library facility, but your proposal has many educational ramifications and its advisability and feasibility must necessarily be left to the discretion of the administrative agency.

Accreditation is also a necessary requisite for federal grants or loans. Typical is the Higher Education Facilities Act, 20 U.S.C.A., Sections 751 *et seq.* To qualify for a federal construction grant under this Act the institution must be accredited by a "nationally recognized accrediting agency or association" listed by the Commissioner of Education; 20 U.S.C.A., Section 751(f)(5). The Middle States Association of Colleges and Secondary Schools is the accrediting agency so listed for your region. The Middle States Association advises us that there are no rules and regulations specifically requiring a college to have its own library, but that each case will be determined on an individual basis. The Association is anxious to discuss these matters at the early stages of development so that it can render as much assistance and guidance as possible.

We would advise you, therefore, to communicate with the State Department of Education and the Middle States Association of Colleges and Secondary Schools for their

determination of the sufficiency of your contemplated library program. Since the ultimate decision is theirs, not ours, we regret that we cannot assist you further.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Assistant Attorney General.*

EDUCATION—ELECTED MEMBERS OF MONTGOMERY COUNTY SCHOOL BOARD ARE "COUNTY OFFICERS" WITHIN THE MEANING OF ARTICLE XVII, SECTION 3 OF THE STATE CONSTITUTION AND CAN HOLD OFFICE FOR A TERM OF ONLY FOUR YEARS.

November 7, 1968.

Honorable Leonard S. Blondes

You have asked our advice as to whether Article 77, Section 12 of the Maryland Code can be properly amended to allow for six-year elected terms for the members of the Montgomery County School Board. The present law provides for elected four-year terms.

Article XVII, Section 3 of the State Constitution provides as follows:

> "All State and county officers elected by the qualified voters shall hold office for terms of four years."

If elected school board members are deemed to be "county officers", then any legislation establishing terms longer than four years would violate this constitutional provision. In *School Comrs. v. Goldsborough,* 90 Md. 193 (1899), it was held that an appointed school commissioner of Worcester County was not a "civil officer" subject to removal by the Governor under Article II, Section 15 of the State Constitution. The basis of the Court's conclusion was as follows (90 Md. at 207, 209-210):

> "Civil officers, therefore, are governmental agents — they are natural persons — in whom a part of the State's sovereignty is vested or reposed, to be exercised by the individuals so entrusted with it for the public good. The power to act for the State is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he

exerts, and the official acts done by him are done as his acts and not as the acts of a body corporate. . . . "

* * *

"It was manifestly not the purpose of the Legislature to confer upon the school commissioners, as individuals, the powers, or to impose upon them, personally, the duties which in explicit terms, and by the use of exact language, the General Assembly committed to *boards* that were called into corporate existence expressly to conduct the school system. As we have pointed out already there is not conferred upon the members of these boards a single power to be exercised by them personally, save the right to administer an oath in matters relating to the schools. A commissioner can do nothing but that which a majority of the board orders, and no matter what his individual views or judgment may dictate he is powerless to put those views or that judgment in force if he happens to be in the minority. Alone he can do nothing — he has no power whatever. The scheme of this legislation was designed to make the management of the schools impersonal; and in no better way could that end have been reached than by creating a body corporate which, and which only was clothed, not only with the title to the school funds and property, but was invested with all the authority needed to make the system harmonious and effective. It could not have been contemplated that the members of the boards were to be independent civil officers or the Legislature would scarcely have disregarded sec. 13 of Art. 2 of the Constitution, and made the tenure six years and fixed the beginning of the term in August.

"But, when, superadded to all this, it is remembered that the county school boards are, them-

> selves, subject, in many respects, to the control of the State Board of Education, which, under *sec. 11, Art. 77 of the Code,* as amended, by the *Act of 1898, ch. 221,* has power to enact by-laws for the administration of the public school system and to suspend or remove an examiner elected by the county boards, and which, also, under *sec. 12* has the general care and supervision of the public school interests of the State; it becomes apparent that the agents or individuals selected to be members of these subordinate local school boards were never intended to be, and do not in fact become civil officers, as that term must have been understood by those who adopted the organic law."

This reasoning was followed in *Clark v. Harford Agri. & Breed. Assoc.,* 118 Md. 608 (1912), in reaching the conclusion that members of the Racing Commission of Harford County were not persons elected or appointed to an "office of profit or trust" within the meaning of Article I, Section 6 of the State Constitution. However, *Howard County Comm. v. Westphal,* 232 Md. 334 (1963), held that membership on the Howard County Metropolitan Commission *was* an "office of profit or trust" within the meaning of Article 35 of the Declaration of Rights. The argument was made in *Westphal,* that, based on the holding of *Goldsborough,* the members of the Commission are not public officers because they corporately exercise the sovereign powers of government entrusted to them as a body corporate rather than in their individual capacities as members of the Commission. In rejecting the argument, the Court of Appeals stated as follows (232 Md. at 340-341):

> "The essential question in *Goldsborough* was whether or not a member of a board of county school commissioners was a civil officer subject to removal by the Governor under § 15 of Article II of the Constitution. The holding was that a school commissioner was not such an officer. Insofar as the reasoning in that case rested on the premise that a member of a school board is not a civil offi-

> cer because he could exercise the power of the board only as a member thereof and not as an individual, we think the reasoning should not be extended so as to apply to the meaning of the term 'office of profit, created by the Constitution or Laws of this State', as used in Article 35 of the Declaration of Rights, which is the constitutional provision with which we are here concerned. And, insofar as *Clark v. Harford Agricultural and Breeders' Association,* 118 Md. 608, 85 Atl. 503 (1912), followed and applied the reasoning in the *Goldsborough* case, in determining the meaning of 'office of profit' as used in Article 35, *supra,* we think *Clark* was wrongly decided, and we decline to follow it."

The Court of Appeals did not expressly overrule *Goldsborough,* but it did refuse to extend the definition of "civil officer" as used in Article II, Section 15 of the State Constitution to the term "office of profit" in Article 35 of the Declaration of Rights. Prior to *Westphal,* the term "civil office" seemed to be synonymous with "public office". *Nesbitt v. Fallon,* 203 Md. 534, 544 (1954). However, *Westphal* equated "public officer" with "office of profit", 232 Md. at 339, but still distinguished these terms from "civil officer" as used in *Goldsborough.* We feel that the *Westphal* decision reflects a strong inclination by the Court to restrict *Goldsborough* to the narrow issue then before it, especially since a county school board, like the Metropolitan Commission, also exercises extensive sovereign powers. Subject to the bylaws and policies of the State Board of Education, county school boards are empowered to receive and hold property, determine educational policies, control and supervise the public school system, purchase school sites, condemn land, appoint principals and teachers, propose and submit budgets and create school districts. Article 77, Sections 49-75.

Accordingly, we believe that the Court of Appeals would similarly refuse to extend the *Goldsborough* definition of "civil officer" to the term "county officer" as used in Article

XVII, Section 3 of the State Constitution. We are constrained to conclude, therefore, that elected members of the Montgomery County School Board are county officers and may hold office only for terms of four years.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Assistant Attorney General.*

EDUCATION—SEPARATE CERTIFICATION FOR SPECIAL EDUCATION FUNDS REQUIRED UNDER ARTICLE 77, SECTION 241 (b) AND (c).

November 14, 1968.

Honorable Meyer M. Emanuel, Jr.

You have forwarded me a copy of a letter you received from William S. Schmidt, Superintendent of Schools for Prince George's County. Mr. Schmidt's letter states that, as a result of a ruling of the Attorney General's office, the State aid for the education of handicapped children is limited to $600 instead of the $1,000 that the county school system had anticipated. You have asked us for a clarification of this situation, as well as the effect of the ruling on Senate Bill 155, which was passed in the 1968 legislative session.

On May 24, 1968, we replied to an inquiry from Dr. James A. Sensenbaugh, the State Superintendent of Schools, concerning the provisions of Article 77, Section 241 (b) and (c) of the Annotated Code of Maryland. In that opinion, 53 Opinions of the Attorney General 173 we interpreted the provisions of the statute. We found the statute to be clear and unambiguous, in that it authorized reimbursement by the State in an amount not to exceed $600 per pupil for tuition and/or fees incident to a basic education program for mentally or physically handicapped children in those instances where the county itself does not provide such a program. We also stated that subsection (c) permits reimbursement in excess of $600 where extensive therapy or services, in addition to the basic special education program, are required.

We have reviewed that opinion. Notwithstanding our desire to see these handicapped children receive every possible form of financial assistance from State government, we can come to no other conclusion than that reached in our opinion of May 24. From your own legislative experience we are certain that you understand our inability to

read into a law an intention contrary to the express language of the statute.

It might very well be that State aid for the basic education program should be increased, and we are inclined toward that view. To accomplish that purpose, however, subsection (c) of Section 241 must be amended. We are advised by Dr. David W. Zimmerman, Deputy State Superintendent of Schools, that the Legislative Council is currently considering revisions to this section, so the time may now be opportune for you to pursue this matter legislatively.

Senate Bill 155, now known as Chapter 118 of the Laws of Maryland of 1968, relates to reimbursement to the parents of these handicapped children by the Board of Education of Prince George's County for certain costs over and above the amount of State aid. You seemed to indicate in your letter that the $600 limitation for the basic aid was a result of Senate Bill 155, but the limitation derives from Section 241 (c) of Article 77, not from your local bill.

FRANCIS B. BURCH, *Attorney General.*

MARTIN B. GREENFELD, *Assistant Attorney General.*

ELECTIONS

MEMBER OF BOARD OF SUPERVISORS OF ELECTIONS SHOULD NOT SERVE AS PARTY OFFICER—SECTION 2-1(a), ARTICLE 33.

January 4, 1968.

Mr. Marshall W. Jones, Jr., Secretary.

In your letter of November 21, 1967, you request our opinion as to whether it would be legally permissible for you to serve as Chairman of the Republican State Central Committee for Baltimore City during your tenure as a member of the Board of Supervisors of Elections of Baltimore City. We herewith respond to your inquiry.

It is our understanding that *members* of the Republican State Central Committee for Baltimore City are elected at the Gubernatorial primary election held every four years, and the *Chairman* of the Republican State Central Committee for Baltimore City is then elected by the members of said committee, from the membership of said committee.

From our examination of the laws of this State, we find no *legal* barrier to your acceptance of the Chairmanship of the Republican State Central Committee for Baltimore City. We feel constrained to say, however, that even though your acceptance of this position would not be in violation of the laws of this State, we do not think it proper or appropriate for a member of the Board of Election Supervisors to hold any party office.

We believe it obvious that the General Assembly of Maryland shares our view. The 1967 session of the General Assembly substantially rewrote the election laws of Maryland. Section 2-1(a) of Article 33, effective July 1, 1967, provides, in pertinent part ". . . during the time of acting as a member of any Board (Members of the Board of Election Supervisors) shall not be a candidate for any public or party office."

We find nothing that would make this statute retroactive in application and thus compel you to resign your party office—although under the terms of this statute you would not be permitted to seek reelection to the Republican State Central Committee at the 1970 elections, and still retain your membership on the Board of Election Supervisors. Nor do we find that your election as Chairman, in the "private" election to be held by your fellow members of the Republican State Central Committee, is violative of the letter of the law. We do find, however, that your dual service as a member of the party committee and of the Election Board transgresses the spirit of the law, and your acceptance of the Chairmanship, in our opinion, would be all the more inappropriate.

The thoughts set out herein are not a unique expression from the office of the Attorney General. In 1958 Attorney General C. Ferdinand Sybert, in an opinion reported in 43 Opinions of the Attorney General 167, expressed similar views. Attorney General Sybert's opinion antedated by nine years the statute prohibiting an Election Board member from holding a party office. General Sybert, however, found that "public policy" did not permit a member of the Board to be a candidate for a party State Central Committee. The Attorney General stated that it was inappropriate for any person to be in the position of counting his own votes in an election in which he was a candidate.

We believe that the same philosophy applies to the instant situation, and that it is contrary to the public interest for a person charged by law with supervising City, State and national elections, to be also the same person charged with leading a political party to success in those elections.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

EDWARD L. BLANTON, *Assistant Attorney General.*

ELECTIONS—ARTICLE 33, SECTION 26-22 PROHIBITION AGAINST CORPORATION CONTRIBUTIONS APPLICABLE ONLY TO GENERAL ELECTIONS—CONSTITUTIONAL CONVENTION REFERENDUM ON MAY 14, 1968, IS NOT A GENERAL ELECTION WITHIN THE MEANING OF THAT SECTION.

March 5, 1968.

Honorable Walter S. Orlinsky.

By recent letter you have requested our opinion as to whether or not it would be in violation of the Corrupt Practices Act for corporations to contribute money to organizations or individuals in connection with the forthcoming vote on the proposed constitution.

In considering your inquiry, we have reviewed all of the provisions of Article 33 of the Annotated Code, and particularly Section 26-22 thereof. That Section provides, in pertinent part,

> "It shall be unlawful and shall be deemed a corrupt practice for any corporation, incorporated under the laws of Maryland or of any state or territory of the United States, or the District of Columbia, or of the United States, or of any other country directly or indirectly, by itself, or through any officer, agent or employee, representative, or other person whatsoever, to give, contribute, furnish, lend or promise any money, property, transportation, means or aid to any political party, or any candidate for public officer, or for nomination thereto, or to any political, treasurer or subtreasurer, as herein defined, either directly or indirectly, to aid, promote or influence the success or defeat of any political party or principle, or of any measure or proposition submitted to a vote at a general election in this State, or to aid, promote or influence in any manner the election or defeat of a candidate therein, or to be used, ap-

plied, or expended in any way whatever for political purposes."

We do not believe that the provisions of this Section are applicable to the election of May 14 and we so advise you.

It is to be noted that the use of the restrictive phrase "general election" is a result of a 1967 amendment to Article 33. (Ch. 392, Acts of 1967)

Prior to the amendment, the antecedent Section, then Section 219 (a), prohibited corporate expenditures "at any public election."

It is apparent, upon examination, of Section 1-1 (8) of Article 33, as amended in 1967, that the phrase "general election" is a specific term, and applies, in the language of the Statute, to "that election held on the first Tuesday after the first Monday in the month of November, at which the voters of the State vote for candidates for President of the United States or Governor and in Baltimore City, this means the municipal election for mayor held on the Tuesday next after the first Monday in November in any year in which a municipal election is to be held in the city.

Obviously, the election of May 14 is not a "general election" contemplated by the provisions of Section 26-22 of Article 33. We assume, without deciding, that the election of May 14 is an "Election" as defined by the provisions of Section 1-1 (6) of Article 33.

We point out to you that Section 26-22 is a penal statute and provides for fine and imprisonment of violation of its provisions. It is a fundamental principle of criminal law that such statutes are to be strictly construed, and in view of the qualifying phrase "general election," we see no possibility of a court in this State determining that a corporation, or its officers, would be in violation of this Act by making contributions, or otherwise acting, to aid, promote, or influence the success or defeat of the proposed constitution.

Similarly, examination of the other sections of Article 33 reveals no prohibition against corporate contributions in connection with the success or failure of the proposed constitution at the May 14 election.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—ELECTION LAW: 1. A CANDIDATE FOR PUBLIC OFFICE IS ENTITLED TO FILE FOR SAID OFFICE AND BE A CANDIDATE IN A PRIMARY ELECTION, PROVIDED HE WILL POSSESS THE LEGAL QUALIFICATIONS FOR THE OFFICE BY THE DATE OF GENERAL ELECTION. 2. ABSENT A STATUTE EXPRESSLY REQUIRING THAT EVERY PROVISION THEREOF BE PRECISELY FOLLOWED, AN ELECTION WHICH HAS BEEN HONESTLY AND FAIRLY CONDUCTED WILL NOT BE VITIATED BY MERE FAILURE TO FOLLOW THE ELECTION STATUTES PRECISELY, UNLESS DEVIATION FROM LAW IS OF SUFFICIENT MAGNITUDE TO AFFECT RESULT OF ELECTION.

March 22, 1968.

Honorable Thomas Hunter Lowe, Chairman.

You have asked our opinion on two questions pertaining to the municipal election in the town of St. Michael's, Maryland. We are pleased to respond to your request for advice.

Your first question concerns the qualifications for a candidate for the office of Town Commissioner. You advise us that an individual filed a certificate of candidacy for this office in proper time and manner. The individual, however, was not a registered voter at the time the certificate of candidacy was filed but did in fact become a registered voter subsequent thereto and prior to the election which will be held on April 1, 1968. You asked us whether or not the individual is entitled to have her name appear on the ballot notwithstanding the fact that she was not a registered voter at the time of filing her certificate of candidacy.

The qualifications of office of Town Commissioner are set out in the Charter of St. Michael's. That document requires the Town Commissioner to be above the age of twenty-one years, shall have resided for more than one year in the said township, and shall be a duly registered voter therein. We are advised by you that the individual in

question meets the other qualifications but does not meet the qualification as to voter registration. The Charter, a copy of which has been supplied to us by you, does not specifically require that these qualifications be in existence at the time of filing the certificate of candidacy, but merely states it "will be necessary for election". In the brief time available to us for research, we have found no Maryland case directly on the point of whether the qualifications for office must exist at the time for filing for office or whether they need only exist at the time of election.

On October 3, 1961, however, the Honorable Thomas B. Finan, then Attorney General, advised the Secretary of the State of Maryland that a candidate for nomination to the office of attorney general was eligible for that office, notwithstanding the fact that the candidate did not possess the constitutional qualifications for attorney general even by the date of primary election. In that opinion, the Attorney General ruled that if the candidate had become eligible by the date of general election he was qualified to file therefor. This ruling, which is not contained in the official reports of the Attorney General, seems to be completely in keeping with the majority of rulings throughout the country. The general rule is stated in 29 C.J.S., *Elections,* Section 130.

> "A person to be nominated under the election law must be one who, at the time of his election, can take and hold the office to which elected, . . ."

It would appear that the leading recent case on this point is that of *Findley v. State Election Board of Oklahoma,* 325 P. 2d. 1037, decided by the Supreme Court of Oklahoma in 1958. In that case a candidate for the office of attorney general did not meet the constitutional requirement as to age by the date of the primary election. In ruling on the question, the Oklahoma court said:

> ". . . This provision does not mean that the above qualifications must be possessed by one who seeks to become a candidate for that office in a party

> primary, but such qualifications must be had prior to the general election for such office. If they are possessed prior to the general election, applicant is entitled to have his name placed upon the primary ballot."

We believe that the reasoning of the Court in the Oklahoma case is applicable to the situation at hand and is consistent to the ruling of Attorney General Finan in 1961. We further find that cases holding to the contrary (See *Smith v. Parish Democratic Executive Committee,* 115 So. 54; *Champagne v. Parish Democratic Executive Committee,* 192 So. 120; and *State ex rel. Brobston v. Culbreath,* 168 So. 244) turned on statutory requirements that certain qualifications be met at the time of *filing for office* and thus do not disturb the result reached in the Oklahoma case or by Attorney General Finan.

We advise you, therefore, of our view that, absent contrary statutory direction, qualifications of a candidate for a public office are to be judged as of the date of the election and not at the time on which the certificate of candidacy therefor is required to be filed. We note in passing, that the election law of the State of Maryland indicates the approval of this philosophy, as a citizen who does not meet voting qualifications by the date of a primary election, but who will possess those qualifications by the time of a general election, is nonetheless entitled to vote at the primary election. Article 33, Section 3-5, Annotated Code of Maryland (1967 Supplement).

Your second question pertains to statutory requirement for publication of names of candidates for public office. You advise us that all of the formal requirements for publication of the names of the candidates for public office in the town of St. Michael's have not been strictly complied with. You further advise us that the names of the candidates did appear in a newspaper of general circulation in your county at least once, and that all persons entitled to vote at the said election will be notified by mail of the names of said candidates. You ask us if the procedures for publication

which you have followed are sufficient to comply with the provisions of the law.

We are of the opinion that adequate notice will have been given under the circumstances you describe. Particularly, we believe that notice by mail to all persons entitled to vote goes above and beyond the requirements for newspaper publication of the names of said candidates. Our view in this regard is affirmed, in our opinion, by the decision of the Court of Appeals of Maryland in *Dutton v. Tawes*, 225 Md. 484 (1961). In *Dutton*, the Court stated that an election which has been honestly and fairly conducted will not be vitiated by mere failure to follow the statute precisely, unless the result is shown to have been affected, or unless the statute expressly states that failure to precisely follow the law renders the election void. The Court reiterated in *Dutton* that election officials should follow the requirements of the law regarding publication and other matters. Where, however, there has been a technical violation of the law but yet the purpose and intent of the statute have substantially been carried out, that technical defect should not invalidate the election.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—CONSTITUTIONAL LAW—FAIR ELECTION PRACTICES ACT APPLIES TO SPECIAL ELECTION SUBMITTING PROPOSED CONSTITUTION TO ELECTORATE—CORPORATIONS MAY CONTRIBUTE—REPORTS OF EXPENDITURES TO BE FILED BY TREASURERS OF POLITICAL COMMITTEES OPPOSING OR PROMOTING THE PROPOSED CONSTITUTION.

April 5, 1968.

Mr. Henry J. Ripperger, Clerk.

In your letter of April 1, 1968, you inquired as to the application of the Fair Election Practices Act in the Special Election to be held on May 14, 1968, in which the voters of this State will be asked to ratify the proposed new State Constitution. As it appears more logical to do so, we will answer your questions in inverse order.

You inquired whether the Fair Election Practices Act, Sections 26-1 through 26-26, of Article 33 of the Annotated Code of Maryland, applies to the Special Election to be held on May 14, 1968. From reading Section 26-1 of Article 33, which generally describes the application of the Act, it would appear that it does not. However, Section 19, of Chapter 4, *Laws of Maryland* 1967 specifically provides that the "laws of this State relating to elections for members of the House of Delegates shall govern and apply to the election of the delegates to the Convention and those relating to referendum elections shall govern and apply to the special referendum election on the adoption or rejection of the constitution proposed by the Convention." In view of the fact that elections for members of the House of Delegates are subject to the Fair Election Practices Act, and in view of the fact that the express provisions of the Act apply to any proposition submitted to the voters in any public election, we have previously concluded and so advised other interested State officials, that the provisions of the Act apply to the Special Election to be held on May 14th.

As to your second question relating to the propriety of corporate contributions, we have recently advised Delegate Walter S. Orlinsky, under date of March 5, 1968, that in our opinion the prohibition against corporations contributing to committees formed to promote or oppose the new constitution would not apply to the Special Election on May 14th. We reached that result because the language of the section, to the extent it referred to a "measure or proposition submitted to a vote at a general election" indicated a legislative intent not to extend the application of that section to any matter submitted to vote at a *special* election. We remain of the opinion, therefore, that a corporation may contribute to a Committee formed to promote or oppose the new constitution without violating Section 26-22.

Finally, the treasurer of any Committee formed to work for or against the ratification of the proposed constitution must file the reports of expenditures required by Sections 26-14 and 26-15 of Article 33. Section 26-9 provides that no person "to aid or promote the success or defeat . . . of any proposition submitted to vote at any public election" shall make any payment or contribution to anyone other than a treasurer. A political committee is required to appoint a treasurer by Section 26-4 and the same section requires the treasurer to file the reports required by Sections 26-14 and 26-15. It is our opinion, therefore, that the treasurer of any such Committee must file a report not later than noon on the seventh day preceding the election and thirty days following the election.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

ELECTIONS—TERM OF OFFICE OF PARTY COMMITTEE MEMBERS—CODE DELEGATES AUTHORITY TO POLITICAL PARTIES TO DETERMINE TERM, QUALIFICATIONS AND OTHER MATTERS RELATING TO ELECTION OF PARTY OFFICERS AND COMMITTEE MEMBERS.

June 7, 1968.

Honorable Walter S. Orlinsky.

We have your letter of June 3, 1968 in which you ask questions concerning the tenure of members of the State Central Committee, and refer us to Section 11-2 (e) of Article 33.

Please be advised that we do not believe that Section 11-2 (e) is controlling on the question presented. That section, in our view, merely provides when the term of office will begin after the appropriate election, and provides that a change in the date of the primary election shall not act to vacate the office of state central committeemen. The section in no way stipulates the *length* of the term of a state central committeeman.

We note that Section 11-1 requires that those political parties which at the general election have polled 10% of the entire vote cast, must adopt a constitution and bylaws for the conduct of their affairs. Section 11-1 (b) provides:

> "The constitution and bylaws shall provide for such matters as in the opinion of the political party shall be necessary for the proper conduct of party affairs, and shall specifically provide *for the election of a party chairman and the State central committee of the party; . . .*". (Emphasis supplied).

We believe that the above quoted language constitutes a legislative direction that all matters relating to the election and duties of state central committeemen, not specifically set out in the statute, shall be regulated by the party constitution and bylaws. We are advised that the Constitution

and Bylaws of the Democratic Party, in Article V, Section 3, sets out a four year term, dating from the gubernatorial primary, and that Article II, Section 1 and Article III, Section 3 of the Republican Party Constitution contains a similar provision.

We believe these party constitutional provisions to be valid and, therefore, advise you that it is not appropriate for any individual to file for the position of state central committee member until the primary election to be held in this State in 1970.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—SECRETARY OF STATE—FILING OF APPOINTMENT OF TREASURER FORMS AND REPORTS OF CONTRIBUTIONS AND EXPENDITURES BY CANDIDATES FOR JUDICIAL OFFICE.

June 25, 1968.

Honorable C. Stanley Blair.

In your recent letter you requested our opinion as to whether candidates for a judgeship on the Supreme Bench of Baltimore, the Circuit Court for the various counties in the State, the Court of Special Appeals and the Court of Appeals are required to file the form appointing a treasurer with your office, and, further, whether or not they are required to file their reports of contributions and expenditures with your office.

As you know, the answer to these questions is governed by the provisions of the Fair Election Practices subtitle of Article 33 of the Annotated Code of Maryland (1967 Replacement Volume). This subtitle has been repealed and reenacted by virtue of Chapter 613 of the Acts of 1968 which becomes effective July 1, 1968. We therefore, in responding to your inquiry, differentiate between the requirements in effect up to June 30, 1968 and those which become effective July 1, 1968.

We turn first to the law as it presently exists. Under the provisions of Section 26-2 each candidate is required to appoint a campaign treasurer and file the name and address of that person "with the clerk of the circuit court of the county or Baltimore City in which the candidate resides or if he is a candidate for State-wide office or Representative in Congress, with the Secretary of State." Since the offices in question are not State-wide offices, the form appointing the candidates' treasurer need not be filed with you.

Under the provisions of Section 26-14 the reports of contributions and expenditures are similarly to be filed with

the clerk of the circuit court of the county in which the candidate resides.

Consequently, it is our opinion that under the Fair Election Practices law as it now exists neither the appointment of the treasurer nor the expense reports of candidates for the above-named judicial offices are to be filed with you.

As of July 1, 1968 under the provisions of Section 26-3 (c) of the Fair Election Practices law as repealed and reenacted, the form appointing the candidates' treasurer "shall be filed with the Secretary of State except that in case the primary or election for which the appointment is made shall be limited to any county, city, ward, or legislative district exclusively, such [appointment] form shall be filed with the board [of election supervisors] of the county or Baltimore City to which the election is limited, instead of with the Secretary of State." Under this provision such judicial candidates who are running only in Baltimore City or in one county need not file their appointment of a treasurer with you. However, all candidates for a judgeship who are to be elected at-large from judicial circuits (other than Baltimore City) must file their appointment forms with you.

Revised Section 26-11 (a) provides that the report of contributions and expenditures shall be filed with the "Board [of election supervisors] of the county or Baltimore City in which the candidate resides, except that the report or statement of a candidate for State-wide office or for United States Senator or Representative in Congress shall be filed with the Secretary of State". Under the provisions of this section such reports of contributions and expenditures need not be filed with you since these candidates are not running for State-wide office.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

ELECTIONS—JUDGES—CONSTITUTIONAL LAW—ELECTIONS—WHERE JUDGE SERVING UNDER GUBERNATORIAL APPOINTMENT DECLINES TO FILE AS CANDIDATE, VACANCY IN OFFICE IS TO BE FILLED BY OTHERS WHO HAVE DULY FILED FOR SAID OFFICE—IF, HOWEVER, SUCH A JUDGE SHOULD RESIGN HIS OFFICE PRIOR TO ELECTION DAY, THE VACANCY MUST BE FILLED BY GUBERNATORIAL APPOINTMENT.

July 16, 1968.

Mr. Peter Parker

By recent letter, you have asked our opinion on a question concerning vacancies for the office of Judge of the Supreme Bench of Baltimore.

In your letter you advised us that three members of the Supreme Bench are serving under gubernatorial appointment, and will seek their first elective term of office in the general election of 1968, under the provisions of Section 5, Article IV of the Constitution of Maryland. Each of these judges has filed in the primary election of the two major political parties, and at least four other individuals, not sitting judges, have similarly filed as candidates for these judicial offices.

Your question to us does not directly concern the three positions of Judge of the Supreme Bench referred to above, but, rather, concerns the office of Associate Judge of the Supreme Bench now held by the Honorable Joseph R. Byrnes. Judge Byrnes was elected to the Supreme Bench for a term of 15 years at the general election of 1952. On the expiration of that term, he was reappointed by Governor Agnew on November 7, 1967, as an "Associate Judge of the Supreme Bench of Baltimore City until the next general election of November 1968". Judge Byrnes did not file as a candidate for reelection at the forthcoming elections, and you ask us when he will have vacated his office and how and when his successor will be elected.

We believe it abundantly clear that the office of judge now held by Judge Byrnes is to be filled at the general election of 1968, from among the candidates who have filed for the judicial offices which will appear on that election ballot. That is to say, in the present posture of this matter, there will be four offices of associate judge of the Supreme Bench for nomination in the primary election of September and the general election in November. We reach this conclusion because the Governor's commission to Judge Byrnes of November 7, 1967 is a commission as contemplated by the provisions of Section 5, Article IV of the Constitution dealing with judicial vacancies. That section states, in pertinent part:

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

The election of November 1968 being the biennial general election made applicable by the Constitution, Judge Byrnes shall hold office until his successor is elected and qualified at said election. Had Judge Byrnes chosen to file as a candidate, he would have been eligible to succeed himself; but since he did not choose to file, his successor shall be chosen from among those candidates who did duly file for that office.

All of the above, in our opinion, is readily manifest from an examination of the Constitution. You ask one further

question, however, which poses a more difficult problem, on which we are pleased to give our views. You ask us whether the procedure outlined above would be changed in any material way, if Judge Byrnes should resign his judicial office and retire, prior to the general election. This is, of course, in the nature of a hypothetical question, but we are assured that it is important to you and the candidates for judicial office that our views be made known prior to the statutory deadline for withdrawal as a candidate, which will occur on July 27th next. Because of all the unusual circumstances of this case, therefore, we will give our views on this question, despite its hypothetical nature.

It is our opinion that if Judge Byrnes should resign his office and retire any time prior to the general election in November, the Governor may then appoint a successor to him, under the provisions of Section 5 of Article IV. The person so appointed, in that contingency, would, under the provisions of Section 5, hold that office until the general election of 1970, at which time his successor (who could be himself) would be elected for a term of 15 years. The resignation of Judge Byrnes and the appointment of a successor by the Governor, would, therefore, have the effect of reducing from four to three the number of judicial vacancies to be filled by the electorate of Baltimore City at the general election of 1968. We advise you, therefore, that if Judge Byrnes does not resign prior to the primary election, the four candidates for each party receiving the greatest number of votes shall be deemed nominated. If Judge Byrnes should resign prior to the primary election, however, and the Governor should fill that vacancy with an appointee, only the three candidates for each party receiving the greatest number of votes shall be deemed nominated.

If Judge Byrnes should resign between the primary and general elections, and the Governor should fill that vacancy by appointment, then, notwithstanding the fact that each party shall have nominated four persons for judicial office, only the three persons receiving the greatest number of votes shall be elected.

We believe that our views on this question are fully sustained by the opinion of the Court of Appeals in the case of *Hillman v. Boone,* 190 Md. 606 (1948). In that case a judge died, his successor was appointed, and the successor resigned. A successor to the latter judge was appointed and took office on March 9, 1948—less than a year prior to the general election of 1948. The Appellant, Hillman, sought to file as a candidate for nomination for the judgeship in the primary election of 1948. Election officials refused to place his name on the ballot, contending that no judgeship was to be contested at that election, since the judge then serving by appointment would not, by the general election day, have held his office for more than one year. The Appellant sought mandamus to compel the Board to place his name on the ballot. The circuit court dismissed the petition and petitioner appealed. The Court of Appeals affirmed.

Judge Markell, speaking for a unanimous court, interpreted the appropriate sections of the Constitution and, in our view, completely disposed of the question which you ask. The Court discussed the meaning of the phrase "[u]pon every occurrence or recurrence of a vacancy through death, resignation, removal, disqualification by reason of age or otherwise, or expiration of the term of fifteen years of any judge, or creation of the office of any judge, or in any other way", and held that upon every occurrence of a vacancy, in any way, a judge shall be appointed, to hold office until the election and qualification of his successor; and that the successor in question shall be elected after one year after the occurrence of the vacancy.

Applying this reasoning to your hypothetical question, we believe it beyond argument that a vacancy which might occur by the resignation of Judge Byrnes would be such a vacancy as is contemplated by the provisions of Section 5, Article IV of the Constitution. Notwithstanding the fact that the term of office of Judge Byrnes would expire immediately subsequent to the November general election, his resignation from office prior to that election *does* create a vacancy, and the Constitution clearly gives the Governor the right to appoint a person, duly qualified, to fill *any*

vacancy in the office of judge. That same section (Section 5 of Article IV), with equal clarity, provides that the person so appointed shall hold that office until the first biennial general election for Representatives in Congress after one year after the occurrence of the vacancy. Without a complete reversal of its decision in *Hillman v. Boone, supra,* we cannot conceive of the Court of Appeals holding any view other than that expressed herein.

We are not unmindful of the fact that the law, as we view it, will cause those now seeking judicial office and you and your subordinates who are charged with preparing the primary and general election ballots considerable confusion and uncertainty. Yet, in our view of the Court of Appeals decision in *Hillman,* there is no way of resolving that uncertainty at this time. We call to your attention the fact that a somewhat similar situation faced the Court in *Hillman,* and the Court noted:

> "Appellant asserts that before Judge McWilliams's resignation became effective he filed his certificate of candidacy and thereby created a 'contest', which cannot be 'frustrated' by Judge McWilliams's resignation. This is a pointless contention. A candidate for office cannot acquire under the election laws a right contrary to the constitution. . . ". 190 Md. 606, 612.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—ABSENTEE BALLOTS—MAY BE SENT AND RETURNED POSTAGE FREE UNDER FEDERAL LAW.

July 23, 1968.

Mr. Peter Parker.

By recent letter you have submitted to us a sample of an envelope to be used by your Board in sending absentee ballots to those Maryland residents who qualify for same, and a similar envelope to be used by such residents when returning the ballots to your agency. These envelopes contain a notation in the upper right hand corner, "Free of postage, including air-mail (absentee ballot)."

You ask us whether or not such envelopes may be sent postage free, and, assuming that they may be so sent, whether the form you utilize is satisfactory for that purpose.

Please be advised that the Federal Absentee Ballot Voting Assistance Act of 1955 provides that official post cards, ballots, voting instructions, and necessary envelopes, whether transmitted individually or in bulk, shall be free of postage, including air-mail postage. (Title 50, USCA 1472).

In addition the Superintendent of Mailing Requirements at the U. S. Post Office in Baltimore has advised us that their office processes these ballots free of postage. The postal regulation concerning this is found in Postal Manual, Section 137.6.

We believe, therefore, that the sample envelopes which you have submitted to us are in proper form under federal requirements.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS — PUBLICATION OF NOMINATING PETITION — WHETHER NEWSPAPER IS A "DAILY NEWSPAPER OF GENERAL CIRCULATION THROUGHOUT THE STATE" IS A FACTUAL QUESTION FOR DETERMINATION BY THE SECRETARY OF STATE, OR APPROPRIATE ELECTION BOARD. NO REASON EXISTS WHY SECRETARY OF STATE MAY NOT FIND "THE DAILY RECORD" TO BE SUCH A NEWSPAPER.

August 5, 1968.

Honorable C. Stanley Blair.

By recent letter, you advised us that certain nominating petitions have been filed with you for statewide office, and you ask our views on the requirements of law relating to the publication of the names of all signers to such petitions.

The statutory requirement for such publication is contained in Section 7-2 of Article 33 of the Annotated Code of Maryland (1967 Repl. Vol.), which states, in pertinent part:

> "Within thirty days after the filing of any nominating petition, the Secretary of State, in cases of such petitions filed with him, shall cause to be published at least once in a daily newspaper of general circulation throughout the State, the names of all signers of any such petition, together with an explanation of the nature of any such petition to which said persons' names are affixed. . . . The cost of such publication shall be paid prior to such publication by the nominee whose name is to be entered on the ballot; and if the cost is not paid, the name of the nominee shall not be printed on the ballot."

You advise us that you contemplate publishing the names on the nominating petition in "The Daily Record" and ask us if "The Daily Record" is a "daily newspaper of general circulation throughout the State", within the meaning of the above statute.

From our examination of the statute and the leading Maryland case on this point, we believe that this is a question of fact that you, in the first instance, must determine. Your findings on this question, in our opinion, can only be disturbed by a reviewing court if the court should find that you have *abused* the discretion vested in you in this matter.

"The Daily Record" is a newspaper published six days a week by the Daily Record Company of Baltimore. We have reviewed a letter to us from R. Curzon Hoffman, III, Vice-President of that Company, in which Mr. Hoffman sets out certain pertinent information relating to the circulation of that publication and the type of news information and advertisements contained therein. Appended to his letter is a list of the various post offices in Maryland which receive that publication daily. We do not suggest that you are bound to accept Mr. Hoffman's views as to whether "The Daily Record" is a daily newspaper, but his letter does contain information of interest on that point.

Of additional interest, we believe, is the fact that in 1954, in a State senatorial contest, and in 1966, in a gubernatorial contest, names on a nominating petition were, in fact, published in "The Daily Record", under antecedent statutes to the one now before you.

In the recent case of *Van Gorder v. Board*, 229 Md. 437, the Court of Appeals dealt with a statute which required the publication of nominating petitions for a countywide office ". . . at least once in a newspaper of general circulation throughout the County . . .". The Court said, at 441:

> ". . . It has been stated that whether a newspaper is one of 'general circulation' is a matter of substance, not merely of size: it is one that circulates among all classes and is not confined to a particular class or calling in the community, and it is a term generally applied to a newspaper to which the general public will resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the notices or official

> advertising will be brought to the attention of the general public. 66 C.J.S., *Newspapers,* § 4, p. 26."

The above test, applied to "The Daily Record" according to the information supplied by Mr. Hoffman, could very well lead to the conclusion that said publication is a daily newspaper of general circulation throughout the State. We could not say, therefore, that you would be in error to cause the names on the nominating petition before you to be published therein.

We also point out to you, however, that if you believe some other publication would better serve the purpose of the statute, you are free to utilize such other publication, whether you find "The Daily Record" to fall within the statutory classification of a daily newspaper, or not. The mere fact that publication in "The Daily Record" might be more economical than publication in other newspapers is not, in itself, sufficient to require you to publish the names in "The Daily Record".

It is our hope that the information contained herein is of some interest to you. Please do not hesitate to call on us if we can assist you further.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—NOMINATING PETITIONS—PRIMARIES—MARYLAND LAW DOES NOT DISQUALIFY PERSONS SIGNING NOMINATING PETITIONS FROM ALSO PARTICIPATING IN PRIMARY ELECTIONS.

September 5, 1968.

Mr. Peter Parker, President.

We have at hand your letter of September 3rd in which you ask us certain questions pertaining to the eligibility to vote in the primary election of those persons who have signed nominating petitions.

Specifically, you advise us that some 80,000 persons have signed a nominating petition to cause the name of a candidate for the United States Senate to be placed on the General Election Ballot. You ask us whether these signers remain eligible to vote for any of the Senatorial candidates whose names will appear on the ballot at the forthcoming primary election.

At the outset we note briefly the purpose of primary elections and of nominating petitions. Both of these devices are methods established by Maryland law by which the voters of this State may cause to be placed on the General Election Ballot the names of candidates for public office.

Article 33 of the Annotated Code of Maryland (1967 Supplement), provides in Section 5-1 that primary elections shall be conducted so that those political parties which at the previous General Election polled 10% or more of the entire vote cast in the State may nominate their candidates for public office.

That same Article, in Section 7-1, further provides that a candidate for any public office who is neither a candidate of a party whose nominee must be nominated by primary election, nor a registered member of such a party, may be nominated by petition. That section makes provision for the form of said petition and requires that it shall be signed by not less than 3% of the registered voters who are

eligible to vote for the office for which the nomination by petition is sought.

A third method of nomination, by primary meeting, is also permitted under Maryland law, in Section 6-1 of Article 33. Since nomination by this method is in no way applicable to the question you ask, we will not comment further on this method of nomination.

You point out that Section 7-1 (d), entitled "Restrictions on Signers", states:

> "No person shall join in nominating more than one nominee for each office to be filled; nor shall any person sign more than once for the same nominee for an office."

You ask us whether this section amounts to a legislative mandate that no person who has signed a nominating petition for a public office shall be permitted to vote in the primary election of either political party for that same office.

It is obvious that there is a certain injustice and inequity in permitting persons who have signed a nominating petition to also participate in a primary election of either political party for that same office. We make this statement because we believe it obvious that to permit such a signer to also vote at a primary is tantamount to permitting him to vote twice. The purpose of the primary election is to cause a candidate's name to appear on the General Election Ballot. The purpose of a nominating petition is also to cause the name of a candidate to appear on the General Election Ballot. To permit one citizen to exercise both of these devices would appear to be as inherently unfair as it would be to permit a citizen to vote in both the Democratic and Republican primaries.

We have found no decision of the Court of Appeals of Maryland bearing on the question under discussion, but in the brief time available to us to research the matter, we have found that the great weight of out-of-state authority supports the view that a person who has voted in a pri-

mary election is disqualified from being a signer to a nominating petition for that same office, and vice versa. See, for example, *Cavender v. Board of Supervisors of Pima County*, 333 P. 2d 967; *Eastwood v. Donovan*, 105 N.W. 2d 686; *Katz v. Fitzgerald*, 93 P. 112, and *Sullivan v. Cohen*, 44 N.Y.S. 2d 280. See also 29 C.J.S., *Elections*, Section 110 and 25 Am. Jur. 2d, *Elections*, Section 173.

We believe the reasoning of these cases to be correct, and we believe that such should be the law in Maryland.

We are, however, mindful of the fact that it is not our function to make the law, as that role is properly delegated by our Constitution to the General Assembly. Indeed, in each of the cases cited above from other jurisdictions, there existed a strong specific *statutory* prohibition against one individual voting in a primary election and also signing a nominating petition for the same office upon which he had voted. Despite what we *believe* to be the legislative intent in enacting Section 7-1 (d), we cannot categorically state that the Maryland Legislature has sufficiently forbidden a citizen to vote in a primary, if he has signed a nominating petition for the same office. It could well be argued that the language of Section 7-1 (d), that "[n]o person shall join in nominating more than one nominee for each office to be filled", refers to nomination by any means—by primary, or by nominating petition. Yet, it could be equally well argued that the language of that subsection, contained, as it is, in the section dealing with nomination by petition, might be a legislative injunction only against one individual signing more than one nominating petition for the same office. If such were, in fact, the case, there is authority for the proposition that such a limited restriction would not operate to bar a person who has signed a nominating petition from also participating in a primary for the same office.

In *State ex rel. Blydenburgh v. Burdick*, 46 P. 854, the Supreme Court of Wyoming held that a statute barring an individual from signing more than one nominating petition for the same office was not sufficient to bar an individual who had signed a nominating petition from voting in the

primary election. This is, as we have stated above, a minority view—but we have no way of saying, with assurance, that the Court of Appeals of Maryland would not interpret the provisions of Section 7-1 (d) as the equivalent of the Wyoming statute discussed in *Blydenburgh,* and reach a conclusion similar to the Supreme Court of that State.

Furthermore, we are aware of the fact that our decision on this point, if contrary to a decision ultimately reached by the Court of Appeals of Maryland, could lead to the disenfranchisement of some 80,000 citizens of this State. We are further mindful of the fact that the time remaining before the General Election is scarcely sufficient for a full legal test of the questions herein presented, either at the *nisi prius* level, or before the Court of Appeals. There is the further complicating factor that it would be difficult, if not impossible, to enforce, at this late date, a decision that those persons who had signed a nominating petition for United States Senator had thereby become disqualified from voting in the primary election for that same office. Obviously, by any standards, those persons would not be disqualified from voting for other offices which will appear on the Primary Election Ballot. We can think of no effective device that would permit an individual to vote for all offices other than Senator which would not either violate the secrecy of his ballot, or require the expensive, time-consuming, and now impracticable procedures of setting up separate voting machines, or providing separate paper ballots, from which the office of United States Senator would be omitted.

In view of the lack of absolute clarity as to the meaning of Section 7-1 (d), and in view of the seemingly insoluble practical problems that would arise from a decision at this late hour that petition signers could not participate in the primary election, we advise you that those persons should be permitted to vote at the forthcoming primary election. We shall, however, immediately call to the attention of the General Assembly of Maryland the inconsistency of permitting such individuals to twice participate in the nominating

process. We will recommend to the General Assembly that that body direct its attention to this situation and resolve the doubts which now exist, by the enactment of a law which will categorically state whether individuals who have signed a nominating petition may also participate in a political party primary for the same office.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

ELECTIONS—SECRETARY OF STATE—ELECTIONS—FAIR ELECTIONS PRACTICES ACT—CONTRIBUTIONS BY PERSONS WHO ARE NOT CANDIDATES—APPLICATION OF THE MONETARY LIMITS.

September 30, 1968.

Honorable C. Stanley Blair.

In your recent letter you have made certain inquiries concerning the proper construction of Section 26-9 (b) of Article 33 of the Annotated Code of Maryland. Section 26-9 (b) provides as follows:

> "It shall be unlawful for any individual or corporation, either directly or indirectly, to contribute any money or thing of value greater than twenty-five hundred dollars ($2,500.00) in any primary or general election."

Your first inquiry is whether a single contributor may contribute $2,500.00 in the primary and then make an additional $2,500.00 contribution in the general election which follows. We view Section 26-9 (b) as authorizing a maximum contribution of $2,500.00 for each election. As noted in Section 26-9 (b), the $2,500.00 maximum applies to "any primary *or* general election." Where the disjunctive word "or" is used, we cannot construe it to impose a conjunctive or combined maximum for both the primary and general election. If the Legislature wanted to limit contributions to a maximum expenditure of $2,500.00 for both elections combined, it could certainly have done so expressly.

Your second inquiry is whether a single contributor may contribute $2,500.00 to as many candidates as he may wish in any one primary or general election. We are of the opinion that Section 26-9 (b) places a maximum contribution limit of $2,500.00 for each contributor in each election. Compare the present section to Section 26-9 (b) of Article 33 as it existed prior to the 1968 amendments where the

maximum contribution allowed was $2,500.00 "to any candidate, party, or proposition, in any primary or general election." (See also Section 219 (b) of Article 33 as it existed prior to the 1967 amendments.) This becomes even more apparent when we consider the fact that the amendment to Section 26-9 (b) as proposed by the Legislature in Chapter 613 of the Laws of Maryland, 1968, had the words "to any candidate, party or proposition" and these words were stricken from the amendment prior to its passage by the Legislature. It is important to note that Section 26-9 (b) now imposes the limit on the contributor for the particular election, and not on the contributor with respect to a particular recipient. Therefore, a contributor may not contribute any more than $2,500.00 in each election even if he desires to contribute to various candidates who may or may not be opposing each other. Of course, a contributor may divide this maximum contribution in any manner he sees fit.

Your third inquiry is whether there is any limitation on the amount of money a Maryland resident may contribute during a primary or general election to a candidate running for national office. Although with respect to a candidate for national office the limitation applies only to contributions made in Maryland, or to committees acting on the candidate's behalf in Maryland, we are of the opinion that Section 26-9 (b) places a maximum limit on the amount of political contributions which a Maryland resident may make. As you know, the term "election" as defined in Section 1-1 (6) of Article 33 includes elections for national as well as state office and, therefore, we are of the opinion that such a limit would apply to contributions to or on behalf of candidates in national elections.

Your final inquiry asks whether the cost of tickets to political fund raising affairs must be considered as a part of total contributions allowed. We are of the opinion that the purchase of such tickets is to be considered as a campaign contribution and, therefore, to be included in determining whether or not the maximum contribution has been ex-

ceeded. We refer specifically to Section 26-7 (b) (1) which recognizes that the purchase of such a ticket necessitates the issuance of a campaign contribution receipt if the cost of the ticket is $51.00 or more.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

ELECTIONS—SECRETARY OF STATE—NOMINATING PETITIONS —EFFECT OF INVALIDITY OF ONE SIGNATURE ON THE AFFIDAVIT ATTACHED—EFFECT ON REMAINING SIGNATURES.

October 3, 1968.

Honorable C. Stanley Blair.

In your recent letter you request our advice concerning the possible effect which an invalid signature would have on a separate sheet of a nominating petition. Specifically you inquire as to whether certain signatures found to be invalid either by yourself or by the various boards of election supervisors cause the affidavit attached to the sheet on which the invalid signatures are found, to be false and to thereby destroy the presumption of validity of all of the signatures contained on that sheet. Your inquiry relates, of course, to the discussion by the Court of Appeals of the effect of an invalid signature on a referendum petition in *Tyler v. Secretary of State,* 229 Md. 397 (1962). In your letter you note that some signatures may have been declared invalid because either:

1. The signer was not a registered voter, or
2. The signature was different from that on the voting records, or
3. The signature failed to comply with the formal requirements of Section 7-1 of Article 33, or
4. The signature failed to include the proper designation of the signer's precinct or district.

The critical language is contained in Section 7-1 (c) of Article 33 of the Annotated Code of Maryland. That section provides in part:

> "Every such paper shall be accompanied by an affidavit or affidavits made before a justice of the peace, notary public or other officer authorized to take oaths under the laws of this State, by one or more persons known personally to the justice,

> notary public or other officer, and so certified by him and signed by the affiants, to the effect that the signers are known to such affiant or affiants to be registered voters of the precinct as set forth in said petition, and that the said affiant or affiants personally saw the signers, in regard to whom he or they make oaths, sign such paper."

The affidavit then must affirm that the signers are known to the affiant to be registered voters of the precinct or district as set forth in the petition and that the affiant personally saw the signers sign.

Initially we point out that only where the signer was not a registered voter or not a registered voter of the precinct or district listed could there be any challenge to the affidavit and through the affidavit to the remaining signatures covered by that affidavit, because the other stated reasons for invalidity of a signature do not affect the affidavit in any way or show it to be false. The issue then arises as to what effect is to be given to the other signatures covered by an affidavit where one of the signers is shown to be not a registered voter or not a registered voter of the precinct or district listed in the petition.

In *Tyler v. Secretary of State, supra,* the Maryland Court of Appeals in considering the effect of the falsity of the affidavit with respect to one signature on a referendum petition held:

> "We do not go so far as to hold, as we understand the appellant to contend, that proof of the falsity of the affidavit as to some signers renders invalid, in the sense of being a nullity, the entire paper or part of the petition it purports to verify. We hold, however, that if the circulator of a referendum petition in this State makes affidavit that, of his own personal knowledge, the signers of the petition which he has circulated are registered voters of the State, and the County, as set opposite their names when, in fact, he has no such personal

> knowledge, the falsity of his affidavit gives rise, at least, to a presumption of fraud. * * * Upon proof of the falsity of the affidavit, the prima facie presumption of the validity of the petition, or a sheet thereof, ostensibly verified by the affidavit, must fail, along with all the signatures thereon, and the burden is cast upon the proponents of the referendum to affirmatively show that the remaining signatures on such petition or sheet thereof are genuine and bona fide and that the signers are registered voters as required by law." (PP. 405-406).

In considering the applicability of the *Tyler* case to the issues raised here two points must be observed.

First, as the Court noted in *Tyler*:

> "While the principle that provisions governing referendum petitions are to be liberally construed is generally accepted, it has been pointed out in *People v. Kelly*, 294 Mich. 503, 293 N.W. 865, that certain jurisdictions, including that state, have adopted the view that the referendum is a concession to an organized minority and a limitation upon the rights of the people.
>
> "The exercise of the right of referendum is drastic in its effect. The very filing of a petition, valid on its face, suspends the operation of any of a large class of legislative enactments and provides an interim in which the evil designed to be corrected by the law may continue unabated, or in which a need intended to be provided for, may continue unsatisfied. * * *
>
> "We believe that it is clear, in any case, that the stringent language employed in Section 4 of the Article shows an intent that those seeking to exercise the right of referendum in this State must, as a condition precedent, strictly comply with the conditions prescribed." (P. 402).

Therefore, in judging whether the constitutional mandates with respect to referenda petitions have been satisfied the rule of strict compliance must be observed.

Secondly, the affidavit attached to the referendum petition must affirm that the affiant knows of his own personal knowledge that every signature on the petition is genuine and bona fide, and that the signers are registered voters of Maryland and of Baltimore City or a county as set opposite their names. As the Court also noted in *Tyler*, the knowledge required of the affiant with respect to a referendum petition must be personal; that is it must be original and not dependent on hearsay. Therefore, since the question of whether or not a person is a registered voter is a matter of fact to be determined from an examination of the lists of registered voters kept by the supervisors of elections, where a signer of such a petition is found not to be a registered voter, the affidavit is false and the prima facie presumption of the validity of the petition is destroyed. The burden then is on the petitioners to prove the validity of the petition.

The crucial issue then is the extent to which this analysis is applicable to a nominating petition. While we do not, in this opinion, undertake to define and establish the extent of the relationship between the two types of petitions, we are of the opinion that, absent other factors indicating fraud, the existence of one or two signatures on a nominating petition sheet which prove to be of persons who are not registered voters does not destroy the prima facie validity of the remaining signatures on that nominating petition sheet, especially where the remaining signatures have been verified by the boards of election supervisors.

It must be remembered that the right of referendum, whereby an act passed by the General Assembly may be suspended, is, as the Court of Appeals has noted, "a concession to an organized minority and a limitation upon the rights of the people", and therefore available only after strict adherence to the conditions precedent. No such situation prevails with respect to nominating petitions. The

nominating petition is merely one of the three ways by which a candidate may get himself nominated for a particular office. Of course, there is no doubt that the purpose of the requirements of the affidavit on a nominating petition is to protect against the fraudulent obtention of signatures, and of course every effort must be made to insure against such a possibility. However, where no showing of fraud has been made and the signatures have been verified, we do not believe that an error with respect to a particular signer destroys the presumption of validity with respect to the remaining signatures created by the assertions contained in the affidavit.* To fail to include persons properly qualified in the absence of a showing of fraud would create, we believe, a serious question of infringement of the right of suffrage.

While not essential to our position, we also point out that we are not convinced that the validity of the affidavit on a nominating petition has been destroyed where a signature of a person not registered is found. Section 7-2 (c) requires that the affidavit show that the signers are "known to such affiant". The section does not use the term "personal knowledge", which is defined and discussed in *Tyler* and which is used in other parts of Section 7-2 (c), and in Article XVI, Section 4 of the Maryland Constitution. It could well be argued that in the absence of the term "personal", knowledge obtained by the affiant in good faith from secondary sources, but which is wrong, would not make the affidavit false.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* It is interesting that the affidavit on a nominating petition does not have to assert that of the affiant's own personal knowledge the signatures contained thereon are genuine and bona fide as does the affidavit on a referendum petition.

ELECTIONS: BALLOT ARRANGEMENT—CANDIDATES OF SAME PARTY SHOULD BE PLACED ON BALLOT IN THE SAME HORIZONTAL OR VERTICAL COLUMN, IN THE ORDER SPECIFIED BY THE ELECTION LAWS. THE COLUMNS SHOULD BE PLACED ON THE VOTING MACHINE IN ALPHABETICAL ORDER, ACCORDING TO THE SURNAME OF THE CANDIDATE FOR THE HIGHEST OFFICE BEING VOTED ON IN THE PERTINENT ELECTION.

October 11, 1968.

Mr. Charles Dorsey.

By telephone conversation the afternoon of Wednesday, October 9th, and by personal conference yesterday, Thursday, October 10th, you have, on behalf of the Board of Supervisors of Elections of Baltimore City, solicited our views as to the proper form and arrangement of the names of the candidates for public office on the ballot for the General Election of November 5, 1968.

At our conference yesterday afternoon, you submitted to us a "Voting Machine Sample Ballot" prepared by your staff, on which the candidates are listed as their names would appear on the voting machines to be used in Baltimore City, if this sample ballot were approved. On this sample ballot the listing of the candidates is as follows:

OFFICES	(titles of offices being sought)
REPUBLICAN CANDIDATES	(names of candidates for that party)
DEMOCRATIC CANDIDATES	(names of candidates for that party)
AMERICAN CANDIDATES	(names of candidates for that party)
INDEPENDENT CANDIDATES	(names of candidates for that party)

OFFICES	(titles of offices being sought)
JUDICIAL OFFICES	(titles of pertinent judicial offices contested in this election)
JUDICIAL CANDIDATES	(names of p e r s o n s contesting such judicial offices).

It is our opinion that the form and arrangement of this sample ballot is not in compliance with the laws of this State, for the reasons hereinafter set out.

In considering whether the form and arrangement of this voting machine sample ballot comply with the laws of this State, we have carefully reviewed the provisions of Section 16-5 of Article 33 of the Annotated Code of Maryland (1968 Cum. Supp.). Subsection (a) of Section 16-5, titled "Alphabetical arrangement", states, in pertinent part:

> "The names of candidates for every office shall be arranged alphabetically on the ballots according to their surnames, under the designation of the office; except that the names of the candidates of each political party for President and Vice-President shall be grouped together, with the party name at the right of the surnames under the designation 'Electors for President and Vice-President,' and arranged alphabetically in the order of the surnames of the presidential candidates . . .".

From an examination of this section alone, it would appear that all candidates on the ballot are to be listed in alphabetical order. Section 16-5 (e), however, further provides:

> "*Grouping of names of all candidates of political party.*—The names of all candidates of a political party shall appear on the ballots in adjacent rows or columns containing generally the names of candidates nominated by such party . . .".

It is immediately apparent on examination of the sample ballot submitted to us, that the form thereof is in compliance with the requirements of Section 16-5 (e), but ignores the mandate of Section 16-5 (a), requiring that "[t]he names of candidates for every office shall be arranged alphabetically on the ballots according to their surnames".

We are aware that there is an inconsistency between the two requirements of an alphabetical listing and a columnar listing by party. That is to say, if the candidates for every office are to be listed in alphabetical order, it is not possible in every instance to have those listings arranged so that the names of the candidates of each political party shall appear on the ballot in the same horizontal row or column and be separated in vertical columns as to offices. While recognizing the inconsistencies contained in these two subsections of Section 16-5, it is our opinion that your Board is required to comply with all provisions of the statute in so far as is possible. Even though an alphabetical listing cannot be completely followed throughout the ballot in general elections without abandoning the columnar listing, we believe that the Board is first required to assign positions on the ballot in alphabetical order, according to the surnames of the candidates of each of the political parties for the highest office being voted on in the pertinent election. In intra-party listings and listings without party designation, the conflict here considered does not exist and precise alphabetical arrangement of candidates is necessary. Section 16-5 (c) requires the following order for the listing of offices on the ballot in this election:

1. President and Vice-President.
2. United States Senator.
3. United States Representative.
4. Associate Judge of the People's Court.

These offices are the only ones being contested by party designation in the forthcoming election.

In following this format, the second row on the machine should be devoted to the candidates of the party whose nominee for President of the United States ranks first in the alphabet, namely the Democratic Party, since its candidate is Hubert H. Humphrey. The remainder of that row should be devoted to the other candidates of that Party for the remaining offices. The third row should be devoted to the candidates of the party whose nominee for President ranks next alphabetically, namely the Republican Party, since its candidate is Richard M. Nixon, with the remainder of that row being devoted to the other candidates of that Party. The fourth row should be devoted to the candidates of the party whose nominee for President ranks next alphabetically, namely the American Party, since its candidate is George C. Wallace, with the remainder of that row being devoted to the other candidates of that Party. In following this format, the voting machine ballot would be set up as follows:

OFFICES.....	
DEMOCRATIC CANDIDATES	Humphrey and Muskie
REPUBLICAN CANDIDATES	Nixon and Agnew
AMERICAN CANDIDATES	Wallace and Griffin

The remainder of the ballot should be set out in the form of the sample ballot you submitted to us.

You have advised us that the form and arrangement which we say the law requires differs from the form and arrangement used by your Board in previous elections. You have submitted to us, for example, the general election ballots utilized in the gubernatorial election of 1966 and the presidential election of 1964. In each of these instances, the alphabetical listing of the candidates for the highest

office was ignored, but a columnar listing of candidates of the same political party was followed. Our research does not disclose any prior opinion of this office on the correctness of the form of ballot utilized in these elections dealing with this specific question. To our knowledge, the views of this office have never before been sought on the question now presented. We find it unnecessary to decide whether the form and arrangement of the ballots used in elections prior to July 1, 1967 were proper and legal, because the election laws of this State were generally revised as of that date. It may very well be argued that under antecedent statutes the form and arrangement of the general election ballots of 1964 and 1966 were legally permissible. Assuming, *arguendo,* that such is the case, we would note that at that time, the election laws of this State contained separate provisions for the form and arrangement of ballots for voting machines and that of paper ballots. In 1964 and 1966 the form and arrangement of voting machine ballots was governed by the provisions of Section 122 of Article 33 of the Annotated Code of Maryland (1957 Ed.). That section specifically required a columnar listing of the candidates of the same political party, but did not specifically require the alphabetical listing of candidates now required by the provisions of Section 16-5 (a). Section 122 (a) of the old law dealing with ballot labels did incorporate by reference the provisions of Section 94 of Article 33, dealing with the form and arrangement of the names of candidates on paper ballots. Although Section 94 contained a requirement that the names of candidates be listed in alphabetical order, its incorporation into Section 122 (a) was, by Section 122 (a), subject to a number of exceptions, one of which related to party columns peculiar to machine ballots. It would appear that in the elections of 1964 and 1966, and even prior thereto, your Board made a determination that the columnar listing requirement of Section 122 must be followed, and that the alphabetical requirements of Section 94 were not pertinent to voting machines.

You have advised us that in elections prior to July 1, 1967, the political party controlling the Board of Election

Supervisors of Baltimore City placed first on the ballot the candidates of their own party, without regard to the party whose principal candidate was first in order alphabetically. Whatever the legality of such a procedure under the old law, we believe it plainly illegal under the revised election statutes of this State. The 1967 revision of the election laws consolidated the provisions of paper ballots and voting machine ballots, repealing the separate requirements pertaining thereto and enacting, instead, the present Section 16-5 which we have hereinabove quoted. The obvious legislative intent in repealing the separate requirements for paper ballots and voting machine ballots and enacting the single requirement was that the same form and arrangement prevail for both, in so far as possible. We find no reason why the form and arrangement we approve herein is not equally applicable to both the voting machine and paper ballots.

In attempting to reconcile the somewhat inconsistent provisions of Section 16-5, we have tried to adhere to the principle that position on the ballot should be made without preference to political affiliation, or without consideration being given to which political party has a majority representation on the Board. It is our intention herein to deal with the present statute in such a way that in this election, and in all future elections under it, position on the ballot shall be determined by observance of alphabetical listing requirements compatible with columnar party arrangement, rather than by any political considerations.

We would also point out that our views on the need for alphabetical listing of the candidates are in accord with those of the Secretary of State, who has just supplied to each election board in this State a sample form ballot to be used for those non-resident voters who are entitled to vote for the offices of President and Vice-President, alone, under the provisions of Article 33, Section 28-1 et seq.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

ELECTRICAL EXAMINERS

LICENSES — UNLICENSED INDIVIDUAL MAY NOT OPERATE BUSINESS OF MASTER ELECTRICIAN WHERE MASTER ELECTRICIAN OFFERS ONLY FINANCIAL SUPPORT.

March 13, 1968.

Mr. James A. Johns, Jr.

This is in reference to your recent inquiry wherein you ask whether or not an individual, who is lawfully licensed by the Board and who owns an electrical contracting business, may hire an unlicensed person to operate that business for him. It is our understanding that the licensed person will contribute only financial support to the business and that no licensed person will control any of the work.

This matter is controlled by Section 490 of the Charter and Public Local Laws of Baltimore City (1949 Edition), as amended by Chapter 450 of the Laws of Maryland (1957), which provides as follows:

> "Nothing in this subtitle shall be construed to prevent any person from doing or performing the kinds of work enumerated in Sections 483 and 483A of this subtitle, *provided that such work is performed under the direction and supervision of a duly licensed Master or Maintenance Electrician; but no such work shall be performed excepting under such direction and supervision of a duly licensed Master or Maintenance Electrician,* and the said licensed electrician shall be responsible for any and all work so done under his direction and supervision." (Emphasis supplied).

We believe that the key to this matter is the use of the words of "direction and supervision" above. Their use was discussed in 22 Opinions of the Attorney General 306 (1937) wherein the Board had raised the question as to whether or not a general building contractor could lawfully install electrical equipment, provided he employed a

master electrician to obtain a permit for him, make inspection of the work and act in a capacity described as "electrical consultant". In the opinion Attorney General Herbert R. O'Conor and Assistant Attorney General Charles T. LeViness had this to say:

> ". . . In our judgment the term 'direction and supervision' means that the master electrician actually must direct and supervise the work; the statute is not gratified when a master electrician merely lends his name to a contract for the purpose of obtaining the permit. Of course, there must be some elasticity in the application of this term; and common sense and ordinary business judgment must control your Board in passing upon the facts of each case. We do not mean, for instance, that the master electrician must be physically present during the entire period of the installation; *but we think the statute is not gratified unless the master electrician actually lays out the work for his subordinates and directs the installation in all of its material aspects.* You must bear in mind that the master electrician is required to post a bond, running in favor of the owner of the property upon which the work is being done, and conditioned upon 'faithful performance of any and all work entered upon or contracted for by said master electrician.' For his own protection the master electrician should want to watch closely the work done under his direction, since he and his bond are liable for any want of skill on the part of his subordinates or failure to use suitable or proper material in the performance of any work contracted for or undertaken. . . ."

> "In the case stated by you the electrical work is being installed under the supervision and direction of an electrical foreman who is not a licensed master electrician. You state that the only purpose served by the master electrician is to obtain

> the permit from the City, since an unlicensed person may not obtain such permits, and from time to time make inspections of the work and offer suggestions. It is our view that such an operation does not comply with the law. However, we believe that whether a particular job is being 'supervised and directed' by a master electrician is a question of fact for your Board to determine, under all the circumstances of a given case. We can do no more than lay down general principles and leave to your Board the duty of applying them in given instances." (Emphasis supplied).

We believe that the above opinion is applicable to the present case, and following the reasoning therein, we must conclude that mere financial support to the business is not sufficient "direction and supervision" to satisfy the statute. In our judgment, therefore, the arrangement in the instant case is unlawful.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

ELECTRICAL EXAMINERS—LICENSES—INDIVIDUAL OR FIRM WHICH SOLICITS OR AUTHORIZES OTHERS TO SOLICIT BUSINESS TO DO ELECTRICAL CONTRACTING MUST HAVE MASTER ELECTRICIAN'S LICENSE.

March 14, 1968.

Mr. James A. Johns, Jr.

This is in reference to your recent inquiry wherein you ask whether or not an individual or firm may solicit business to install, erect or repair electrical wires, etc., or to perform other electrical contracting, without first having obtained a master electrician's license from the State Board of Electrical Examiners and Supervisors. It is our understanding that the firm or individual is the one to perform the work being solicited and is not merely an agent of a duly licensed firm or individual.

Section 484 of the Charter and Public Local Laws of Baltimore City (1949 Edition), as amended by Chapter 450 of the Laws of Maryland of 1957, provides that:

> "Before any person, firm or corporation shall hereafter engage in the work or business of a *master* or maintenance electrician in Baltimore City, as *defined* in this subtitle . . . such person, firm or corporation *shall apply to said board for a license as herein required* . . ." (Emphasis supplied).

The term "master electrician" is defined in Section 483 of the above Public Local Laws as "including any and all persons, firms and corporations *engaged in* the business of *or holding themselves out to the public as engaged in* the business of installing, erecting or repairing or contracting to install, erect or repair electrical wires, etc." (Emphasis supplied).

Section 483 further provides:

> ". . . A license of 'master electrician' issued and in accordance with the provisions of this Act,

> shall entitle *any* such person, firm or corporation so licensed to *engage in* the business of and *to hold himself or itself out to the public as engaged in the business of* installing, erecting, and repairing and of contracting to install, erect and repair any electrical wires or conductors, etc." (Emphasis supplied).

It is obvious that electrical contracting must be done by a licensed master electrician. Further, there is no prohibition against soliciting business as such. The questions arise as to whether or not the soliciting of business to do electrical contracting causes the solicitor to "hold himself or itself out" as being engaged in the business or to actually engage in the business and, therefore, violate the above sections if unlicensed. In our judgment, solicitation of business, either directly or through an agent, constitutes, at the minimum, a "holding out" of the person on whose behalf solicitation is made as qualified to perform the work. Accordingly, an individual or firm which solicits or authorizes others to solicit business to do electrical contracting must have first obtained a master electrician's license from your Board. The person who actually solicits need not be licensed but he must act on behalf of a licensed person or firm.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

EMPLOYEES, STATE

MERIT SYSTEM—PERSONS ELIGIBLE FOR INCREASED VACATION BENEFITS.

January 2, 1968.

Mr. Russell S. Davis.

You have requested our opinion concerning the effect to be given to Chapter 659 of the Laws of Maryland, 1966, which repeals and re-enacts Section 37 of Article 64A dealing with the Merit System for State employees. The Act, which by its terms took effect on July 1, 1966, provides for increased vacation benefits for classified employees as of January 1, 1966.

The Act provides in part:

> "Section 37. Vacation and sick leave.
>
> (a) Amount of vacation and sick leave allowable.—From and after January 1, [1962] *1966*, every classified employee shall receive as annual vacation in each calendar year, a leave of absence with pay as follows:
>
> Less than 5 years of service—10 working days
> 5 to less than [25] *20* years of service—15 working days
>
> [25] *20* years of service and more—20 working days, provided, however, that every classified State employee on January 1, 1957, who as of that date shall have less than five (5) years of service shall be entitled to receive, as vacation in each calendar year until his period of service reaches [25] *20* years, a leave of absence with pay of fifteen (15) working days. The term 'years of service,' as used herein shall include any previous continuous State service ~~in excess of one year as an unclassified employee~~."

As indicated above, Chapter 659 modified the definition of the term "years of service" by eliminating the somewhat

ambiguous provision relating to an employee's period of service as an unclassified employee and at the same time lessened the years of service needed for twenty days vacation. Specifically, you have requested our advice as to whether the modification of the definition of "years of service" is applicable to all classified employees or is limited only to those employees whose six-month probationary period* ends on or after January 1, 1966.

It is our opinion that the liberalized employment benefits provided for in Chapter 659 of the Laws of Maryland, 1966, including the modified definition of "years of service" are applicable to all classified employees in State service on January 1, 1966, who remain in State service until July 1, 1966, regardless of their date of completion of probation. However, the Act is not retroactive and, therefore, does not affect benefits accrued prior to January 1, 1966.

Before discussing the specific issue raised, we point out that since the Act did not go into effect until July 1, 1966, a classified employee must have remained in the State service until July 1, 1966 in order to qualify for the benefits under the Act. However, if the employee has remained in the State service until that time, he is entitled, as provided in the Act, for the increased benefits as of January 1, 1966. See 47 Opinions of the Attorney General 150 (1962).

We turn then to the question whether the Act is limited only to persons whose probationary period ended on or after January 1, 1966. Section 37 (a) provides in pertinent part that "From and after January 1, 1966 *every classified employee shall receive as annual vacation . . .*" certain amounts dependent on the employee's length of service. (Emphasis supplied). There is no provision in the Act which specifically limits the applicability of the italicized provision to only those employees completing their probationary period on or after January 1, 1966. The italicized provision existed prior to the passage of Chapter 659 and was not affected by it. What Chapter 659 did do was to change the applicable date from January 1, 1962 to January

1, 1966 so that the increased benefits would not be retroactive to January 1, 1962. It is apparent, therefore, that the only statutory reference which could support the restriction that only persons whose probationary period ends on or after January 1, 1966 are eligible for the increased benefits, is the date itself.

The question, therefore, necessarily raised is what is the purpose of the inclusion of that date. It is our opinion that the purpose of the inclusion of the January 1st date is to avoid any ambiguity concerning the applicable date of the increased benefits, and explicitly to negate any argument that increased benefits are to be applied retroactively to persons who would have been entitled to them had they been enacted at an earlier time. For example, the January 1, 1966 date makes clear that a person who for the first time attained in 1965 20 years of service would not be entitled to 5 additional days vacation because he did not receive 20 days vacation in 1965.

Section 37 (a) was previously amended in 1962 by virtue of Chapter 87 of the Laws of Maryland, 1962. As a result of that Act, all classified employees were given a minimum of 10 days vacation. The Act became effective June 1, 1962 and made the increased minimum effective January 1, 1962. The January 1, 1962 date, thus inserted, replaced a previously existing date of January 1, 1957, again apparently to avoid retroactivity. See 47 Opinions of the Attorney General 150 (1962).

We feel, therefore, that it would be unduly restrictive to limit the applicability of Chapter 659 to only those classified employees who completed their probationary period on or after January 1, 1966.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* The period during which an employee earns no leave time. See the concluding paragraph of Section 37 (a) of Article 64A and Rule 42B (2) (a) of the State Employees' Personnel Rules.

EMPLOYEES, STATE—COMMISSIONER OF PERSONNEL—COMMISSIONER'S RESPONSIBILITY FOR DETERMINING ELIGIBILITY FOR OVERTIME PAY.

April 2, 1968.

Mr. Russell S. Davis.

In your recent letter you request our opinion as to whether your office has the responsibility for determining the eligibility of all State positions for overtime payments. You inform us that the State Auditor has indicated his belief that under Article 100, Section 76 of the Annotated Code of Maryland your office does have such responsibility. You also inform us that your office has thus far concerned itself only with those positions which are within the jurisdiction of the Standard Salary Board. (Article 64A, Section 26 *et seq.*)

As you know, under the provisions of Section 76, all non-supervisory State employees, except per diem and hourly employees, who work in excess of forty hours in any week are entitled to receive extra compensation.* The specific issue which your inquiry raises is whether your office is responsible under the provisions of Section 76 (b) for approving the supervisory status of State employees who are outside of the jurisdiction of the Standard Salary Board.

Section 76 (b) provides:

> "The executive head of every department, bureau, board, commission or other agency of the State, *with the approval of the State Commissioner of Personnel,* is authorized and empowered to designate those bona fide supervisory employees who actually exercise supervisory control over a major function within the respective department, bureau, board, commission or other agency who shall not be subject to the provisions of a forty

> hour week. The State Commissioner of Personnel is authorized to adopt and promulgate reasonable rules and regulations to prevent an abuse of this section by the granting of unnecessary and unwarranted overtime or by the failure to grant overtime compensation when the employee is eligible to receive the same under the provisions of this section. Any employee who is designated by his executive head as being not subject to the provisions of a forty hour week, shall have the right to appeal to the State Commissioner of Personnel, who shall investigate and decide such employee's appeal, and the Commissioner's decision shall be final and binding upon both the executive head and the employee who appeals such designation." (Emphasis supplied).

In light of the fact that this subtitle is not limited to those positions which are under the jurisdiction of the Standard Salary Board, it is our opinion that your responsibilities under this section are not so limited. We believe that the provisions of Section 76 contemplate that while the primary responsibility for determining whether an employee is exercising supervisory authority is with the various department heads, your approval must be obtained before a conclusive designation may be made which would preclude the employee holding the position from the benefits of the overtime provisions. The section also contemplates that your office shall promulgate rules and regulations to guide department heads in determining whether an eligible employee is entitled to overtime under a given set of circumstances, and further, the section provides that any employee who is designated as a supervisory employee may appeal such designation to your office and present evidence as to why the department head's designation was incorrect. The reasoning behind these provisions seems clear; that is, to attempt to obtain uniformity among the various State agencies in this area of employment relations. We therefore advise you that it is your responsibility to approve the supervisory status of all State employees

other than those excepted under the provisions of subsections (a), (c) and (d) of Section 76.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* Also excepted are employees of certain named State agencies. See Section 76 (d) of Article 100, Annotated Code of Maryland, 1967 Cumulative Supplement.

EMPLOYEES, STATE—MERIT SYSTEM—ARTICLE 66C, SECTION 4 (b)—STATUS OF MERIT SYSTEM EMPLOYEES.

April 2, 1968.

Mr. Russell S. Davis.

In your recent letter you request our opinion concerning the meaning of Section 4 (b) of Article 66C of the Annotated Code of Maryland (as amended by Chapter 688 of the Laws of Maryland 1966) as applied to an individual employed by the Board of Natural Resources who resigned from the State Classified Service in 1961 and who in 1965 was re-employed by the Board of Natural Resources in a higher classification. The employee desires to be reinstated to his former standing in seniority and retirement service credits. You have informed us that your practice has been to allow reinstatement to an employee who has resigned only where the employee had permanent status in his previous classification, had been away from the State service for a period of one year or less, and had not been employed during the period of absence. You inform us that the employee in the present case did not meet any of these requirements and further that his new employment was in a classification higher than the classification he held before he resigned. The employee contends that under Section 4 (b) of Article 66C, as amended by Chapter 688 of the Laws of Maryland 1966, he qualifies for reinstatement. Section 4 (b) provides:

> "(b) The chairman shall, with the approval of the Board and in accordance with the provisions of the merit system law, appoint an executive secretary and such other technical, professional and clerical employees as deemed necessary. The executive secretary shall be a person with both academic training and experience in the administration, management, and/or conservation of natural resources. *The executive secretary of the Board and all employees who on June 1, 1966,*

have held such employment under Article 64A of this Code for a period of six months prior thereto shall be continued as merit system employees of the Board of Natural Resources with no diminution of seniority from all previous State service or retirement rights or salary.

"The executive secretary and the staff shall be responsible for keeping the Board informed on all federal, State, interstate and other natural resources programs relating to the activities and responsibilities of the Board, for making special studies and reports, for preparing the agenda for Board meetings, for preparing the annual budget of the Board, for the preparing and editing annual reports and other publications, and for performing and maintaining generally the staff functions and operations of the Board." (Emphasis supplied)

The issue thus raised is whether or not under this section an employee of the Board of Natural Resources who had been so employed for six months by June 1, 1966, would be entitled to seniority rights, retirement rights and salary rights from all previous State service, even though he left the State service for a period of four years.

It is our opinion that the italicized language of Section 4 (b) was not intended to confer upon employees of the Board of Natural Resources the automatic right to reinstatement after voluntary termination of State service, but rather was designed to guarantee that no employment rights then existing, would be lost by any permanent employee by virtue of a reorganization of the Board.

Sections 1 through 5 of Article 66C set up the Board of Natural Resources and conferred upon it the function of coordinating the conservation activities of several State agencies. In 1964, by virtue of Chapter 72 of the Laws of Maryland 1964, Sections 1 through 5 of Article 66C were repealed and reenacted, effecting a reorganization of the Board and providing for an independent chairman ap-

pointed by the Governor. In 1966, by virtue of Chapter 688 of the Laws of Maryland 1966, Sections 1, 2, 4 and 5 of Article 66C were repealed and reenacted and the Board was again reorganized.

The provision relied upon by the employee as contained in the 1966 amendment is virtually identical to the provision as contained in the 1964 amendment except the June 1 date is changed from 1964 to 1966. In light of the fact that the provision relied on was inserted in the law both in 1964 and in 1966 as part of a reorganization of the Board, it is our opinion that the language referred to was designed to guarantee that no employment rights would be lost by any permanent employees by virtue of the reorganization, but was not designed to create additional rights for persons who would not otherwise have had them. Consequently, we must advise you that the employee in question would not be entitled, by virtue of Section 4 (b) of Article 66C, to be reinstated to the status which he occupied immediately prior to his resignation in 1961 if he would not otherwise be entitled to such reinstatement.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

EMPLOYEES, STATE—COMMISSIONER OF PERSONNEL—RULE 42C3—CERTIFICATE OF PHYSICIAN AUTHENTICATING ILLNESS OF EMPLOYEE—AUTHORITY OF STATE AGENCIES TO PRESCRIBE RULES IN REGARD THERETO.

June 19, 1968.

Commissioner Russell S. Davis.

In your recent letter you request our opinion as to whether certain State institutions may require an employee absent for one day due to illness to bring a certificate from a duly licensed physician evidencing such illness before receiving any pay for the period. You have advised us that all of the major state agencies which you have contacted concerning their practice in this regard have an established policy requiring a doctor's certificate for absences of less than three days which becomes operative only after an employee has missed a specified number of days due to illness or other cause. In our opinion to you of February 26, 1958, in advising you that a doctor's certificate could be required after one day of illness, we said:

> "Although this office takes no position on the desirability or advisability of such a policy, the State department heads of each department may establish such rules regarding sick leave as they deem proper for increased efficiency and economy. I therefore believe that the problem must be solved by each department head in the promulgation of rules and regulations governing sick leave within that department. It may be that this rule would be too stringent when applied to all departments equally, because of the nature of the work involved in the various departments. The law, of course, gives wide discretion to the Commissioner of Personnel and department heads to establish rules and regulations concerning the proper conduct of employees."

Some question has been raised concerning the relationship between this opinion and Rule 42C3 of the State

Employees Personnel Rules. (See also Section 37 (a) of Article 64A.) Rule 42C3 provides in part: "Any illness of three or more consecutive working days duration requires a certificate signed by a duly licensed physician which authenticates the period of illness." We adhere to the position previously taken that Rule 42C3, which requires such a certificate where the absence due to illness is *at least* three consecutive working days, is a minimum regulation. We do not feel that this provision would prohibit the governing authority of a particular State institution from promulgating a rule more strict than that provided for under Rule 42C3 under circumstances deemed necessary or desirable by such authority. Consequently, we do not believe that our previous opinion upholding the requirement of a doctor's certificate after one day's illness is in conflict with Rule 42C3.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

EMPLOYEES, STATE—BLIND, MARYLAND WORKSHOP—COMMISSIONER OF PERSONNEL—CREDIT FOR SERVICE PERFORMED AS STATE EMPLOYEE UPON TRANSFER TO STATE DEPARTMENT OF EDUCATION.

July 10, 1968.

Mr. Russell S. Davis.

In your recent letter you have requested our opinion as to whether you have the authority to extend to former employees of the Home Teaching Program of the Maryland Workshop for the Blind who have now transferred to the State Department of Education credit for years of prior State service for annual leave purposes. You have informed us that the transfer was accomplished by means of an appropriation in the budget which provided:

> "Of the amount hereby appropriated, funds for the Home Service Program [Home Teaching Program] for the Blind shall be transferred to the State Department of Education—Vocational Rehabilitation by approved budget amendment when all administrative details have been agreed upon by the two agencies involved."

Since you cannot extend service credits beyond the period of an employee's State service, the issue thus raised is whether these employees were State employees during any part of the time they were with the Maryland Workshop for the Blind. It is also relevant to consider whether or not the General Assembly, by virtue of this note to the text of the budget bill, contemplated that the transferring employees were to be given benefits of prior State service.

The Maryland Workshop for the Blind was created as a semi-autonomous corporate entity by Chapter 566 of the Laws of Maryland 1908. The Act was amended by Chapter 100 of the Laws of Maryland 1955 and is now codified in Sections 4 through 10 of Article 30 of the Annotated Code of Maryland (1967 Replacement Volume). As described in

the 1967-1968 Maryland Manual, the Maryland Workshop operates through three divisions. The training and work center division, the vending system division and the home teaching division. The home teaching division, with which this opinion deals, provides teaching service to the blind in their homes and provides aid to the blind in their personal adjustment to their disability.

Former Attorney General Herbert R. O'Conor in an opinion to the Maryland Workshop pointed out that the purpose of the Act creating the Workshop was to provide "a central and responsible State unit to administer relief to the blind in Maryland. As such it [was, in his] opinion, a State agency qualified . . . to administer in this State the blind relief contemplated in the Social Security Act." 21 Opinions of the Attorney General 170, 171 (1936). More recently, former Attorney General Finan in an opinion to the State Superintendent of Schools pointed out that a majority of the five member board of trustees is appointed by the Governor, that the Workshop as a legal entity was created by the General Assembly and therefore "the workshop is currently a State agency . . . for purposes of receiving financial assistance through the Department of Education." 50 Opinions of the Attorney General 188 (1965).

Considering its status, at least for certain purposes, as a State agency, we turn to the question as to whether or not the employees of that institution can be considered as State employees. You have informed us that the employees of the Maryland Workshop are not in the State Retirement System, they are not directly hired by the State, they are not within the jurisdiction of the Standard Salary Board or the Commissioner of Personnel and they are not paid through the State Payroll System. We therefore do not believe that the employees of the Maryland Workshop for the Blind can be broadly categorized as State employees. See 35 Opinions of the Attorney General 185 (1950). However, with respect to the employees of the Home Teaching Program, other factors need be considered. We have been informed that 100% of the funds necessary to finance the

Home Teaching Program have been supplied by State appropriation and that persons hired for this program must be approved by the State Department of Education. This procedure has been formalized by virtue of an agreement between the State Department of Education and the Maryland Workshop for the Blind regarding this program of home teaching for the blind. Paragraph 3 of this agreement provides as follows:

> "Candidates for all positions in the Home Teaching Program shall be approved by the State Department of Education in accordance with standards set up by the Department. Persons employed for secretarial and other clerical positions shall be expected to meet standards of such positions established by the Commissioner of Personnel."

Paragraph 4 of this agreement provides in effect that training programs for such teachers are to be conducted in cooperation with the State Department of Education, and paragraph 5 provides that a representative of the State Department of Education is to be assigned to work with the supervisor of home teaching of the Workshop. Paragraph 5 further provides that all referrals to the home teaching program are to be reported periodically to the Department of Education and the Department is to make a periodic review of the work performed by the home teachers and to provide general supervision and consultation with respect to the operation of the Home Teaching Program. Paragraph 7 of the agreement provides that no funds appropriated to operate the program shall be used by the Workshop for any of its other programs and any balance remaining at the end of a fiscal year is to be applied to reduce the next succeeding budget request for State funds. (See also the regulations for the program of home teaching for the blind adopted by the Workshop effective July 1, 1947.)

On January 31, 1968, the Maryland State Board of Education adopted a resolution approving the transfer of the home teaching program from the Maryland Workshop for

the Blind to the Division of Vocational Rehabilitation of the Maryland State Board of Education. Attached to that resolution is a report of the Home Teaching Program outlining the close relationship between the Workshop and the State Department of Education. The report points out that all parties to the agreement were desirous of seeing that persons transferred should not be disadvantaged by virtue of the transfer.

In light of the fact that the Maryland Workshop has been considered at least for certain purposes a State agency and in light of the further fact that the Home Teaching Program has been closely related to and under the supervision of the State Department of Education, especially since the agreement of January 28, 1963, we believe that the note to the budget provisions contemplated authorization for these employees to obtain service credit for their period of employment with the Maryland Workshop for the Blind subsequent to January 28, 1963. We believe that at this time it became clear that the overall supervision of this program was under the aegis of the State Department of Education. Therefore, service credit for annual leave purposes may be given from that period forward. We do not in any way mean to imply that employees of similar agencies lacking any of the prerequisites of employment found here would be eligible for retroactive service credit without legislative authorization.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

EMPLOYEES, STATE—COMMISSIONER OF PERSONNEL—OVERTIME PAYMENTS IN LIEU OF COMPENSATORY LEAVE—AUTHORITY OF DEPARTMENT HEAD TO GRANT.

September 6, 1968.

Mr. Russell S. Davis.

In your recent letter you have requested our opinion as to whether overtime payments may be made to State employees working in the Comptroller's Office in lieu of accumulated compensatory leave earned for work in excess of 35½ hours per week (the agency's normal work week) but not in excess of 40 hours per week.[1] If so, you also inquire as to whether such payments may be made to supervisory personnel.

It is our opinion that cash payments for overtime may not be made to these State employees for time worked which is not in excess of forty hours per week. It is also our opinion that supervisory personnel are not entitled to such overtime payments since, as discussed below, they are not covered by the provisions of the forty hour week.

Article 100, Sections 76 and 77 of the Annotated Code of Maryland (1964 Replacement Volume) sets forth certain working conditions for State employees. Section 76 (a) and (b) provide as follows:

> "(a) Except as otherwise provided in this section, *every State employee* except per diem and hourly employees *who works in excess of forty (40) hours in any week shall receive extra compensation for such hours worked in excess of that time.* The amount of compensation for such excess hours shall be computed by dividing the biweekly compensation by eighty and multiplying the resulting quotient by the number of hours in excess of said forty hours.
>
> (b) *The executive head of every department,* bureau, board, commission or other agency *of the State,* with the approval of the State Commis-

sioner of Personnel, is authorized and empowered to designate those *bona fide supervisory employees who actually exercise supervisory control over a major function within the respective department,* bureau, board, commission or other agency *who shall not be subject to the provisions of a forty hour week.* The State Commissioner of Personnel is authorized to adopt and promulgate reasonable rules and regulations to prevent an abuse of this section by the granting of unnecessary and unwarranted overtime or by the failure to grant overtime compensation when the employee is eligible to receive the same under the provisions of this section. Any employee who is designated by his executive head as being not subject to the provisions of a forty hour week, shall have the right to appeal to the State Commissioner of Personnel, who shall investigate and decide such employee's appeal, and the Commissioner's decision shall be final and binding upon both the executive head and the employee who appeals such designation." (Emphasis added).

It seems apparent to us from these provisions that overtime payments may only be made for work performed in excess of forty hours, and in any event, to non-supervisory employees.[2] This is confirmed by reference to Rule 42E3 of the State Employees Personnel Rules. Rule 42E3 provides in part as follows:

"3. *Overtime and Compensatory Leave*

a. Work in excess of the normal work week is compensable by overtime payments or compensatory leave provided that

(1) Overtime payments are only made for work performed in excess of 40 hours in any work week. Holidays taken or paid leave taken during the week shall be credited toward the 40 hours after which overtime payments may be made.

(2) No overtime payments may be made to properly designated supervisory employees. All other employees shall be compensated by cash payments for overtime work if the agency has funds available for this purpose.

b. Overtime payments or compensatory leave shall be for the exact amount of hours worked in excess of 40 hours or in excess of the normal work week for the agency, subject to the provisions of section 'a' above."

In light of the above provisions there can be no doubt that a department head would have no authority to authorize overtime payments for hours worked which did not exceed forty hours in any work week. It must also be remembered that under Rule 42E1 of the State Employees Personnel Rules, the normal work week designated by the department head may consist of as much as 40 hours per week.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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[1]You inform us that the employees have been paid overtime for the hours worked in excess of forty per week.

[2]Using the forty hour week, Section 76 (a) of Article 100 authorizes overtime payments on a "straight time" basis. Under the 1966 amendments to the Federal Fair Labor Standards Act, certain covered State employees, not involved here, would be entitled to time and a half for overtime. See *Maryland, et al v. Wirtz,* —— U. S.——, 36 LW 4565 (June 10, 1968).

GENERAL ASSEMBLY

CONSTITUTIONAL LAW — GENERAL ASSEMBLY — MARYLAND GENERAL ASSEMBLY LACKS AUTHORITY TO PROPOSE AMENDMENTS TO THE CONSTITUTION OF 1968, PRIOR TO RATIFICATION OF SAID CONSTITUTION—ASSEMBLY MAY, HOWEVER, ENACT LEGISLATION TO BE EFFECTIVE CONTINGENT ON SUBSEQUENT RATIFICATION OF NEW CONSTITUTION.

January 29, 1968.

Dr. Carl N. Everstine, Director.

We have at hand your recent letter in which you make certain inquiries concerning the power of the General Assembly of Maryland, during the regular session of 1968, to propose amendments to the Constitution of Maryland.

The questions you addressed to us fall into two separate categories. The first relates to amendments which the 1968 regular session of the General Assembly of Maryland might propose to the Constitution of 1867, which Constitution, of course, is now in effect in Maryland. We will deal with this category of questions first.

The questions, as submitted, and our answers thereto, are as follows:

1. *"May the General Assembly of 1968 propose amendments to the Constitution of 1867? That Constitution remains in effect during the entire period of the 1968 session. Stated otherwise, this question is whether or not the proposal of a new Constitution by the Constitutional Convention prohibits any right of the General Assembly in 1968 to consider and propose amendments to the Constitution of 1867."*

ANSWER—We believe that the General Assembly of 1968 has the power to propose amendments to the Constitution of 1867 at any time up until the new Constitution may be ratified. We do not believe that there is any restric-

tion or prohibition on this right because of the *proposal* of a new Constitution by the Constitutional Convention.

2. *"If the ruling in Question No. 1 is that the General Assembly of 1968 may consider and propose amendments to the Constitution of 1867, may it add a condition in the referendum section that the proposed amendment to the Constitution of 1867 will be negated, and will not be placed on referendum in November 1968 if the new Constitution is adopted on May 14?"*

3. *"If the General Assembly may submit amendments to the Constitution of 1867, at its session of 1968, whether with or without conditions attached concerning the submission to referendum, would the adoption of the new Constitution on May 14 have the effect of cancelling the referendum and thereby negating the proposal?"*

We will treat these questions as one.

ANSWER—While it would seem that such a condition is inherent in the referendum provision itself, we are of the opinion that some practical difficulty might ensue if a condition were to be added to a proposed constitutional amendment, stipulating that the amendment be negated and not placed on the ballot if the new Constitution is adopted on May 14.

As you are well aware, there is a marked difference between a constitutional amendment proposed by the General Assembly, and other bills enacted by that body. The most obvious difference, of course, is that while a constitutional amendment, under the provisions of Article XIV of the Constitution of 1867 requires the affirmative vote of three-fifths (3/5) of the members of each House of the General Assembly, a simple statute requires only a constitutional majority in each House for passage. Another material difference between constitutional amendments and simple statutes is that a constitutional amendment, to be placed on the ballot, does not require the signature of the Executive, while a statute does require that signature to become law, unless it be passed over the veto of the Governor. *Warfield v. Vandiver,* (1905), 60 A. 538, 101 Md. 78.

Our apprehension on this matter is occasioned by the fact that if a provision were adopted by the present Legislature for a constitutional amendment to the Constitution of 1867, to go on the ballot only in the event that the proposed Constitution should be rejected in the May 14 election, such contingent provision would be statutory in nature, and would be effective only if passed in the manner generally provided for the enactment of laws of this State.

We recommend, therefore, that no such contingent provision be added to such amendments to the Constitution of 1867 as may be proposed by the 1968 Session of the Maryland General Assembly.

We are of the further opinion, as noted above, that such a contingent provision is not necessary, for it is our view that if the electorate of Maryland should, at the special election of May 14, 1968, ratify the Constitution of 1968, that ratification will have the effect of eliminating any need for the Governor or the Secretary of State to cause to be placed on the general election ballot of November 1968 any amendments to the Constitution of 1867 that might be proposed by the General Assembly of 1968.

In reaching this conclusion we are fully aware of the repeated views of the Attorneys General of Maryland that the Secretary of State is merely a ministerial officer of the State, and does not possess judicial functions. See 1 Opinions of the Attorney General, 87 and 21 Opinions of the Attorney General, 350-353. See also *Wells v. Munroe*, 86 Md. 443 and *Sterling v. Jones*, 87 Md. 141. For a discussion of the ministerial nature of gubernatorial functions in matters pertaining to constitutional amendments, see also *Warfield v. Vandiver, supra.*

Notwithstanding that the duties of the Governor and Secretary of State in referendum questions are purely ministerial, we do not believe that those officers would be required to place before the electorate of Maryland an amendment to a Constitution which itself is no longer in force and effect. The amendment, even if ratified, would be

meaningless as there would be nothing to which the amendment, as an amendment, could adhere. See *Fulton County v. Lockhart,* (1947), 45 S.E. 2d 220.

See also *Lampkin v. Pike,* 42 S.E. 213 and *Bibb County v. Garrett,* (1949), 51 S.E. 2d 658.

The Court of Appeals of Maryland, in our opinion, will neither compel nor permit a useless expenditure of public funds. Therefore, even absent a provision in a proposed amendment to the 1867 Constitution, stipulating that the amendment not be placed on the November ballot in the event of prior ratification of the Constitution of 1968, we believe that the Governor and Secretary of State need not put such an amendment before the people, if the Constitution of 1968 is ratified on May 14.

4. *"If the proposed amendment to the Constitution of 1867 goes to referendum in November 1968, following approval of the new Constitution on May 14, is the referendum conducted under the old Constitution or under the new Constitution?"*

5. *"If this proposed constitutional amendment goes to referendum in November 1968 after the adoption of the new Constitution and if it is approved by the voters, how will it be merged into the format of the new Constitution?"*

ANSWER—As previously stated, we believe that the ratification of the new Constitution on May 14, 1968, would negate any proposed amendments to the Constitution of 1867. We do not believe that proposed amendments to the Constitution of 1867 could in any way amend or otherwise affect the Constitution of 1968, should that Constitution be ratified on May 14. Therefore, the question of merging an amendment to the Constitution of 1867 into the Constitution of 1968 need not be answered.

We now turn to your second series of questions, relating to the power of the 1968 General Assembly to propose amendments to the proposed new Constitution. Your questions in that regard are numbered 6 through 10.

6. *"May the General Assembly of 1968 prior to the adoption of the proposed new Constitution on May 14 propose amendments to that document to be voted upon in November 1968?"*

7. *"If the ruling on Question No. 6 is that the General Assembly of 1968 may consider amendments to the proposed new Constitution, may it add a condition in the referendum section that the proposed amendment to the new Constitution will be negated and will not be placed on referendum in 1968 if the new Constitution is rejected on May 14?"*

8. *"If the General Assembly at its session in 1968 may submit amendments to the proposed new Constitution whether with or without conditions attached concerning submission to referendum in November 1968, would the rejection of the new Constitution on May 14 have the effect of cancelling the referendum and thereby negating the proposal?"*

9. *"Or, if this proposed amendment to the new Constitution goes to referendum in November 1968 after approval of the new Constitution on May 14, is the referendum conducted under the old Constitution or under the new Constitution?"*

10. *"Finally, if this proposed amendment to the new Constitution goes to referendum in November 1968 after the rejection of the new Constitution on May 14 and if it is approved by the voters, how will it be merged into the format of the old Constitution?"*

ANSWER—Our answer to your Question No. 6 is in the negative. Since we are of the opinion that the General Assembly of 1968 may not propose amendments to the proposed new Constitution, prior to its adoption no answers are required to Questions numbered 7, 8, 9 and 10.

Our reasons for stating that the General Assembly of 1968, at its regular session, may not propose amendments to the new Constitution prior to its ratification are as follows:

The Maryland General Assembly possesses all of the legislative powers and authority of the State. This legislative power covers every subject of legitimate legislation except as limited by constitutional provision. See *Maryland Committee v. Tawes,* 228 Md. 412, 439; *Board of Supervisors for Anne Arundel County v. Attorney General of Maryland,* 246 Md. 417-428; *Brawner v. Supervisors,* 141 Md. 586. *C.J.S. Constitutional Law.*

The Courts, however, have made a marked distinction between the legislative powers of the General Assembly and the rights of the General Assembly regarding constitutional amendments. On at least three separate occasions the Court of Appeals has emphasized the limited nature of legislative authority relating to amendments to the Constitution.

In *Brawner v. Curran,* 141 Md. 586, at 604, the Court said:

> "The people adopted the Constitution and the people alone can change it, and while it stands unchanged it is the supreme law binding and controlling this Court as well as every other department of the State's government and its people, *and when changed conditions make it desirable to amend its provisions, the amendment must be in accordance with and not in violation of its mandates".* (Emphasis supplied).

Similarly, in *Johnson v. Duke,* 180 Md. 434, at 442, the Court said:

> "It is the sacred duty of the Courts to preserve inviolate the integrity of the Constitution. *Hence, it would be a violation of their duty to treat the fundamental law as subject to modification except in conformance with constitutional methods".* (Emphasis supplied).

In *Hillman v. Stockett,* 183 Md. 641, the Court of Appeals discussed the question of proposed constitutional amendments at some length. The Court said at page 649:

> "We think it is a correct statement of the law that the provisions of the Constitution as to its own amendment are mandatory upon the Legislature, and that if they are not followed, a proposal not in conformity with them should not be submitted to the voters".

In *Hillman,* the Court also quoted, with approval, 16 C.J.S. Constitutional Law, Paragraph 7A:

> "The Constitutions of the several states respectively prescribe the method by which they may be amended or revised; *and a particular Constitution may be changed only by the method therein prescribed, and a failure to comply therewith renders an alleged amendment void.*" (Emphasis supplied).

See also "Cooley on Constitutional Limitations," 8th Edition, Volume I, pages 84 and 85, in connection with the amendment of Constitutions.

These cases, we believe, make it abundantly clear that the Legislature may propose amendments to the Constitution only in accordance with the terms of said Constitution. There is, of course, only one Constitution in force and effect in the State of Maryland today—the Constitution of 1867, which (together with the Federal Constitution) is now the supreme law of this State. That Constitution, by its very terms, limits the legislative authority regarding constitutional amendments where it states in Section 1 of Article XIV:

> "The General Assembly may propose amendments to *this Constitution*; provided that each amendment shall be embraced in a separate bill, embodying the article or section, as the same will stand when amended and passed by three-fifths of all of the members elected to each of the two Houses, by yeas and nays, to be entered on the Journals with the proposed amendment . . ." (Emphasis supplied).

We find this language to be exclusive and restrictive, and to authorize proposed amendments by the General Assembly only to *that* Constitution. We cannot find that this language or any other language in the Constitution provides general authority to the General Assembly to propose amendments to a Constitution which is not yet in effect and which may or may not some day be in effect.

Similarly, we find nothing in the proposed Constitution which would authorize amendments to that Constitution by any General Assembly except a General Assembly in existence at such time as that new Constitution might be in full force and effect.

Section 10.03 entitled "Constitutional Amendment" is the single authority in the new Constitution for amendments thereto. That section states in pertinent part:

> "An amendment to *this* Constitution may be proposed either by the affirmative vote of three-fifths of all of the members of each House of the General Assembly or by the affirmative vote of a majority of all of the members of a Constitutional Convention." (Emphasis supplied).

In view of the repeated holdings of the Court of Appeals of Maryland in *Brawner v. Curran, supra,* and *Johnson v. Duke, supra,* and *Hillman v. Stockett, supra, inter alia,* that a Constitution may be changed only by the methods therein prescribed we do not believe it likely that the Courts of Maryland would sustain amendments to a Constitution proposed by a General Assembly not acting under the document sought to be amended.

We further point out that even if there were no constitutional barriers existing to prevent amendments to the new Constitution by the present Assembly, an insoluble conflict exists between the amendment procedures of the existing and the proposed documents.

Article XIV of the Constitution of 1867 requires that "the bill or bills proposing amendment or amendments

shall be published by order of the Governor, in at least two newspapers, in each county, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for four weeks immediately preceding the next general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of this State for adoption or rejection."

Section 10.03 of the Constitution of 1968, relating to notice, simply states:

"Notice of the election shall be given as the General Assembly shall prescribe by law."

It is clear that the 1968 Regular Session of the General Assembly in proposing any amendments to the Constitutional law of this State can only do so under the Constitution now in effect. That Constitution, as noted above, has specific provisions as to the manner and times of publication of notices of the proposed amendments. In addition, it also provides that the amendment upon passage and approval by the voters shall be proclaimed by the Governor, following which it shall become effective.

Any amendment to the new Constitution obviously must comply with the provisions of that Constitution, both as to the manner of proposing the amendment and the procedures to be followed in its adoption. Since the present Legislature can only act under the present Constitution, it cannot provide for the notice of election to be given as set forth in Section 10.03, since that section will not be the Constitutional law of the State of Maryland unless and until it is adopted by the voters on May 14th. To hold otherwise would be a classic example of "putting the cart before the horse."

We would point out, however, that our view is limited to amendments proposed by the regular session of 1968. It would seem clear that if the new Constitution should be ratified on May 14, and thereby become effective on July 1, amendments to it may be proposed at any special or regu-

lar session of the General Assembly after July 1. In such event, the Assembly would be operating under the provisions of the new Constitution.

In addition to the ten questions set out in your letter, you subsequently asked us to advise you as to an additional question. We shall treat that question, which reads as follows, as No. 11:

11. *"May the General Assembly validly enact legislation, at the regular session of 1968, to be effective only if the new Constitution shall be ratified on May 14, or not ratified on that date, as set out in such legislation?"*

We believe that the answer to this question is in the affirmative, and that the decisions of the Court of Appeals of Maryland resolve any doubts concerning the same. In *Brawner v. Supervisors of Elections of Baltimore City,* 141 Md. 587, at 597, the Court, quoting from *Bartow v. Himrod,* N. Y., 4 Seld. 483, stated the rule in this regard:

> ". . . It is not denied that a valid statute may be passed, to take effect upon the happening of some future event certain or uncertain."

Such a statute, the Court said, is merely law *in presenti* to take effect *in futuro,* and is valid, as distinguished from those laws which are only to take effect if affirmatively voted upon at an election held for such purpose. The latter class of law is, under many decisions of the Court of Appeals of Maryland, unconstitutional. See *Board of Supervisors of Elections of Anne Arundel County v. The Attorney General of Maryland,* 246 Md. 417 at 431.

For your convenience we summarize our views as follows:

a). The General Assembly of Maryland at its 1968 regular session or at any special session held prior to such time as the new Constitution may be ratified, may validly propose amendments to the Constitution of 1867. If a new Constitution should take effect in this State before such proposed amendments to the Constitution of 1867 are placed on the ballot in November of 1968, those proposed amend-

ments become null and void, and need not be referred to the electorate.

b). The General Assembly of Maryland may not, either at its regular session of 1968 or at any special session prior to the effective date of a new Constitution, validly propose amendments to the said new Constitution. We are of the opinion, however, that if and when a new Constitution becomes effective in Maryland, the General Assembly at any special or other session subsequent thereto may propose amendments to said Constitution.

c). The General Assembly, at this or any session, may pass legislation to be effective contingent upon the adoption or rejection of the proposed Constitution at the May 14th election.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

GENERAL ASSEMBLY—CONSTITUTIONAL LAW: PROCEDURE TO BE FOLLOWED BY THE GENERAL ASSEMBLY IN ELECTING A GOVERNOR TO FILL A VACANCY IN THAT OFFICE.

November 29, 1968.

Honorable William S. James.

By letter of November 11, 1968, you have asked our opinion on the procedure to be followed by the General Assembly in electing a governor to fill the unexpired portion of the term of the Honorable Spiro T. Agnew, who has been honored by election to the Vice-Presidency of the United States.

Specifically, you have asked the following questions:

(1) Does the Maryland Constitution contemplate a joint meeting of House and the Senate in a single assembly or should each body act separately?

(2) Even though Article II, Section 6 establishes the basic requirement of a quorum in the body or bodies electing the Governor, does the victorious candidate need a majority vote of the entire membership or of members of a quorum present and voting? In any case, does a plurality standard apply?

(3) Can the election of Governor by the General Assembly be by secret ballot or must it be taken viva voce?

You have also asked for such other pertinent procedural information as might spring from our research on the above questions.

Article II of the Constitution of Maryland, entitled Executive Department, created the office of Governor. That article sets out the qualifications, powers and duties of the Chief Executive and various sections thereof are concerned with a vacancy in that office. At first glance, the sections of Article II which would appear to be pertinent to the questions you have posed, are Sections 6 and 7, which we set out in their entirety:

Section 6. *General Assembly to fill vacancy in office of Governor.*

"In case of the death, resignation, removal from the State, or other disqualification of the Governor, the General Assembly, if in session with a quorum present, or if not, at its next session with a quorum present, shall elect some other qualified person to be Governor for the residue of the term for which the said Governor had been elected."

Section 7. *Vacancy during recess of legislature; impeachment of Governor; vacancy not provided for in Constitution.*

"In case of any vacancy in the office of Governor, and until the General Assembly meets in session with a quorum present and elects a Governor as provided for in Section 6, the President of the Senate, at the time such vacancy occurred, shall discharge the duties of said office; and in case there be no President of the Senate or in the case of his refusal to serve, and in the case of his death, resignation, removal from the State, or other disqualification while discharging the duties of said office of Governor, then the duties of said office shall, in like manner and for the same interval, devolve upon the Speaker of the House of Delegates, at the time such vacancy occurred; and in case there be no Speaker of the House of Delegates or in the case of his refusal to serve, and in the case of his death, resignation, removal from the State, or other disqualification while discharging the duties of said office of Governor, then the duties of said office shall, in like manner and for the same interval, devolve upon the Comptroller of the State, at the time such vacancy occurred; and in case there be no Comptroller of the State, or in the case of his refusal to serve, and in the case of his death, resignation, removal from the State or other disqualification while discharging

> the duties of said office of Governor, then the duties of said office shall, in like manner and for the same interval devolve upon the Attorney General of the State, at the time such vacancy occurred. And the Legislature may provide by law, for the impeachment of the Governor; and in case of his conviction, or his inability, may declare what person shall perform the Executive duties; and for any vacancy in said office not herein provided for, provision may be made by law; and if such vacancy should occur without such provision being made, the Legislature shall be convened by the Secretary of State, for the purpose of filling said vacancy."

It should be noted at this point, that the captions now appearing for each of the various sections of each article of the Constitution of Maryland (Volume 9A, Annotated Code of Maryland, 1957 Ed.) were not written or created by the framers of the Constitution. They were evidently written by the annotator who assisted the publishers of the Code (The Michie Company, Law Publishers, Charlottesville, Va.) at the time of preparation of that Edition. Captions for the various sections do not appear in the original Constitution of 1867 as adopted by the Constitutional Convention of that year, nor do they appear in any of the previous Maryland Codes, prior to the 1957 Edition. At the time of its adoption by the Convention of 1867, Article II, with which we are primarily concerned, was simply captioned "Executive Department". It will be seen, hereinafter, why we believe the origin of the various captions is of significance.

A close and careful scrutiny of the provisions of Sections 6 and 7 of Article II reveals little about the procedures to be followed by the General Assembly in electing a governor. Stated simply, it is Section 6 which ordains that such a vacancy in the office of Governor shall be filled by the General Assembly, while Section 7 makes provision for the continuation of the discharge of the duties of that office

until such time as it is filled by the General Assembly. As we will discuss in further detail, Sections 6 and 7 are not now in the form of their adoption in 1867, having been amended by Chapter 743 of the Acts of 1959, which amendment was ratified on November 8, 1960.

Since Sections 6 and 7 do not, on their face, supply us with the answers to the questions you have propounded, we have turned to two other sources.

First, we have examined the Journals of Proceedings of the General Assembly of Maryland for each of the three occasions since 1850 when that body has elected a governor to fill a vacancy in that office. Secondly, we have carefully reviewed the proceedings of the Constitutional Conventions of 1850, 1864 and 1867 to determine if the proceedings or debates of those conventions revealed the intention of the framers of our Constitution with regard to the issue now at hand.

Our reliance on these two sources is in accord with the established practice of the Court of Appeals of this State. In *Norris v. Baltimore*, 172 Md. 667, 676 (1937), the Court said:

> "In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature".

See also *Trustees of Catholic Cathedral Church of Balto. v. Manning,* 72 Md. 116 (1890) and *Wyatt v. State Roads Comm.*, 175 Md. 258 (1938).

In interpreting constitutional provisions, the Court of Appeals has also frequently relied upon the discussions and debates of the delegates to conventions as most reliable contemporaneous sources.

In *Buckingham v. Davis,* 9 Md. 324, 328 (1856), the Court said:

> "In interpreting the Constitution the first thing to be got at is, what was the purpose of its framers? Where this has not been clearly expressed, we must look to the necessity and nature of the thing provided for, or against, as the case may be. With this guide we can experience but slight, if any difficulty, in ascertaining the meaning of the language used in the section quoted".

Thus, in *Johns Hopkins Univ. v. Williams,* 199 Md. 382 (1952), the Court, in interpreting the provisions of Section 34 of Article III of our present Constitution, turned to an examination of the Constitution of 1851, in which that section, in substance, first appeared. See also *Hitchcock v. State,* 213 Md. 273 (1957). See also *McMullen v. Shepherd,* 133 Md. 157 (1918), wherein the Court of Appeals, in construing a provision of the present Constitution, considered the debates of the Constitution Convention of 1864.

Turning first to the legislative history relating to elections of governors by the General Assembly, we find that on March 4, 1874, Governor William Pinkney Whyte resigned to accept a seat in the United States Senate. The General Assembly thereupon elected the Honorable James Black Groome for the unexpired term.

In 1885, Governor Robert M. McLane resigned his office to accept appointment as Minister to France. The Legislature elected the Honorable Henry Lloyd to fill that vacancy.

On January 2, 1947, Governor Herbert R. O'Conor resigned to accept the seat to which he had been elected in the United States Senate. On that same day the Legislature elected the Honorable William Preston Lane, Jr., then Governor-elect, to fill the unexpired term, which was only five days.

The Journal of Proceedings of the House of Delegates for each of these occasions reveals that both houses met in joint session to elect a governor. In 1947, only the name of Governor Lane was placed in nomination, and he was,

in effect, elected by acclamation, without a roll call vote. In 1874 and 1886, however, the vote taken was open and public. In each of these elections, only one ballot was taken and on that single ballot a governor was elected by an overwhelming majority. Since the vote on each of those three occasions exceeded a constitutional majority, no controversy arose as to whether a constitutional majority or a simple majority, or merely a plurality, was required to elect.

These journals, however, are of great significance, in our view, because they reveal the following particulars:

1. The houses met in "Joint Convention".

2. A roll call vote was taken on the two occasions when the election was contested.

3. The Journals for the election of 1874 and the election of 1886 both carried the notation:

> "The Speaker of the House of Delegates, as Chairman of the Joint Convention, announced, that in conformity with the provisions of the Constitution, Article II, sections 4 and 6, and by agreement between the two Houses, the Joint Convention would now proceed to elect, by a *viva voce* vote of each member of the General Assembly of Maryland present, a person to the office of Governor". (Section 4 emphasis supplied).

Section 4 of Article II, referred to in the journal entries above, states as follows:

> "If two or more persons shall have the highest and an equal number of votes for Governor, one of them shall be chosen Governor by the Senate and House of Delegates; and all questions in relation to the eligibility of Governor, and to the Returns of said election, and to the number and legality of votes therein given, shall be determined by the House of Delegates; and if the person, or persons, having the highest number of votes, be

> ineligible, the Governor shall be chosen by the Senate and House of Delegates. Every election of Governor by the General Assembly shall be determined by a joint majority of the Senate and House of Delegates; and the vote shall be taken *viva voce*. But if two or more persons shall have the highest and an equal number of votes, then, a second vote shall be taken, which shall be confined to the persons having an equal number; and if the votes should again be equal, then the election of Governor shall be determined by lot between those, who shall have the highest and an equal number on the first vote".

This section is now captioned, "How tie elections decided; questions relating to election determined by House of Delegates".

Earlier herein we noted that the captions appearing above each section of each article of the present Constitution were not the work product of any of the various constitutional conventions, but had been placed there by the annotator, at the time of the preparation of the 1957 edition of the Annotated Code.

These captions, we might note, are generally most accurately drawn, and are quite helpful in dealing with the Constitution. It is, however, because of the caption given Section 4 that that section has been presumed, in recent years, to be applicable only to tie elections, and not applicable to an election where the General Assembly is called upon to fill a vacancy in the office of Governor.

To determine whether the framers of the Constitution of 1867 did, in fact, intend the procedures of Section 4 to apply when the General Assembly must elect a governor to fill a vacancy in the office, as well as to a tie vote, we turn to a study of the debates and proceedings of the Convention.

The proceedings of the Convention of 1867[1] revealed that virtually no discussion was held on the floor of the conven-

tion pertaining to any of the sections of the Article on the Executive, Article II, which are pertinent to our discussion. These sections were adopted by the Convention in almost the exact form reported by the Committee Upon the Executive Department. Indeed, except for an attempt to delete the phrase "joint majority", as that phrase now appears in Section 4 of Article II, and to substitute therefor the phrase "concurrent majority", which motion failed of passage, no material discussion of the provisions of Sections 4 through 7 of Article II appears to have been had.

The reasons for this seeming lack of interest in the constitutional language relating to the most important elective office in this State are better understood when one remembers that the Convention of 1867 followed by only three years another Constitutional Convention, that of 1864, which had met and adopted the Constitution which was ratified by the voters in that year. The Constitution of 1864, replacing that adopted in 1851, was a wartime document, reflecting views strongly partisan to the Union side of the Civil War which was then raging, and it was considered by many to be punitive and vindictive.

Contemporary sources indicate that only those persons who were willing to take an oath of allegiance to the Union were permitted to vote for the office of Delegate to the Convention of 1864, or permitted to vote on the ratification of that Constitution. Article I, Section 4 of the Constitution of 1864 required a loyalty oath of all voters, and also forever denied the vote to all who had taken up arms against the Union, or who had given aid or comfort to the Confederacy, unless he later served in and was discharged, with honor, from the Union Army, or was granted restoration of his franchise by a vote of two-thirds of the members of the General Assembly. Among the many controversial features of this Constitution was the explicit command that no compensation be paid to the owners of slaves for such of those slaves who were freed by law.

An examination of the Constitution of 1864 discloses that little contained therein concerning filling a vacancy in the

office of Governor can be of interest on the questions now presented, since that Constitution provided for the office of Lieutenant Governor, and provided that the Lieutenant Governor should succeed to the office of Governor upon the death, resignation, or other disqualification of the person elected Chief Executive of the State.

In accepting without debate the recommendations of its Committee Upon the Executive, the Convention of 1867 appears to have been motivated by a desire to discard the major changes in the Executive Department instituted by the unpopular Constitution of 1864, and to return to the provisions on the Executive which had been the basic law of the State under the Constitution of 1851; for the recommendations of the Committee on the Executive at the 1867 Convention were almost exactly, word for word, the same as the Article on the Executive in the 1851 Constitution. Indeed, the only substantial difference between the Constitution of 1851 and that of 1867, insofar as the Article on the Executive is concerned, is that the latter Constitution eliminated that provision of the 1851 document which had required that for the purpose of electing a governor, the State should be divided into three districts, and the Governor elected from each of those districts in turn. (The same provision, it should be noted, was contained in the Constitution of 1864).

Our study of the debates and proceedings of the Constitutional Convention of 1850 has led us to the conclusion that the method of electing a governor set out in Section 4 of Article II is equally applicable to an election to fill a vacancy in the office, as well as to an election to break a tie in the popular vote.

Because of the importance of this conclusion, we believe it in order to summarize the history of the pertinent constitutional sections on the Executive, as revealed by "The Proceedings of the Maryland State Convention to Frame a New Constitution, Commenced at Annapolis November 4, 1850" (Riley and Davis, Printers, Annapolis, Maryland, 1850), and "Debates and Proceedings of the Maryland Re-

form Convention to Revise the State Constitution Published by Order of the Convention" (William M'Neir, Official Printer, Annapolis, Maryland, 1851).

On March 7, 1951, Delegate William Grason of Queen Anne's County (First popularly elected Governor of Maryland, 1839-1842), Chairman of the Committee on the Executive Department, delivered to the Convention the report of that committee which consisted of 23 sections. Since only the first eight sections have any possible bearing on the questions now before us, we set out those sections, in the form in which they were reported to the Convention for consideration (Debates, 1850, at 451) :

> "Section 1. The Executive power of the State shall be vested in a Governor, whose term of office shall commence on the first Monday of January next ensuing his election, and continue for three years, or until his successor shall have qualified by taking the oath herein prescribed.
>
> "Sec. 2. The persons qualified to vote for delegates to the General Assembly, shall meet on the first Wednesday of October, in the year eighteen hundred and fifty-three, and on the same day and month in every third year thereafter, at the places where they are entitled to vote for delegates, and elect a Governor; the election to be held in the same manner as the election of delegates, and the returns thereof, under seal, to be addressed to the Speaker of the House of Delegates, and enclosed and transmitted to the Secretary of State, by whom or by the Executive, they shall be delivered to the said Speaker at the commencement of the session of the Legislature next ensuing said election.
>
> "Sec. 3. And the Speaker of the House of Delegates shall then open the said returns in the presence of both houses, and the person having the highest number of votes, and being constitution-

ally eligible, shall be the Governor, and shall qualify in the manner herein prescribed, on the first Monday of January next ensuing his election, or as soon thereafter as may be practicable.

"Sec. 4. And if two or more persons shall have the highest and an equal number of votes, then one of them shall be chosen as Governor by the joint ballot of the Senate and House of Delegates; and all questions in relation to the legality and number of votes given in the election of Governor, and in relation to the returns of said elections, shall be determined by the House of Delegates.

"Sec. 5. The State shall be divided into three districts; the eight counties of the Eastern Shore to be the first; Baltimore, Harford, Carroll, Frederick, Washington and Allegany counties, the second; and St. Mary's, Charles, Calvert, Prince George's, Anne Arundel and Montgomery counties, and the city of Baltimore, the third; and the Governor elected from the second district in October last, shall continue in office during the term for which he was elected; his successor shall be chosen from the third district, and then a Governor shall be taken from each district in regular succession.

"Sec. 6. A person to be eligible to the office of Governor, must have attained the age of thirty years, and been for ten years a citizen of the United States, and must have been for seven years next preceding his election a resident of the State, and for two years a resident of the district from which he was elected.

"Sec. 7. In case of death or resignation of the Governor, or of his removal from the State, the General Assembly if in session, or if not, at their next session, shall by joint ballot elect some other qualified resident of the same district, to be the

Governor for the residue of the term for which said Governor had been elected.

"Sec. 8. And in case of any vacancy in the office of Governor during the recess of the Legislature, the President of the Senate shall discharge the duties of said office till a Governor is elected by the two Houses; and in case of the death or resignation of said President, or of his removal from the State, or of his refusal to serve, then the duties of said office shall, in like manner, and for the same interval, devolve upon the Speaker of the House of Delegates, and the Legislature may provide by law for the case of impeachment or inability of the Governor, and declare what person shall perform the executive duties during such impeachment or inability; and for any vacancy in said office, not herein provided for, provision may be made by law, and if such vacancy should occur without such provision being made, the Legislature shall be convened by the Secretary of State for the purpose of filling said vacancy."

There is no doubt that Section 4, in the form as reported by the Committee, above, then related only to an election by the General Assembly for the purpose of breaking a tie in the popular vote.

It should also be noted that the Committee Report provided in Section 7 (the antecedent section to our present Section 6) that in case of the death or resignation of the Governor, etc., the General Assembly, when in session, should *"by joint ballot"* elect some other qualified resident. Of equal interest is the fact that in the form presented to the Convention by the Committee, Section 8 (the antecedent section to the present Section 7) provided that during the continuance of the vacancy, the President of the Senate should discharge the duties of the office until a governor be *"elected by the two Houses"*.

Volume I of the Debates (pp. 451-506) disclosed that discussion on the Committee Report continued until Friday,

March 14, 1851. The debate on the eighth section, the last section now of interest to us, was concluded on Tuesday, March 11, 1851.

During the course of these floor proceedings, various amendments were offered and adopted, which materially altered Section 4 and the present Sections 6 and 7. Section 4 was adopted at this point in the Convention, in the following form:

> "And if two or more persons should have the highest and an equal number of votes, then one of them shall be chosen as Governor by the joint vote of the Senate and House of Delegates, the said vote to be taken *viva voce*. And all questions in relation to the legality and number of votes given in the election of Governor, his eligibility, and in relation to the returns of said election, shall be determined by the House of Delegates." (Vol. I, Debates of 1850, 458-459).

Section 7 (Section 6 of present Constitution) was amended to read as follows:

> In case of death or resignation of the Governor or his removal from the State, the General Assembly, if in session, or if not, at their next session, shall, by the joint vote, elect some other qualified resident of the same district, to be the Governor for the residue of the term for which said Governor had been elected. (Vol. I, Debates of 1850, 466).

Section 8 (Section 7 of present Constitution) was amended to read as follows:

> "And in case of any vacancy in the office of Governor during the recess of the Legislature, the President of the Senate shall discharge the duties of said office till a Governor is elected as hereinbefore provided; and in case of the death or resignation of said President, or of his removal from

> the State, or of his refusal to serve, then the duties of said office shall, in like manner, and for the same interval, devolve upon the Speaker of the House of Delegates and the Legislature may provide by law for the case of impeachment or inability of the Governor, and declare what person shall perform the executive duties during such impeachment or inability; and for any vacancy in said office, not herein provided for, provision may be made by law, and if such vacancy should occur without such provision being made, the Legislature shall be convened by the Secretary of State for the purpose of filling said vacancy." (Vol. I, Debates of 1850, 467).

The adoption of these sections on the floor, in the form set out above, was not the end of the matter; for it is obvious from a reading of the quoted provisions, as compared to those same provisions in the document ultimately adopted by the Convention, that some further material changes were made. The Debates and Proceedings of the Convention reveal that these latter changes were made by the Committee on Revision, of which Delegate Grason was also Chairman. This Committee was charged with the duty of refining the language adopted by the Convention on the floor, with eliminating redundancies, and with clarifying ambiguities which occurred by the separate enactment on the floor of the various sections of the Constitution.

The Committee on Revision reported its final recommendations on the Article on the Executive Department on Friday, May 9, 1851. Those amendments were adopted by the Convention on that date, without further debate. (Vol. II, Debates of 1850, 816).

The final form of Sections 4, 7, and 8 was as follows:

Section 4.

> "If two or more persons shall have the highest and an equal number of votes, one of them shall be chosen Governor by the Senate and House of

Delegates; and all questions in relation to the eligibility of Governor, and to the returns of said election, and to the number and legality of votes therein given, shall be determined by the House of Delegates. And if the person, or persons, having the highest number of votes be ineligible, the Governor shall be chosen by the Senate and House of Delegates. Every election of Governor, by the Legislature, shall be determined by a joint majority of the Senate and House of Delegates, and the vote shall be taken *viva voce*. But if two or more persons shall have the highest and an equal number of votes, then a second vote shall be taken, which shall be confined to the persons having an equal number; and if the votes should again be equal, then the election of Governor shall be determined by lot between those who shall have the highest and an equal number on the first vote." (Vol. I, Debates 1850, 6).

Section 7. (Now Section 6).

"In case of the death or resignation of the Governor, or of his removal from the State, the General Assembly, if in session, or if not, at their next session, shall elect some other qualified resident of the same district, to be the Governor for the residue of the term for which the said Governor had been elected." (Vol. I, Debates 1850, 7).

Section 8. (Now Section 7).

"In case of any vacancy in the office of Governor during the recess of the Legislature, the President of the Senate shall discharge the duties of said office till a Governor is elected as herein provided for; and in case of the death or resignation of said President, or of his removal from the State, or of his refusal to serve, then the duties of said office shall, in like manner, and for the same interval, devolve upon the Speaker of the House of

> Delegates, and the Legislature may provide by law for the case of impeachment or inability of the Governor, and declare what person shall perform the executive duties during such impeachment or inability; and for any vacancy in said office, not herein provided for, provision may be made by law, and if such vacancy should occur without such provision being made, the Legislature shall be convened by the Secretary of State for the purpose of filling said vacancy." (Vol. I, Debates 1850, 7).

A comparison of the finished product of the Convention of 1850 with those same sections as adopted on the floor before referral to the Committee on Revision, strongly persuades us of the intention of the framers of that Constitution to make the provisions of Section 4, concerning the election of a governor by a joint majority of the Senate and House with a vote taken *viva voce,* applicable not only to the situation dealt with in Section 4 wherein a tie in the popular vote must be broken, but to every election of a governor by the General Assembly. Indeed, Section 4 specifically states that "[e]very election of Governor by the General Assembly shall be determined by a joint majority of the Senate and House of Delegates; and the vote shall be taken *viva voce*". Supporting this conclusion is the fact that the Committee on Revision removed from Section 7 (the present Section 6) the phrase "by the joint vote", apparently because it considered it redundant.

The Committee on Revision left standing Section 8 in the form in which it had been amended and adopted on the floor of the Convention. By deleting the phrase "by the joint vote" from Section 7, and by spelling out in Section 4 that every election of a governor should be by joint majority, *viva voce,* the Convention must have intended that the election procedure set out in Section 4 be utilized in electing a governor to fill a vacancy in the office, as it is only to the procedure set out in Section 4 to which Section 8 could have referred when it provided that ". . . the Presi-

dent of the Senate shall discharge the duties of said office till a governor is elected as *herein provided* . . .". (Emphasis supplied).

Otherwise stated, the debates and proceedings of the Convention of 1850 persuade us, beyond a doubt, that the Constitutional Convention of that year fully intended that all of the sections of the Executive Article be read together, and that the requirements of Section 4 relating to the election of a governor were to be applicable in *every* instance where the Legislature was called upon to discharge that duty.

The Journal of Proceedings of the House of Delegates for the elections of Governor Groome in 1874 and Governor Lloyd in 1886 categorically state that the provisions of Sections 4 and 6 of Article II were the authority for those elections, and our study of the history of those sections leads us inescapably to the belief that the General Assembly in those years was correct in alluding to those sections as controlling. We believe that the General Assembly must follow those same procedures in the impending election. We have no doubt that the courts of this State, if called upon to decide the question, would concur in our view.

It, therefore, becomes incumbent upon us to examine the provisions of Section 4 to see if we can determine therefrom the exact meaning of the language contained therein and provide specific answers to the questions you have propounded.

We again set out the language of Section 4:

> "If two or more persons shall have the highest and an equal number of votes for Governor, one of them shall be chosen Governor by the Senate and House of Delegates; and all questions in relation to the eligibility of Governor, and to the Returns of said election, and to the number and legality of votes therein given, shall be determined by the House of Delegates; and if the person, or persons, having the highest number of votes, be ineligible,

> the Governor shall be chosen by the Senate and House of Delegates. Every election of Governor by the General Assembly shall be determined by a joint majority of the Senate and House of Delegates; and the vote shall be taken *viva voce*. But if two or more persons shall have the highest and an equal number of votes, then, a second vote shall be taken, which shall be confined to the persons having an equal number; and if the vote should again be equal, then the election of Governor shall be determined by lot between those, who shall have the highest and an equal number on the first vote.",

and turn our attention to each of your three questions.

* * * * * * * *

QUESTION

"(1) Does the Maryland Constitution contemplate a joint meeting of House and the Senate in a single assembly or should each body act separately?"

ANSWER

We believe that the Maryland Constitution contemplates a joint meeting of the House and Senate in a single assembly. The reference to a "joint majority" in Section 4 would strongly suggest this to be the case. Moreover, the Journal of Proceedings of the House of Delegates for the elections of 1874, 1866, and 1947 reveals that on each of those occasions the separate bodies met in "Joint Convention" in the House of Delegates Chamber. These journals reveal further, we might add, that on each of those occasions, the Speaker of the House of Delegates presided as "Chairman of the Joint Convention of the General Assembly".

Additionally, we note that in the 1959 amendments to Sections 6 and 7, which we will discuss in more detail in response to your next question, the provision was made in Section 6 that "*the* General Assembly, if in session with *a* quorum present, or if not, at *its* next session with *a* quorum present, shall elect . . .". (Emphasis supplied). This lan-

guage seems to contemplate, by the use of singular, rather than plural verbiage, that a joint session will be held. Section 7, similarly, refers to "*the* General Assembly" and "*a* quorum" in singular, rather than plural form. As is frequently said, we believe that had the framers of the Constitution intended that there be separate sessions of the two houses for electing a governor, they would have so stated. They did not so state, but, instead, specifically used the phrase "joint majority" and, as we have previously pointed out, the Convention of 1867 defeated an attempted amendment which would have substituted the phrase "concurrent majority" for the phrase "joint majority" in Section 4. (Proceedings, Maryland State Convention of 1867, at 175). The defeat of that amendment, we believe, clearly supports our view that a "joint meeting" of the bodies is required.

QUESTION

"(2) Even though Article II, Section 6 establishes the basic requirement of a quorum in the body or bodies electing the Governor, does the victorious candidate need a majority vote of the entire membership or of members of a quorum present and voting? In any case, does a plurality standard apply?"

ANSWER

Your reference to the quorum requirement of Section 6 of Article II requires us to discuss the 1959 amendment to that section, which amendment inserted the quorum requirement.

The Report of the Legislative Council for the year 1959 proposed an amendment to Sections 6 and 7 of Article II for the stated purpose of better establishing a line of succession to the office of Governor, in the event of a widespread disaster, such as an atomic attack.

The 1959 Session of the General Assembly declined to accept the recommendations of the Council, but did propose certain amendments to those sections, by virtue of Chapter 743 of the Acts of 1959. These amendments, which

were ratified on November 8, 1960, amended Section 6 of Article II of the Constitution of 1867 to its present form, requiring that a quorum be present when the General Assembly undertakes the election of a Governor. Chapter 743 also amended Section 7 of Article II, again adding the proviso that the General Assembly have a quorum present when it meets to elect a governor, and then providing for a line of succession to the governorship in the interval between the occurrence of the vacancy and the election of a successor by the Legislature. The amendment to Section 7 included reference to the election of a governor "as provided for in Section 6".

The 1959 amendments have been styled the "Catastrophe" amendments. We see nothing in these amendments which would alter what we believe to be the constitutional mandate that the election of a governor be carried out under the provisions of Section 4 of Article II, and accomplished by a joint majority of both houses, *viva voce*.

In our view, the insertion of the phrase "with a quorum present" in Sections 6 and 7 does not affect the question of whether a majority or plurality vote be required to elect a governor, (although, as hereafter noted, it does shed some light on whether a *constitutional* majority is required) but merely requires that at least a quorum of the General Assembly be in attendance when such an election is undertaken. The reference in Section 7 to the election of a governor "as provided for in Section 6" is a simple reiteration of the mandate of Section 6 that a vacancy in the office of Governor be filled by an election of the General Assembly with a quorum present, and does not contradict the finding that the procedures for such election are those outlined in Section 4. (The quorum of a legislative body, of course, is an absolute majority of the whole number elected, unless the authority by which the body was created fixes a quorum at a different number. See Webster's New International Dictionary of the English Language, 2d Ed., 1953. See also *Heiskell v. Baltimore,* 65 Md. 125 (1886); *Zeiler v. Central Railway Company,* 84 Md. 304 (1896);

Murdoch v. Strange, 99 Md. 89 (1904). Since there are 142 members entitled to be elected to the House of Delegates and 43 members entitled to be elected to the Senate, for a total of 185 offices, a quorum of a joint assemblage would be 93.)

We interpret the phrase "joint majority of the Senate and House of Delegates" (Section 4 of Article II) to require that no person shall be deemed to have been elected Governor, unless and until he shall have received at least one more than one-half of the votes cast by all of those present and voting, provided that a quorum of at least 93 persons be present.

It is almost universally held that where a law provides for election by "majority vote" the word majority refers to a majority of those actually voting, and not those entitled to vote.[2] The Maryland Court of Appeals has so held in *Murdoch v. Strange, supra.*

In *Murdoch,* the Mayor, Counsellor and Aldermen of Annapolis, constituting the City Council and numbering in all eight members, met to elect a Market Master. All eight were present at the election, but one member abstained from voting, with the result that one candidate received four votes and one three. Notwithstanding the fact that the candidate with four votes had not received a majority of those present and entitled to vote, the Court held he had been elected, as all that was necessary was that he receive a majority of the votes actually cast. The principle enunciated by the Court in *Murdoch* is, and has been since time immemorial, supported by the overwhelming weight of authority in this Country and in England. See *Oldknow v. Wainwright,* 2 Burr 1017, Decided in 1760. See also *United States v. Ballin,* 144 U. S. 1, and *Oswald v. Walker,* 65 Md. 146 (1887). To this same effect, see *Baxter v. Davis,* 133 P. 438; *Bell v. City of Ocala,* 56 So. 683; *Wood v. Gordon,* 52 S.E. 261; *Foster v. Mullanphy,* 4 S.W. 260; *Payne v. Petrie,* 419 S.W. 2d 761; *Opinion of the Justices,* 210 A. 2d 683; *Anderson v. Boise,* 427 P. 2d 574.

We believe that *Murdoch* is of particular significance in the present instance, since there the Court of Appeals held this rule to be applicable not only in an election wherein an uncertain number of voters might participate, but equally applicable in a situation, such as the one now at hand, where there is a fixed and certain number of persons entitled to vote. 99 Md. 112.

In answering your query, we have carefully considered the question of whether a *constitutional* majority is required for the election of a governor, and, as indicated above, we have concluded that such a majority is not required. We are not unmindful of the fact that Article III, Section 28 of the Constitution provides that no bill shall become a law and no resolution adopted, unless passed in each house by a majority of the whole number of members elected. Although some may question why a governor may be elected with less than a constitutional majority, while any bill or resolution must receive a constitutional majority to be passed, we point out that there are certain basic differences in the procedure for electing a governor, as opposed to the procedures for passing a bill or resolution. For example, as we have discussed in detail hereinabove, in electing a governor equal weight is given to the vote of every member of each house. Such is not the case when matters are considered separately by each of the houses, since one of the houses consists of 142 members, and the other of but 43. The framers of the Constitution may very well have decided that their early application of the principle of "one man, one vote" to be followed in electing a governor made it unnecessary to require a constitutional majority for such an election to be achieved.

Whatever the reason of the framers of the Constitution, however, it is obvious that when they intended that a constitutional majority be required, they clearly so stated, as they did in Section 28 of Article III. Since they did not make a similar requirement in the provisions of Section 4 of Article II, we must conclude that only a simple majority is required for the election of a governor.

The amendments of 1959, by which was added the requirement that a quorum be present before the General Assembly proceed to elect a governor, further sustain our view that a constitutional majority is not required to elect. If the 1959 General Assembly envisioned that a constitutional majority was required to elect a governor, their insertion of the "quorum" clause would have been completely meaningless, since a constitutional majority is, in fact, a quorum. The 1959 amendment, therefore, by requiring that a quorum be present, obviously contemplates an election by less than a constitutional majority.

We find no support whatever for the proposition that a governor may be elected by less than a simple majority of those present and actually voting. Section 4 requires a "joint majority", and that very phrase defeats the proposition that an individual who might receive more votes than any other candidate, but less than a majority of those actually voting, is entitled to the office of governor. The only instance, in our opinion, wherein a governor may be elected by the Legislature with less than a majority of the votes cast is dealt with specifically in the last sentence of Section 4, which provides that when a tie vote results on two consecutive ballots, then the Governor shall be chosen by lot from among those who are tied.

QUESTION

"(3) Can the election of Governor by the General Assembly be by secret ballot or must it be taken *viva voce*?"

ANSWER

We believe that our opinion that Section 4 is controlling answers your third question, without need for an extensive discussion. That section requires, in specific terms, that the vote be taken *viva voce*. We find nothing that would support the proposition that such a ballot may be taken secretly. We again refer you to the Journal of Proceedings of the House of Delegates of 1874 and 1886. In each of those instances the Journal reveals the call of the individual members of the Senate and House, and the record of the

name of the candidate for whom each such legislator cast his vote. Obviously, there being but one name placed in nomination in the legislative election of a governor in 1947, no roll call was necessary, and no *viva voce* vote required.

SUMMARY

We have dealt at great length with the questions that you have propounded, because of their unusual importance. The Constitution of Maryland gives to the Chief Executive grave and great powers, and it is our view that any question surrounding the election of a governor should be thoroughly examined and answered in detail. By action of the Governor, together with the Board of Public Works and the General Assembly, hundreds of millions of dollars of public funds are expended annually. Aside from fiscal affairs, the actions of our Chief Executive work in many ways to shape the lives of every citizen of this State. Indeed, the Constitution of Maryland gives to the Governor the power of life and death, as he, and he alone, can commute the sentence of an individual convicted of a capital crime and sentenced to be executed.

We hope our answers to your inquiries provide you with some assistance as you and your fellow members of the Senate and House of Delegates undertake this assignment of the utmost importance to our citizens. For your convenience, we will now summarize our views in brief responses to your questions.

First:—We believe that the House and Senate are required to meet together in a single assembly to elect a governor. We think that this was clearly the intent of the framers of the Constitution of 1851, and the authors of the Constitution of 1867. We also believe that this was the view of the 1959 General Assembly in adopting the amendments to Sections 6 and 7 of Article II in that year. Further, we find that a single assembly was convened on each of the three previous occasions when the General Assembly met to fill a vacancy in the office of Governor.

Second:—We believe that a quorum of 93 members must

be present before the General Assembly can conduct the election of a governor. Once the presence of a quorum is established, it is our opinion that a governor must be elected by a majority of all of the votes cast on the question, and not by a mere plurality of the votes cast. We find no authority for the proposition that a constitutional majority is required for such election.

Third:—We believe that the mandate of Section 4 of Article II of the Constitution is clear and unambiguous in requiring that the vote be taken *viva voce*, and that a secret ballot by the General Assembly is not permitted in electing a governor.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

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[1] Proceedings of the State Convention of Maryland to Frame a New Constitution (George Colton, Printer, Annapolis 1867).

[2] It might be of interest to note that on December 6, 1962, while City Solicitor of Baltimore City, the present Attorney General rendered an opinion to the Hon. George W. Arthur, City Councilman, pertaining to the method of electing a president of the Council, and filling a vacancy in that body. It was the opinion of the City Solicitor at that time that the Baltimore City Charter required that a quorum be present for such election, and that a majority of those voting could elect, even though that majority be less than a constitutional majority.

GENERAL ASSEMBLY—CONSTITUTIONAL LAW—MANNER OF COMPUTATION OF QUORUM OF JOINT SESSION—POWER OF MEMBERS OF ONE HOUSE TO PROCEED WITH JOINT SESSION IF THE MEMBERS OR MOST OF THE MEMBERS OF OTHER HOUSE DO NOT ATTEND.

December 27, 1968.

Dr. Carl N. Everstine, Director.

You have asked our opinion as to two questions arising in connection with the impending election of a Governor by a joint session of the General Assembly.

The first question which you present relates to the manner of computation of a quorum of a joint session. You inquire as to whether a quorum consists of a simple majority of the total of 185 members of the joint session or whether the total is determined by adding the number required for a quorum in the Senate (22) to a quorum of the House of Delegates (72). In the first event, the required quorum would be 93 members; in the second case the required number of members to make up a quorum would be 94. We are of the opinion that the presence of only 93 members is sufficient to constitute a quorum of a joint session and that a quorum of the membership of the separate houses need not be present.

In reaching this conclusion we have given careful consideration to the character of a joint session of the General Assembly and to the available precedents in other jurisdictions.

As we pointed out in our opinion to the Honorable William S. James, dated November 29, 1968 (p. 16), the Maryland Constitution provides for the election of a Governor by "a joint meeting of the House and Senate in a single assembly". The Constitutional Convention of 1867 rejected an attempted amendment to the applicable provisions drawn from the Constitution of 1851 which would have substituted the phrase "concurrent majority" for the phrase

"joint majority" (Proceedings, Maryland State Convention of 1867, at 175). The framers of the 1951 Constitution refrained from following the example of the 1776 Constitution which provided for the choice of a Governor "by the joint ballot of both houses, to be taken in each house respectively, deposited in a conference room, the boxes to be examined by a joint committee of both Houses, and the numbers severally reported . . ." (Constitution of 1776, Section 25). Rather, we find the 1851 Constitution to provide for the election of a Governor by an assembly consisting of members of both houses. It is for this reason that we concluded in our opinion of November 29, 1968, that "no person shall be deemed to have been elected Governor, unless and until he shall have received at least one more than one-half of the votes cast by all of those present and voting, *providing that a quorum of at least 93 persons* be present". We adhere to that opinion.

The characteristics of a joint meeting of a legislature have been discussed in a number of opinions in other jurisdictions. All of these opinions recognize that a joint convention of a General Assembly of the character convened on three previous occasions in this State to choose a Governor, and periodically convened in this State to choose a State Treasurer pursuant to the provisions of Article VI, Section 1 of the Constitution of Maryland, is in substance an electoral college, having a character, once convened, differing from a simultaneous session of the two separate houses of a legislature.

Thus, in the earliest case that we have found dealing with the attributes of joint sessions, it was observed by the Supreme Court of Kansas in *Prouty v. Stover*, 11 Kansas 252 (1874) that "The joint convention is a body as different, and with as distinct powers and functions from those of the two separate houses, as a partnership is from the individuals composing it . . . the act of voting is not a legislative act. Giving the election of printer to the Legislature in joint convention, simply creates an electoral college composed of the members of the two houses. The

powers of the college thus created can be no greater than if the college had been composed of the probate judges of the several counties convened for that purpose". 11 Kansas at 257-258. The author of the opinion, Mr. Justice Brewer (as he later became) went on to ask the rhetorical question "Shall it be said that limitations placed upon the action of the several houses, when performing their appropriate legislative functions, or certain limited judicial duties, apply either directly or by implication to the powers of an electoral college composed of the members of those houses in question." This question Mr. Justice Brewer answered in the negative. The *Prouty* case held that a candidate receiving the votes of the majority of a quorum, which was a majority sufficient under the rules of both houses, was not properly elected, since a valid statute regulating the proceedings of joint assemblies required election by a majority of those eligible to sit.

In the later case of *Snow v. Hudson,* 56 Kan. 378, 43 Pac. 260 (1896), a majority of the Kansas Supreme Court held that a later Kansas statute of 1879, which required the concurrence of a majority of the members elected to each house in an election by a joint convention, was invalid in light of the provisions of the Kansas Constitution providing for "elect[ion] by the legislature in joint session". In holding the Act providing for concurrence of a majority of members of both houses invalid, the Court majority pertinently observed:

> ". . . The term 'joint session,' in our view, has a well-recognized meaning, and implies the meeting together and commingling of the two houses, which, when so met and commingled, act as one body. Each member of that body, when it has been once properly and lawfully convened, has equal rights, and his vote has equal weight with that of any other member; and it is beyond the power of the legislature to say that in a session, which the constitution says shall be joint, the vote of a senator shall have greater weight than the vote of

a member of the house. The framers of the constitutional provision, and the people who voted for its adoption, are presumed, not only to have understood the meaning of the words they selected, but also the customs of joint conventions which meet in all the states for the election of United States senators, and in many of them for other purposes. Our understanding of the very purpose of making a session joint is to remove the check which each house holds on the other, and to permit the two houses combined to vote and act as a single body. If the act of 1879 is valid, 21 senators may defeat the election of a state printer, although 125 representatives and 19 senators vote for the same person. No duty would rest on the senators to yield because their right to vote for the person of their choice would be equal to that of the other members.

* * *

There is no force in the suggestion that 21 senators, by refusing to enter a joint convention, can prevent the election of a state printer, just as effectually as by refusing to vote for any particular person when the joint convention has been formed. The law makes it the clear duty of the senate and of the senators, under their oaths of office, to attend a joint convention, and it is to be presumed that they will do so: but, when voting in that joint session, no duty rests on them to vote for any one other than the person of their own selection. Officials do sometimes fail to perform the duties the law imposes on them, but unless we can safely presume that they will perform their duties, the very idea of government must be abandoned. It is unnecessary to consider whether the attendance of the absent senators could have been compelled, under the circumstances of this case, because the facts present no such question."

In the leading case of *Richardson v. Young*, 122 Tenn. 471, 125 S.W. 664 (1910), the existing authorities bearing on election by a joint convention were exhaustively reviewed. In that case the Court rejected the claim that a quorum of each house (a quorum being defined by Article 3, Section 11 of the then effective Tennessee Constitution as two-thirds of the members of each house) was required in order for a joint convention to hold an election. The court, in discussing the characteristics of joint conventions, observed that:

> "These conventions are deliberative bodies, and, their organization and proceedings not being regulated by any statute, it would seem, like all other such bodies, they would have the power to elect their own officers, and adopt their own rules and be governed by established parliamentary usages and laws, one of which is that a majority of the members constitute a quorum to do business, and a majority of that majority controls and has the power to do the work of the whole. *Lawrence v. Ingersoll*, 88 Tenn. 62, 12 S.W. 422, 6 L.R.A. 308, 17 Am. St. Rep. 870.
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> They are not a part of the legislative department, and have no legislative powers. Legislation can only be done while the two houses are acting separately in their respective chambers. Their sole power is the political function of electing officers, and then only when that power is expressly delegated to their members. They are merely electoral colleges, composed of the members of the two houses, and have no greater power than if they were composed of judges, or other officers, to whom the power of election had been delegated.
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> Joint conventions are not composed of the Senate and the House of Representatives, but of the members of the General Assembly, without regard to the house to which they were elected. The Sen-

> ate, while acting as a separate body, although its members number only one-third of the House, has equal power with the latter, and can reject any measure passed or proposed by it. Thus each Senator exercises in all legislation the power of three Representatives; but this power is lost in a joint convention. There they meet the members of the House upon an equality, as members of the convention; all having the same authority and only one vote. They are not governed by the rules of the house to which they belong, but by those of the convention.
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> Could it have been contemplated that a minority of the Senate, after a joint convention had been agreed upon by both houses acting separately, with constitutional quorums, should have the power to block the action of the joint convention, and defeat the election of constitutional officers, merely by absenting themselves from the convention? It is difficult to believe that the framers of the Constitution intended that such minority should have this power to control, not only the majority of that house, but also the entire membership of the other house in that way."

The court, in *Richardson v. Young,* went on to observe, after discussing the opinion of one of the three Kansas judges in *Snow v. Hudson, supra*: "While the opinion of Mr. Justice Allen is the only authority cited by Complainants to sustain their contention, there are a number holding that where an election is committed jointly to two separate bodies, a quorum of both is not necessary to make an election valid." The court cited for this proposition the cases of *Tillman v. Otter,* 93 Ky. 600, 20 S.W. 1036 (1893); *Whiteside v. People,* 26 Wend. (N.Y.) 634 ( ); *Beck v. Hanscomb,* 29 N.H. 213 (1854); *Kimball v. Marshall,* 44 N.H. 465 (1863) and a determination by the United States Senate in a case involving a disputed election of a United

States Senator by a joint session of the Florida legislature, prior to enactment of a federal constitutional amendment providing for direct election of senators.[1]

The most recent case we have found dealing with the question here at issue is *Wilson v. Atwood,* 270 Mich. 217, 258 N.W. 773 (1935). In that case the court observed "the number of members elected to the House of Representatives in 1933 was 100; to the Senate, 32. The total combined membership of the two houses was, therefore, 132 and it was necessary that a majority of that number, or 67, be present in order to constitute a quorum for a 'joint convention'." (258 N.W. 774).

It is thus clear that the nearly unanimous weight of authority supports the conclusion that a quorum of both houses need not be present at a meeting of the joint convention and that the presence of a quorum of the combined membership of the joint convention is sufficient to validate its actions.

The second question which you have posed relates to "the power of the members of one house to proceed with the joint session if the members or most of the members of the other house do not attend". The authorities are clear that when a meeting of a joint session has been called pursuant to concurrent resolution, the attendance of a majority of members of both houses is not required. The cases which we have already reviewed are clear on this point. We have noted that the *Richardson* case held that attendance of a quorum of both houses was not necessary. The *Wilson* case further pertinently noted that "without [a quorum] the convention could not transact business except to adjourn from time to time and take action to force the attendance of absent members. Compare *Richardson v. Young,* 125 S.W. at 681. In the *Snow* case, the Kansas judges expressing an opinion on the point were evenly divided.

It is, we think, clear that once a joint convention has been called by concurrent resolution of the two houses, the presence of a majority of the members of both houses is

not necessary to constitute a quorum of the general assembly so long as a majority of the general assembly are present.

Under the general principles of parliament law and the majority of precedents we have considered, it is clear that the persons reporting to a joint session called by a concurrent resolution have the power to compel the attendance of the absent members, even if those in attendance are less than a majority of the joint session.

The questions you have presented to us do not require us to consider the situation which would arise if either house failed to adopt a concurrent resolution setting the time and place of a joint session, or otherwise failed to agree to such a joint session. It is by such agreement that joint sessions of the General Assembly have been held on three previous occasions to elect a governor. It is also by such agreement that the Legislature quadrennially meets in joint session to elect a State Treasurer. The practice of conducting a joint session by agreement seems to have been established, however, by custom and usage alone and is not founded upon constitutional or statutory law.

We cannot say with certainty what actions could or would be taken by the courts of this State if one or the other body should refuse to meet for the purpose of electing a governor. In some jurisdictions, in cases involving elections by joint sessions of bicameral municipal bodies, the courts have held that a refusal of one body to participate in the election by failure to adopt a concurrent resolution calling a joint meeting was not effective to prevent a valid election by a majority of the combined membership. In *Tillman v. Otter*, 93 Ky. 600, 20 S.W. 1036 (1893), it was observed with respect to the situation arising where a body of aldermen rejected a concurrent resolution providing for a joint election with a city council, that:

> ". . . Those opposing the election were each and all violating a plain duty, as they must have known that an adjournment until November, if the mayor

had the power to make it, was taking from the representatives of the people of the city the right to select those who were to be the custodians of large sums of money, and confide it to those who were authorized to make the selection only on the contingency of the members of the city legislature failing to do that which the law required them to do, and in regard to which there could be no mistake. The board of councilmen met the next day, (the 25th of October,) and six of the aldermen with them, and, eighteen councilmen and six aldermen voting for the plaintiff, he was elected commissioner, there being more than two-thirds of the general council voting for him. This court is now asked to declare that election invalid because a majority of the members of the board of aldermen, with its president in the lead, had refused to discharge their duty, and purposely, as their own exhibits filed show, adjourned, or attempted to adjourn, to a period with a view of preventing an election by the general council, and in utter disregard of both public and private interests. They were, however, still in session, with six of the members ready to act with the other board.

* * *

It is not denied that on the 25th of October, 1889, the plaintiff received 18 votes from one body, and 6 from the other, making 24 votes in all; and to hold that the plaintiff was not elected, under the circumstances, because of the violation of official duty by the majority of the board of aldermen, would be recognizing a rule that no court should be willing to adopt."

In *State Ex Rel Shannanhouse v. Withers,* 121 N.C. 376, 28 S.E. 522, it was similarly observed that:

". . . The contemplated meeting is one in which all the individuals of each board are blended, without order, in one joint body, and nothing is de-

> pendent upon the concurrent action of each board. The board of commissioners is not even authorized by the statute to participate in the organization of the meeting, for its presiding officer is fixed under the terms of the statute. The board of commissioners had a sufficient notice of the meeting sent to them by the mayor, apprising them of the meeting provided for under the statute, and of the place where the meetings had been usually held for years. The notice contained the further statement that, if the usual place of meeting was not agreeable to the commissioners, the commissioners might indicate the place. The reasons assigned by the commissioners for their refusal to comply with the law were no reasons. By their conduct they intended a deliberate refusal on their part to comply with the law; a law as clear as light; a law that admitted of no two constructions, and which was enacted for the purpose of having carried out one of the fundamental ideas of our system of government,—the right of the people to choose their own officers at stated periods, and providing a means against perpetuities in office. Can it be seriously thought that our laws would permit this board of commissioners, by its willful refusal to attend this meeting after having received proper notice, to thwart this act of legislation, and thereby enable the present incumbent to hold over; thereby creating confusion in public affairs, and shocking the common sense of justice of our people?"

See *Davis v. Claus*, 125 Ky. 4, 100 S.W. 263 (1907); Annotation, 43 A.L.R. 2d 699, 727 (1955).

On the other hand, there is language in several cases from other jurisdictions strongly indicating that consent of both bodies must be obtained before a joint session of a legislative assembly may validly be held. Cf. *Richardson v. Young, supra,* 125 S.W. at 675-76; *Wilson v. Atwood, supra,* 258 N.W. at 776.

For several reasons, we do not find ourselves unduly concerned by the prospect of the two bodies of the General Assembly failing to agree to meet in joint session to elect a Governor. First, we are aware that the General Assembly will meet at Noon on January 7, 1969, in joint session, to hear an address by the Governor of Maryland in which address he will announce his resignation. It is probable, we believe, that the members of the Assembly will remain in joint session on that occasion to begin the selection of a new Governor.

Secondly, even if the election of a Governor is not begun at that session, we are fully persuaded that the General Assembly will, by agreement of both houses, shortly thereafter, meet for that purpose. The language of Article II, Section 6 of the Constitution relating to the filling of vacancies by the General Assembly is cast in *mandatory terms*, and the members of the General Assembly are under a sworn duty imposed by Article 1, Section 6 of the Constitution of Maryland to support the Constitution and laws of this State. Whether or not this duty is judicially enforceable, we have no doubt that the members of the General Assembly will discharge their sworn duty in this instance as they have done on all similar occasions in the history of this State.

FRANCIS B. BURCH, *Attorney General.*

ROBERT F. SWEENEY, *Deputy Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

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[1] In Maryland pursuant to State statute, see Code 1888, Article 33, Section 115, the indirect election of United States Senators was accomplished by concurrent majorities in separate sessions, the statute providing for election by "joint ballot of both branches of the legislature" and requiring "a majority of votes of all the attending members in both branches of the legislature."

GOVERNOR

MALE CITIZENS OF THIS STATE WHO ARE ALSO MEMBERS OF THE UNITED STATES ARMY RESERVES NOT ON ACTIVE DUTY ARE SUBJECT TO CALL-UP AS INDIVIDUAL MEMBERS OF THE UNORGANIZED MILITIA OF THE STATE TO AID THE NATIONAL GUARD IN THE EVENT OF THE EMERGENCY CONDITIONS SPECIFIED IN SECTION 8 OF ARTICLE 65 OF THE ANNOTATED CODE OF MARYLAND.

June 3, 1968.

Honorable Spiro T. Agnew.

In your letter dated May 13, 1968, to General Gelston, you have asked that I ascertain the legality of a call-up for State militia duty of individual members of the United States Army Reserve, who are citizens of the State, but not on active federal duty. General Gelston, in his letter to you of April 22, 1968, proposed the possible ordering into State service of such trained army reservists on an individual rather than on a unit basis, with the suggestion that such personnel could then be formed into units to augment the regular National Guard troops. It is my opinion that there exists no basic legal prohibition against such a call-up subject to the conditions noted below.

Section 8 of Article 65 of the Annotated Code of Maryland (1968 Replacement Volume) empowers the Governor to order into service in the event of "insurrection, invasion, tumult, riot, breach of peace or imminent danger thereof, or to enforce the laws of this State any part of the militia that he may deem proper". Section 1 of Article 65 states that the State militia shall consist of all able-bodied male citizens of the State as well as all able-bodied males of foreign citizenry who have declared their intention to become citizens of the State, and who, in both instances, are residents of the State. Section 5 of Article 65 divides the State militia into two classes, the organized militia and unorganized militia. Male United States Army Reservists,

not on active duty, would fall into the unorganized militia and be subject to call-up for riot duty by the Governor unless exempted under Section 1 of Article 65.

Section 1 of Article 65 first provides in general that all persons exempted by state or federal law shall be excluded from membership in the State militia. The section then goes on to exempt specifically certain classes of individuals who are either performing services considered essential to the State, such as the members of fire or police departments, judges and clerks of court, or doctors, and certain individuals, such as idiots, lunatics, or confirmed drunkards who, because of their habitual behavior or handicapped condition, would be unfit for military service. Such specifically exempted classes of individuals, however, are subject to militia duty "in case of war, insurrection, invasion or imminent danger thereof".

In my opinion no provision of state law exempts as a class members of the United States Army Reserve not on federal active duty from service in the State militia. I have reviewed the pertinent provisions of Title 10 of the United States Code and find nothing there that appears to exempt Army Reservists not on active duty from a call-up for State militia service. In my opinion, therefore, all able-bodied male Army Reservists who reside in Maryland and who are not members of the classes of specifically exempted individuals set forth in Section 1 of Article 65, the pertinent provisions of which are quoted below,* would be subject to call-up for State militia service.

No United States Army Reservist who might be called up for Guard duty, however, could be directed to bring with him or use any federally issued equipment or supplies. In this sense, therefore, the call-up would have to be on an individual, rather than a unit basis although clearly all members of any Army Reserve unit could be ordered into duty unless otherwise exempted as aforesaid. Finally, it should be pointed out that any such Army Reservists ordered out for militia duty would always be subject to being activated by federal authorities and in the event of

such activation would no longer be under the authority of the Maryland National Guard.

FRANCIS B. BURCH, *Attorney General.*

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* ". . . the members of any regularly organized fire or police department in any city, village or town; . . . judges and clerks of courts of record, registers of wills and deeds, sheriffs, ministers of the Gospel, members of religious communities, ecclesiastical students in the various seminaries and schools of divinity, practicing physicians, superintendents, officers and assistants of hospitals, prisons and jails; all persons actually employed as teachers in any established school, college or university; lighthouse keepers, conductors and engineers of railways, seamen actually employed as such; . . . idiots, lunatics, paupers, vagabonds, confirmed drunkards, persons addicted to the use of narcotic drugs, and persons convicted of infamous crimes; . . ."

GOVERNOR—SECTION 109 OF TITLE 32 OF THE UNITED STATES CODE DOES NOT PRECLUDE A CALL-UP OF INDIVIDUAL UNITED STATES ARMY RESERVISTS NOT ON ACTIVE DUTY AS MEMBERS OF THE UNORGANIZED MILITIA OF THE STATE TO AID THE NATIONAL GUARD IN THE EVENT OF THE EMERGENCY CONDITIONS SPECIFIED IN SECTION 8 OF ARTICLE 65 OF THE ANNOTATED CODE OF MARYLAND.

June 28, 1968.

Honorable Spiro T. Agnew.

On June 3, 1968, I rendered an opinion that resident citizens of Maryland, who are members of the United States Army Reserve but not on active federal duty, would be subject to a call-up for emergency state militia duty under the provisions of Section 8 of Article 65 of the Annotated Code of Maryland (1968 Replacement Volume). I stated in my letter that I had reviewed the pertinent provisions of Title 10 of the United States Code and found no provision there that would exempt such Reservists from militia duty under the provisions of Section 1 of Article 65. It has recently been suggested to me that Section 109 of Title 32 of the United States Code contains language that may bear on the question of Reservist exemption under federal law from state militia duty. I have closely reviewed the provisions of Section 109 of Title 32 and am still of the opinion that nonactive duty Maryland Reservists are not, as individuals, exempt from the unorganized militia of the State and are, therefore, subject to call-up for emergency duty to augment the forces of the National Guard under the provisions of Section 8 of Article 65.

Section 109 (a) of Title 32 provides that in time of peace a state may maintain no troops other than its National Guard and "defense forces" authorized under subsection (c) of the same section. Section 109 (c) authorizes a state to provide by law for the maintenance and organization of a "defense force" to be used within the jurisdiction con-

cerned as its chief executive considers necessary. This subsection further provides that such defense force "may not be called, ordered or drafted into the armed forces". Subsection (d) of Section 109 provides that a member of such a defense force shall neither be exempt from service in the armed forces of the United States nor be entitled to pay, allowances, or other benefits paid for from United States funds because of such membership. The subsection most directly relevant to the question at hand is Section 109 (e) of Title 32 which provides as follows:

> "A person may not become a member of a defense force established under subsection (c) if he is a member of a reserve component of the armed forces."

The question posed is whether Congress intended by Section 109 (e) to prevent a call-up of nonactive duty Reservists to aid the National Guard of this state in the event of the emergency conditions specified in Section 8 of Article 65 of the Maryland Code. It is my opinion that no such prohibition was intended by the language of this section but rather that Section 109 (e) was intended to prevent a nonactive duty Reservist from volunteering for that component of the organized militia of this state, authorized by Section 62 through Section 77 of Article 65 of the Code and therein referred to as the "Maryland State Guard". It is my view that the term "defense force" used in Section 109 of Title 32 was meant to designate the aforesaid "Maryland State Guard". I reach this conclusion both from the legislative history of Section 109 and from the close parallels between the organizational features of the "Maryland State Guard" and those ascribed to "defense forces" in Section 109 of Title 32.

Section 109 originally came into the law as Section 61 of the National Defense Act of 1916. In its original version it merely authorized the states to maintain National Guard units within their respective borders in time of peace. In an amendment to the aforesaid Section 61 by the Act of October 21, 1940, the states were permitted to organize and

maintain additional military units which were not a part of the National Guard. The 1940 amendment also provided that these additional military forces could not be called up or ordered into the military service of the United States although no person by reason of his membership in such a unit was to be exempted from military service under federal law. Senate Report No. 2138 of the Committee on Military Affairs makes it clear that the purpose of the amendment was to permit the states to maintain home guard organizations for local protection purposes during a period when large numbers of the National Guard units of the states had been called into federal service. This legislative history is highly persuasive in indicating that the term "defense force" which appeared in later codifications of Section 109 of Title 32 was intended to designate state home guard organizations, formed to protect the states in the event of the mobilization of the National Guard by the United States.

Statutory authority for the creation of a Maryland State Guard, contained in Sections 62 through 77 of Article 65 of the Code, first came into the law in Chapter 33 of the Laws of 1941 shortly after the amendment of the relevant federal provisions to authorize the creation of home defense forces. Under Section 62 of Article 65 the Governor is given the power to organize and maintain a volunteer organization to be known as the "Maryland State Guard" ". . . [W]henever any part of the National Guard of this state is in active federal service . . ." Section 70 of Article 65 provides that:

> "Nothing in this subtitle shall be construed as authorizing such forces, or any part thereof to be called, ordered or in any manner drafted, as such, into the military service of the United States, but no person shall by reason of his enlistment or commission in any such forces be exempted from military service under any law of the United States."

It seems apparent that the term "defense force" as utilized by Congress in Section 109 of Title 32 would in the Maryland context refer to the Maryland State Guard. The Maryland Legislature quite clearly created the State Guard to

serve in the event of federalization of the National Guard, and it is characterized in the Maryland statute as not being subject to call-up for federal duty (although individual members thereof are not so exempted) just as is the "defense force" permitted to be organized in a state under Section 109 of Title 32.

In my opinion, therefore, Section 109 (e) would clearly preclude a nonactive duty Reservist from volunteering as a member of the Maryland State Guard if, in fact, such an organization existed. The very language of Section 109 (e) to the effect that "a person may not become a member of a defense force . . . if he is a member of a Reserve component . . ." seems to indicate an intent of precluding such voluntary action on the part of a Reservist. To reiterate, however, I do not believe that this language is intended to prevent a mandatory call-up of nonactive duty Reservists, in their individual capacities as citizens of this state, to aid the organized militia under the emergency conditions specified in Section 8 of Article 65.

Furthermore, as I stated in my letter to you of June 3, 1968, Reservists mobilized for temporary state militia duty would always be subject to activation by federal authorities, either in their capacity as members of the Reserves or as members of the unorganized militia of the United States under Section 311 of Title 10 of the United States Code. In the event such Reservists were summonsed by the proper federal authorities, it would be necessary to release them immediately from state militia duty.

My opinion is strengthened by an opinion, dated May 18, 1964, rendered by the Chief, General Law Branch of the Military Affairs Division of the Judge Advocate General's office in the Department of the Army, to the Judge Advocate General. It was therein opined that under the language of Sections 331, 332, and 333 of Title 10 of the United States Code wherein the President is authorized to call into federal service "the militia of the other States" (Section 331), "the militia of any State" (Section 332), or "the militia" (Section 333) to aid in suppressing a state insurrection or to enforce

the laws of the United States that low priority individual members of the Army Reserve would not be exempt from duty as members of the "unorganized militia". Although this opinion relates to the federal militia provisions of Title 10 of the United States Code, the construction by the Judge Advocate General's office of the phrase "the militia of any state" to include nonactive duty Reservists would appear to add weight to my position that such Reservists are not exempted by federal law from emergency duty under Maryland law as members of the "unorganized militia".

FRANCIS B. BURCH, *Attorney General.*

HEALTH DEPARTMENT, STATE

Authority of State Health Department to Require Information on Laboratory Report Forms.

August 14, 1968.

John W. Sause, Jr., Esq.

We have been asked to comment on an inquiry received by you which raises the question whether the Maryland State Department of Health has the authority to require answers to certain questions on its forms number VD-52T (Confidential Report of Laboratory Test Results Indicative of Syphilis or Gonorrhea) and TB-31 (Confidential Report of Laboratory Test Results Indicative of Tuberculosis).

Specifically, the information referred to in the aforementioned inquiry includes identification and residence of patients who are the subjects of such reports.

This particular question involves the provisions of Section 31A, Article 43, Annotated Code of Maryland, 1965 Replacement Volume, and enacted as Chapter 206, Laws of Maryland, 1968. Section 31A (b) states:

> "Each notification shall be in writing on a form provided by the State Health Department and shall include the date and type of the test performed, the results of such test, the *case number*, age, sex, and *political subdivision of residence* of the person from whom the specimen was obtained, and the name and address of the physician for whom such examination was performed." (Emphasis supplied).

The form provided by the State Department of Health, which has been reviewed by this office, does not include the patient case number, but rather a line is provided thereon for "Patient Identification". In addition, the form in question contains another line upon which the laboratory is to include the patient's residence, city, county. Section 31A

(b) sets forth that the form shall include the political subdivision of residence.

The statute requires that all laboratory notifications are to be confidential and not open to public inspection. Moreover, Section 31A (d) is explicit in precluding, or intending to preclude, the Commissioner of Health or his duly authorized agent from contacting the patient or the potential contacts of the patient except by request or with the consent of the attending physician. However, the Commissioner or his duly authorized agent is not precluded from discussing the laboratory notification with the attending physician.

The question, then, reduces itself to, not whether the Maryland State Department of Health has the authority to require certain information on the aforementioned forms, which we think it does under the aforesaid law, but whether the information thereon contained conforms to the legislative intendment.

The legislative history of the statutes at hand reveals that the bill, when introduced as House Bill No. 226, originally included in Section 31A (b) the specific nouns, *name* and *address*, but at final passage the Legislature deleted those words in favor of the more restrictive identifying words, "case number" and "political subdivision".

The information presently on the forms, inasmuch as it differs from the statutory inclusions, apparently could open the door for overzealous personnel, no matter their sincere and conscientious motivations, to communicate directly with the patient, an action obviously contrary to the intent of Section 31A (d). Therefore, it is our opinion that, since the Legislature particularly intended to preclude communications between Health Department personnel and the patient, as above cited, except upon request or approval of the attending physician, the identifying words or phrases, as now appears on the forms in question, exceeds the authority of the Health Department.

In all other respects we feel that the remaining information appearing on said forms is in substantial compliance

with the statute. Since the notification forms are confidential, we do not think the patient is adversely affected in any way. Rather, we view such information necessary to the epidemiologic data and statistics which the State Health Department is required to maintain in the public health interest.

FRANCIS B. BURCH, *Attorney General.*

DONALD H. NOREN, *Special Attorney.*

HOME IMPROVEMENT ACT

APPLIES TO PAINTING CONTRACTORS NOT HIRED ON AN HOURLY BASIS.

May 15, 1968.

Mr. Thomas J. Guidera.

You have asked our opinion as to whether painting contractors are required to be licensed under the terms of the Maryland Home Improvement Act. Sections 249 and 256 of the Act require licenses of contractors and salesmen in the home improvement business. Article 56, Section 249 (c) defines "Home Improvement" as ". . . the repair, replacement, remodeling, alteration, conversion, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place . . .". Section 256 of the Act contains certain exemptions in favor of individuals working for wages and salaries and not acting for contractors in the capacity of salesmen and in favor of plumbers, electricians, architects or any other such persons who are required by State or local laws to attain standards of competency or experience as a prerequisite to engaging in such craft or profession.

You indicate that an attorney for a painting contractor has questioned the applicability of the Act to such contractors. This office has previously stated in a letter of July 20, 1967 to the Honorable Frederick C. Malkus that the Act "does not include within its purview a painter or carpenter hired by an owner of property on an hourly basis. In such a case the owner of the property would be, in effect, the 'contractor' and the painter or carpenter his employee." This ruling rested upon the exemption contained in Article 56, Section 256 (1).

In the same letter, however, this office also stated that "Of course, if the workman is hired at an hourly rate and the hours that he is to work on a particular job are set,

that is, a flat price is agreed upon for the job, that person is considered a 'contractor' within the meaning of the Home Improvement Law and is required to be licensed under the Act." This statement amounted to a determination that the Act applies to painting contractors.

Apart from the prior determination of this office we think it clear that the definition of "Home Improvement" contained in Section 249 (c) of the Act encompasses painting. There is a substantial body of law interpreting references to "permanent improvements" in mechanics' lien statutes which makes clear that painting and papering is to be deemed an improvement within the meaning of such statutes. Among the authorities so holding are *Natl. Wall Paper Co. v. Sire,* 163 N.Y. 122, 57 N.E. 293; *New York Artcrafts, Inc. v. Marvin,* 29 Misc. 2d 774, 215 N.Y.S. 2d 788; *Sica & Sons v. Ciccolo,* 39 Misc. 2d 698, 241 N.Y.S. 2d 923; *LaGrille v. Mallard,* 90 Cal. 373, 27 P. 294; *Baird v. Peall,* 92 Cal. 235, 28 P. 85; see *Thiesen v. City of Los Angeles,* 343 P. 2d 1001, 1005, 54 Cal. 2d 170; 352 P. 2d 529; C.J.S. Mechanics' Liens, Section 26.

In the *LaGrille* case the Court observed with respect to papering that "The paper loses its character of personalty, becomes affixed to the building, and its removal therefrom results in a destruction of its value".

In the *New York Artcrafts, Inc.* case, the Court observed with respect to painting that ". . . the term 'permanent improvement' was doubtless intended to include terracing, sodding, dredging, draining, filling and grading, making or repairing sidewalks, paper hanging, painting, and the like. Such work is permanent in its character and improves the land for all time, and liens have been sustained for such improvements." The Court distinguished between improvements, such as painting and papering, and the services rendered by "the hired man who mowed the lawn, the farm hand who plowed the field or sowed the grain, the gardener who trimmed the trees or cut the shrubs" on the basis that "such services are in their nature temporary, and must be repeated with the recurring seasons".

In the recent *Sica & Sons* case, the Court observed "We deem the word 'permanent' in connection with painting and decorating to mean becoming part of the realty rather than an indication of a span of years."

In our opinion the cases holding painting and papering to be "permanent improvements" are *a fortiori* of the question whether they are home improvements within the Home Improvement Act, which, indeed, contains no express requirement of permanency. We also take note of the decisions such as *Northwestern L & W Co. v. Parker,* 125 Minn. 107, 113, 145 N.W. 964, 966 and the cases following it which distinguish between painting of a house at the time of a fundamental renovation which is held to be an "improvement" within the Mechanics' Lien Law and periodic painting thereafter, which is held to be merely a "repair" not within the lien law. We consider these cases to have no applicability here since Article 56, Section 249 (c) defines "Home Improvement" as including "repair" as well as "improvement". Accordingly it is our opinion that painting and papering contractors and their salesmen, not otherwise exempt from the Act, are required to be licensed by its terms.

We note also that the contractor involved in the present case is situated in the village of Maryland Line, in Baltimore County. We find no provision of law applicable to Baltimore County requiring the examination and licensing of painters which would render them exempt from the Home Improvement Act by reason of Article 56, Section 256 (2).

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

INDUSTRIAL FINANCE LAW

Maryland Industrial Development Financing Authority—Definition of Industrial Project.

January 16, 1968.

Mr. Leonard A. A. Siems.

In your letter of December 18, 1967 you requested our advice with respect to the eligibility of a clothing supplier engaged in the "warehousing and merchandising of finished goods, principally men's and women's apparel", for mortgage insurance pursuant to the Maryland Industrial Development Financing Authority Act.

Section 266T of Article 41 permits the Authority to insure "mortgage payments required by a first mortgage on any industrial project" providing other terms and conditions, not appropriate to this inquiry, provided for elsewhere in the Act, are met. An industrial project is defined, by Section 266-O (3), as follows:

> "(3) *'Industrial project'* means (i) a new industrial or manufacturing plant for the construction of which a mortgage loan guarantee is sought from the Authority; or (ii) a former industrial or manufacturing plant for the acquisition, rehabilitation, or improvement of which a mortgage loan is sought from the Authority; or (iii) buildings used primarily for storage or transshipment of manufactured goods; or (iv) buildings to be used for research and development for the discovery and perfection of new processes and products. However, 'industrial project' shall not be deemed to include a mercantile or service establishment."

We are further advised that the applicant orders from various manufacturers men's and women's apparel which are prepared for the applicant's label, to its specifications, and sold under the applicant's name. The merchandise is

delivered to the applicant's Baltimore warehouse and then distributed to various retail outlets throughout the Southeast.

There appears to be no question but that the facility for which mortgage insurance is sought by the applicant is to be "used primarily for storage or transshipment of manufactured goods"; the difficulty arises from the proviso excluding "mercantile or service establishments" from the definition of an industrial project. The question, therefore, resolves itself into a determination of whether a characterization of a particular facility as a mercantile establishment would make it ineligible for assistance by the Industrial Development Financing Authority.

In *H. H. Kohlsaat & Co. v. O'Connell*, 255 Ill. 271, 99 N.E. 689, the Supreme Court of Illinois was called upon to determine the application of that State's tax statutes to a manufacturing or mercantile enterprise. In finding that the company was subject to taxation as a mercantile corporation, the Court observed as follows:

> "Webster's New International Dictionary gives as one of the definitions of 'mercantile' 'having to do with, or engaged in, trade, or the buying and selling of commodities.' The Standard Dictionary defines 'merchandise' as 'anything movable, customarily bought and sold for profit.' In Rosenbaum v. City of Newbern, 118 N.C. 83, 24 S.E. 1, 32 L.R.A. 123, the court held that 'the term "merchant" embraces all who buy and sell any species of movable goods for gain or profit.' See, to the same effect, In re San Gabriel Sanatorium Co. (D. C.) 95 Fed. 271, and cases cited; 5 Words and Phrases, 4477, 4482, and cases cited; 20 Am. & Eng. Ency. of Law (2d Ed.) 580, and notes; 27 Cyc. 471. There is nothing in the definition of a 'mercantile' corporation which requires that it shall sell goods manufactured by others than itself. Manifestly this corporation must be held to be one organized for manufacturing and mercantile purposes, as

those terms are used in our revenue statute." (p. 690).

Similarly in *Veazey Drug Co. v. Bruza*, 37 P. 2d 294, 169 Okl. 418, a case involving interpretation of the Oklahoma Workmen's Compensation Law, the Supreme Court of Oklahoma was called upon to determine whether a retail drug business "in the maintenance of a separate warehouse" engaged in the "transfer and storage" business or that of a "wholesale mercantile establishment". In the peculiar circumstances of that case, the Court was required to differentiate between a mercantile establishment as such and a "wholesale mercantile establishment". In so doing, the Court reasoned as follows:

> "In Carr v. Riley, 198 Mass. 70, 84 N.E. 426, 428, 'mercantile' is defined thus: 'Of or pertaining to merchants or the traffic carried on by merchants; having to do with trade or commerce, trading, commercial.' Thus while the word 'establishment' may mean almost any kind or character of institution, location, building, or place, yet its meaning is greatly restricted when used following the word 'mercantile.' And the expression 'mercantile establishment' must mean and refer to an institution of mercantile business, or a place, building, or location where the mercantile business or the buying or selling of merchandise is conducted or engaged in. One mercantile business or establishment may differ from another just as one merchant may differ from another merchant as to the character of business engaged in. So we have retail merchants or retail mercantile establishments upon the one hand, and wholesale merchants or wholesale mercantile establishments on the other hand.
>
> "A mercantile establishment is a place where the buying and selling of articles of merchandise is conducted. Hotchkiss v. District of Columbia, 44 App. D.C. 73." (p. 296).

The Maryland Court of Appeals, in *American Insurance v. Lapidus,* has held that the word "mercantile" refers to "buying and selling of goods and merchandise or dealing in the purchase or sale of commodities . . . not occasionally or incidentally, but habitually as a business". 210 Md. 389 at 395. The application of these principles to this inquiry led inevitably to the conclusion that the applicant, although engaged in the wholesale mercantile business, is, nevertheless, operating a "mercantile establishment" within the meaning of Section 266-O (3). The question remains, however, whether such a finding disqualifies the applicant.

A settled principle of statutory construction is that all of the language of a statute should be given effect, and if one interpretation would render any language in the statute nugatory, a construction which gives effect to all the language of the statute is favored. Clearly, any building "used primarily for storage or transshipment of manufactured goods" is a warehouse, and the storage and transshipment of manufactured goods, in modern commercial transactions, necessarily involves some form of buying or selling of such goods. This activity would have to be classified as mercantile, notwithstanding the fact that the company owning the warehouse may have manufactured the goods stored in the warehouse. If this definition of mercantile was applied to such buildings, the language providing for warehouses would be rendered meaningless. We must conclude, therefore, that the words "mercantile establishment" as contained in Section 266-O (3) refers to retail merchandising operations, and not to warehouses used by wholesale distributors and manufacturers.

We advise you, therefore, that in our opinion the applicant is eligible for mortgage insurance under the provisions of the Industrial Development Financing Authority Act.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

INSURANCE

INSURANCE COMPANY RECEIVERSHIP ASSESSMENT AGAINST POLICYHOLDERS—PROCEDURE FOR EXTRAORDINARY SERVICE BY MAIL.

March 7, 1968.

Mr. Newton I. Steers, Jr.

You have advised us that the Circuit Court for Montgomery County has approved a deficiency assessment against policyholders of an insurance company and you have asked our review of your procedure under the provisions of Maryland Code Article 48A, Section 164 to reduce the assessments to judgment against the individual policyholders. We understand that you intend to proceed in the receivership case by the filing of a petition reciting the facts relating to the making of the assessment and you will attach thereto as an exhibit a list of the more than 25,000 policyholders against whom the assessment is chargeable. The exhibit will show the precise unpaid balance of the assessment for which judgment is sought against each policyholder. You contemplate making service upon the policyholders by certified mail, return receipt requested.

We hope that our opinion on the procedure will be helpful to you, but we point out that, in your capacity as receiver and as an officer of the Circuit Court for Montgomery County, you should consult counsel appointed for the receivership by the Circuit Court, since it would be inappropriate for us to intrude into his province. We feel, however, that your procedure is sufficiently similar to other like cases now pending throughout the State that it is proper for us to advise you as the Insurance Commissioner, whose duties will almost certainly require the exercise of some judgment in the other cases.

We have no doubt whatsoever as to the propriety of seeking judgments against the policyholders in the receivership proceedings. Since, as you point out, Section 164 (c)

provides that "the Commissioner may obtain an order in the delinquency proceedings" to charge the individual policyholders, there is every reason to believe that separate proceedings would subject you to criticism for wasting the assets of the receivership in unnecessary court costs.

You have advised us that service by certified mail, return receipt requested, will be accomplished pursuant to an order of the Circuit Court specifically authorizing it. To each policyholder will be mailed a copy of the petition, an order directing the policyholders to show cause why a judgment should not be entered against them and an extract from the lengthy exhibit stating the amount of the assessment which pertains to him.

The method of service and the content of the papers served seem appropriate according to the general description furnished. As we conceive of it, the petition for an order subjecting the policyholders to personal judgments has the characteristics of a new suit as it relates to them, and it is necessary to observe the minimal requirements of due process of law since the Legislature has not laid down the exact procedure applicable to cases such as this. We believe, however, that the procedure is sufficient by analogy to other existing causes of action and the rules of court. Since we understand that all of the policyholders have previously been advised of the assessments levied against them, the petition for judgment is quite similar to a suit at law on an account stated.

The provision for service is closely analogous to Maryland Rule 104 b 2. We note that that rule requires that delivery of the mailed pleadings be restricted to the addressee and we understand from this that certified mail which is actually delivered to the addressee and so shown on the return receipt would be in full compliance with the rule and would enable you to make an affidavit substantially in the form of Rule 104 b 2.

We note that Rule 104 specifically provides that the methods of service therein set forth are in addition to and

not exclusive of any other means of service which may be provided by statute or rule. Since Code Article 48A, Section 164 (c) provides that service on the policyholders may be accomplished "within the time and *in the manner* designated in the order" (emphasis supplied) of the Circuit Court, it would appear that the assessment proceedings come within the terms of Rule 104 i, relating to other methods of service.

You have also asked us several questions regarding the function of the clerk. While we well recognize your legitimate interest in keeping court costs to a minimum, we prefer not to answer the specific questions asked until requested to do so either by the clerk, who is a constitutional officer, or by the court. We must assume for the present that the clerk of the Circuit Court for Montgomery County will, as he is authorized to do, agree with you as receiver on an appropriate fee for his services which, under the unusual circumstances of this case, are not specifically provided in Article 36, Section 12 of the Maryland Code.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

INSURANCE—SALE OF ADVANCE PREMIUMS—VALIDITY OF SALE—DISCLOSURE IN ANNUAL STATEMENT.

April 5, 1968.

Honorable Newton I. Steers, Jr.

You have requested our opinion as to the validity of the following transaction as reflected in the records of a Maryland Insurance Company:

The Company, a Maryland insurer, on December 30, 1966, entered into a "Sale of Insurance Premiums" agreement with a Texas corporation in Texas whereby one-half of an undivided interest in certain designated insurance premiums being earned by the Company were sold to the Texas firm for $2,000,000. The Texas firm was also to receive an amount equal to 7⅝% per annum on the unliquidated balance of the $2,000,000. The terms and conditions of this sales agreement are further considered below.

Also, on December 30, 1966, and apparently in Texas, the Texas firm borrowed from an institutional lender the sum of $2,000,000 at 7½% interest per annum and simultaneously entered into a "Security Agreement" with the lender using as collateral the premiums purchased from the Maryland insurance company.

While the entire series of transactions is relevant to your inquiry, as the insurance regulatory agency of Maryland, your inquiry focuses primarily on the validity of the transaction between the insurance company as seller and the Texas firm as purchaser of these insurance premiums. You have raised two questions with respect to this transaction: (1) does the transaction violate the Maryland Insurance laws; and (2) must the $2,000,000 received from the Texas firm be treated on the Maryland insurer's Annual Statement as "Borrowed Money"?

In response to your first question we point out that after reviewing the matter carefully we are not aware of any provision of Article 48A of the Annotated Code of Mary-

land (the Insurance Code) which would be violated by this transaction. We, of course, do not intend in any way to pass upon the validity of the transaction under the commercial law of Texas or under any pertinent Federal or State taxing provisions.

Your second question presents a somewhat more difficult issue, i.e., whether the transaction must be considered as a loan rather than a sale on the books of the Maryland insurer. The difficulty arises because the sale agreement has certain provisions which make it look like a loan.

First of all the purchaser, rather than making his profit on the difference between what he pays for the face value of the purchased item and what he collects on it, as in the usual case of the sale of accounts receivable, is entitled here to a specified amount equal to 7⅝% per annum on the unpaid balance. This, of course, looks like interest being paid on an outstanding indebtedness.

Secondly, while Paragraph 2 of the sale agreement explicitly provides that the purchaser is "TO HAVE AND TO HOLD the Premium Payment . . . forever", Paragraph 4 of the agreement provides that when certain specified payments have been received by the purchaser "the Premium Payment shall forthwith terminate and all interest in the Subject Insurance Premiums shall immediately revert to and become vested in the Seller". This type of provision is common in land mortgages issued in Maryland.

On the other hand, in addition to the explicit provision in the introductory paragraph of the agreement that it witnesses a sale of insurance premiums, Paragraph 2 of the agreement provides that the purchaser shall look solely to the proceeds of the premiums paid for repayment of all sums due the purchaser and the seller is not liable for any failure of the purchaser to receive full payment.

We believe that the answer to the question as to whether this particular transaction is to be considered as a sale or as a loan may well depend on the purpose for which the question is asked; i.e., for commercial law purposes, it may

be a sale while for income tax purposes, it may be considered in a different manner. On these issues we take no position. We conclude that while the transaction is unusual, we are unable to say that it is a sham. You have informed us that for insurance accounting purposes, you do not find it misleading. It is admittedly designed to accelerate income and thereby to take advantage of a loss carry-forward for Federal income tax purposes and we are informed it follows a pattern established in Texas for the sale of advance oil runs. Not finding it to be unlawful under the Maryland Insurance Code nor a sham, and in the absence of any ruling by a court of competent jurisdiction that the transaction is unlawful under Texas law, we do not believe that the Maryland insurer is required to treat the $2,000,000 so received as "Borrowed Money" on its Annual Statement where the insurer is not obliged to repay the money and where its treatment of the assets specifically pledged fully discloses the nature of the transaction.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

INSURANCE — NONRESIDENT AGENTS — ELIGIBILITY — RELATIONSHIP TO RETALIATORY PROVISIONS.

May 7, 1968.

Commissioner Newton I. Steers, Jr.

You have requested our opinion as to whether an agent of a foreign insurer domiciled in Illinois and residing in Delaware is eligible for a Maryland nonresident agent's license. You have informed us that Delaware would allow a Maryland resident to obtain a similar license in Delaware, but that Illinois apparently would not issue such a license to a nonresident.

Section 61 (1) of Article 48A provides in part:

> "When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or *other material obligations, prohibitions or restrictions are or would be imposed upon Maryland insurers,* or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions of whatever kind shall be imposed by the Commissioner upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in Maryland." (Emphasis supplied).

Section 171 (a) provides:

> "A person not resident and not having a place of business in this State may be licensed as an agent or broker upon compliance with the provisions of this subtitle, other than the provisions of Section 177 (1) relating to education or experience, provided that the state in which such person resides will accord the same privilege to a resident of this State."

The issue thus raised is whether under the applicable provisions of the Maryland Insurance Code the eligibility of a nonresident for a nonresident agent's license is to be determined by the law of the agent's domicile under Section 171 (a) or the law of the state of domicile of the insurer for whom he works under Section 61 (1).

It is our opinion that the eligibility of a nonresident for a nonresident agent's license is to be determined by the law of the state in which the agent resides as clearly provided by Section 171 (a), and not by the law of the state in which the insurer is domiciled.

While the provisions of Section 171 (a) are quite explicit, the confusion arises because of the provisions of Section 61 (1), the retaliatory tax section of the Insurance Code, which, in part, provides that if certain prohibitions or restrictions are imposed upon the agent of a Maryland insurer by the domiciliary state of a foreign insurer, the same prohibitions or restrictions shall be imposed by Maryland on agents of such foreign insurer. The purpose of Section 61 (1) is to prevent unfavorable discrimination against domestic companies (or their agents) by other states. *State Ins. Commissioner v. Nationwide Mut. Ins. Co.*, 241 Md. 108 (1966).

While the applicability of the general provisions of Section 61 (1) is certainly questionable,* we need not resolve that question in light of the provisions of Section 11 of Article 48A. Section 11 provides:

> "Provisions of this article relative to a particular kind of insurance or a particular type of insurer or to a particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matter in general."

It is apparent that even if we believed that Section 61 (1) was applicable, and therefore in conflict with the provisions of Section 171 (a), the latter provisions, specifically applicable to the issue of the eligibility of nonresidents, would prevail.

We conclude, therefore, that the reciprocal provisions of Section 171 (a) control the determination of the eligibility of a nonresident for a nonresident agent's license. We trust that this information will answer your inquiry.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* Query: Is this the type of prohibition or restriction covered by Section 61 (1)? See *State Ins. Commissioner v. Nationwide Mut. Ins. Co.*, 241 Md. 108 (1966).

INSURANCE—MORTGAGE CANCELLATION LIFE INSURANCE—INFLUENCING THE PROCUREMENT OF INSURANCE—PAYMENT OF AN ADMINISTRATIVE FEE.

May 7, 1968.

Commissioner Newton I. Steers, Jr.

In our opinion to you of November 9, 1967 (52 Opinions of the Attorney General 215) we advised that a proposed program whereby a lending institution and an insurance company in a common effort would promote the purchase by the lender's customers of individual policy, "mortgage cancellation life insurance", violated Sections 167 (a) and (c) of Article 48A. Since that opinion was written, certain modifications have been made to the proposed program and you have requested our opinion as to whether Section 167 (c) would still be violated.

The program would now be set up on the following basis: the lending institution on its own stationery would announce to its mortgagors the availability of a plan of mortgage cancellation life insurance payable at the lending institution in installments along with the mortgage. The lending institution would take no other steps to encourage the mortgagor to purchase the insurance. If and when mortgagors of the lending institution do apply for and receive the insurance, the lending institution would receive, account for and periodically forward the premiums to the insurance company. The insurance company which issued the policies would pay an administrative fee to the unlicensed lending institution for handling the collection of the insurance premiums. This fee is said to be based upon the reasonable cost to the lending institution of the collection expense.

The principal issue which is raised is whether the announcement letter sent by the lending institution and the lending institution's participation in the program result in the lending institution "influencing the procurement of any insurance" within the meaning of Section 167 (c), and if so, is the administrative fee to be paid to the lending institution prohibited?

Section 167 (c) provides:

> "No commission, fee, reward, rebate or other consideration for procuring or influencing the procurement of any insurance shall be paid, directly or indirectly, to any person who is not then licensed pursuant to the provisions of this subtitle, except as to the kinds of insurance, types of insurers and transactions exempted from the provisions of this subtitle by Sections 165 and 171; provided, however, that in the case of life insurance and health insurance the provisions of this section shall not prevent the payment or receipt of commissions on renewal premiums on existing policies or other deferred commissions to or by any person solely because such person has ceased to hold a license to act as agent, or broker except as otherwise provided by this article."

We have reached the following conclusions: (a) the letter sent by the lending institution announcing the existence of the plan including the offering of its facilities as collecting agent for the insurance company does necessarily influence the procurement of insurance; and (b) viewing the plan as an entirety, as we feel we must, an administrative fee or other compensation paid to the lending institution for the use of its collection facilities or an agreement to do so must be considered to be consideration for influencing the procurement of insurance and, therefore, in violation of Section 167 (c).

As you know, in addition to our opinion of November 9, 1967, two previous opinions dealt with similar questions concerning the meaning of Section 167. See 49 Opinions of the Attorney General 263 (1964) and 49 Opinions of the Attorney General 273 (1964). In those opinions we advised you that certain activities taken by companies with substantial credit card operations amounted to "influencing the procurement of . . . insurance" or "solicit[ing] . . . insurance" as proscribed by subsections (a) and (c) of Section 167.

In the first of these opinions Attorney General Finan (now Associate Judge of the Maryland Court of Appeals) considered the meaning of the word "influencing" as used in Section 167 (c). There we said:

> "That all three credit card companies are influencing the procurement of insurance seems to admit of little argument. The word 'influence' is defined in Webster's International Dictionary, Second Edition (1953), as the 'act or process, or the power of producing an effect without apparent force or direct authority' and as 'the quiet, insensible, or gradual exertion of power, often arising from strength of intellect, force of character, eminent position and the like.' The persuasion or inducement is 'gentle, subtle and gradual.' 43 C.J.S., *Influence; State v. Robertson,* La. 128 So. 2d 646 (1961). Some of the forces exerted by the credit card companies here to encourage their patrons to purchase the insurance offered are subtle, while others are more direct, but all are effective and influential." 49 Opinions of the Attorney General at pp. 266-267.

After discussing the more obvious attempts at influencing the procurement of insurance, the Attorney General stated:

> "The more subtle inducements, however, exist apart from the brochures, and may be found in the very participation of the companies in the programs themselves. By their mere association with these plans, the credit card companies lend them prestige, and in addition, help to engender in the minds of their patrons a special kind of confidence concerning the insurer and the insurance that, all other things being equal, would not ordinarily be likely to have existed. Any insurance company, no matter how reputable and well known it may be, stands to reap considerable benefits in the form of increased sales from a close association with the goodwill of a company such as Pure Oil, Amer-

> ican Oil or American Express, and the latter companies, in knowingly permitting the insured to secure such benefits from their names and reputations, are participating in, or at least encouraging, the sale of insurance. Moreover, the credit card companies permit the use of their already established credit card operations to enable the insurer to offer a convenient and inexpensive method of financing their patrons' premiums, which in today's economy, is an advantage of inestimable value. This use of the credit card operation is for the sole purpose of assisting the insurer to sell insurance to its patrons, and amounts to an inducement to the sale of the insurance which, though subtle and indirect, falls within the category of 'influence'." 49 Opinions of the Attorney General at pp. 267-268.

While it is true that the lending institutions may not be literally financing its customers insurance premiums in the instant case, nevertheless the use of the lending institution's existing collection machinery still enables the insurer to offer to the proposed insured a convenient method of paying the premiums. This admittedly is an important factor in getting the mortgagor to purchase the insurance. As the insurer noted in its most recent presentation to your Department: "The matter of paying the insurance premium along with the mortgage payment is a convenience of considerable importance to a great portion of home owners who plan in terms of monthly payments."

Nor can there be any real denial of the fact that the lending institution's announcement letter influences the procurement of the insurance. It is apparent, if for no other reason than the importance attributed to it by the insurance company, that a letter from the lending institution which holds a person's mortgage gets much closer attention than a letter from a possibly unknown insurance company. Consequently, we are of the opinion that by sending this letter, by participating in the program, and by offering the

use of its collection facilities, the lending institution is "influencing the procurement of . . . insurance."

Although as we pointed out in our previous opinions, influencing the procurement of insurance (as distinguished from actual solicitation) is prohibited only if done in return for the payment, direct or indirect, of a "commission, fee, reward, rebate or other consideration," the "statute requires only that there be some payment or consideration, not that such payment or consideration be fully compensatory or profitable." (49 Opinions of the Attorney General at p. 268). Since the lending institution is to be paid an administrative fee for the use of its collection facilities as part of this program, we believe the program would violate Section 167 (c).

The insurer argues that the influencing occurs, if at all, when the initial letter is sent by the lending institution and so long as the lending institution is not reimbursed for the letter but merely for its collection costs Section 167 (c) is not violated. We do not agree. In the first place we do not believe the letter can be isolated from the rest of the program. As noted above, an essential part of this program is the initial announcement letter from the lending institution. We believe that as an essential part of the program it would be artificial and in violation of the purpose of Section 167 (c) to hold that only the letter influences the procurement of insurance and the payment of the administrative fee in no way is attributable to the influencing. It is important to keep in mind that the letter itself points out to the mortgagor the convenience of paying for the insurance along with the monthly mortgage payment and thus ties the payment plan inextricably to the letter.

Secondly, we point out that the statute bars payment for influencing the procurement of insurance whether that payment be direct or indirect. We believe that any remuneration or financial benefit given to the lending institution even if it merely results in the lending institution spreading the cost of some of its fixed expenses would be indirect compensation for influencing the procurement of insurance.

The insurer urges that this type of an approach leads to absurd results. As an example, the insurer raises the following two questions:

a) Would a member of the board of directors of an insurance company who is paid a director's fee and who merely by virtue of his prominence in the community has some influence on someone purchasing insurance with the company be violating this provision?

b) Would the courteous clerk in an insurance company office who may have some influence on a prospective customer purchasing insurance be violating this provision?

Obviously, the answer in each case would be "no". It seems to us that any influence which such persons may have would of necessity be quite uncertain and speculative and, therefore, beyond the reach of Section 167 (c). In addition, even where the influencing is apparent, there still must be a causal connection between the influence and the payment. With the program under consideration here, the influence is apparent; and the payments which are made, even if not attributable to the announcement letter are at least attributable to the sales of insurance generated by the lending institution's participation in the program with the insurer.

For all of the above reasons we reaffirm the position taken in our previous opinions. We trust this information will answer your inquiry.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

INSURANCE—PREMIUM REPORTS REQUIRED OF MERGED INSURERS—PREMIUM TAXES.

August 21, 1968.

Commissioner Newton I. Steers, Jr.

You have requested our opinion as to whether an insurer which has been merged into another insurer prior to December 31st of any calendar year must file, within thirty days after the effective date of the merger, a report of the premiums earned by it during the portion of the calendar year immediately prior to the merger.

Section 60 of Article 48A of the Annotated Code of Maryland provides that insurers "shall be subject to taxation according to the provisions of Article 81 and shall file such tax returns and reports as may be directed by the Commissioner". Section 139 of Article 81 requires that each insurer, on or before March 15th in each calendar year, file a report of premiums earned. Section 142 of Article 81 provides:

> "In the event any insurance company shall dissolve or retire from this State, either voluntarily or involuntarily, during any calendar year, such dissolution or voluntary or involuntary retirement from this State shall not defeat the filing of reports and the assessment and collection of the taxes imposed by this subtitle with respect to the premiums written or deposits held during that part of such calendar year prior to such dissolution or retirement from this State. In any such case the report herein required to be filed shall be filed within thirty days after such dissolution or retirement from this State. In the case of an insurance company taken over for liquidation or rehabilitation the report shall be filed within six months thereafter."

The issue which your question raises is whether, when one insurer merges into another, it is either dissolving or retiring from Maryland within the meaning of Section 142.

If so, it must comply with the provisions contained in Section 139 of Article 81 requiring the filing of financial reports.

We believe that the provisions of Section 142 are sufficiently broad so as to include an insurer which is being merged into another insurer. Even though the insurer being merged may not have been dissolved within the meaning of Article 23, Sections 76-83 of the Annotated Code of Maryland, we believe the phrase "dissolution or retirement" as used in Section 142 of Article 81 is broad enough to include companies going out of existence by way of merger.

The obvious legislative purpose of Section 142 is to make sure that premium taxes due from a company ceasing to do business in Maryland during a calendar year are properly reported and paid. This obvious purpose might be defeated, in part at least, if merged companies were not required to file such reports especially where the surviving insurer does not intend to become or remain licensed in Maryland. We believe the language of Section 142, fairly read, encompasses companies being merged.

There can be no doubt that, by virtue of the merger, the merged company ceases to exist and, therefore, in the broad sense of the term "retire[s] from this State" within the meaning of Section 142. (See Section 71 (1) of Article 23. See also *Cummings v. United Artists*, 237 Md. 1 (1964)). Webster's New International Dictionary (Second Edition) defines the word "dissolve" as bringing to an end by dispersal or, "to terminate". Webster's New International Dictionary (Second Edition) defines the term "retire" as a withdrawal. There can be no doubt that the merged company is brought to an end and is withdrawn as an operating entity. We therefore conclude that such a merged company must comply with the requirements of Section 142 of Article 81.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

INSURANCE—MOTOR VEHICLE LIABILITY SECURITY FUND—INSURERS MAY TAKE CREDIT FOR RETURNED PREMIUMS IN COMPUTING THEIR TAX LIABILITY.

August 27, 1968.

Commissioner Newton I. Steers, Jr.

In your recent letter you have requested our opinion concerning the interpretation to be given to Section 482A (c) (1) and (2) of Article 48A, which deals with payments by certain insurers for the support of the Motor Vehicle Liability Security Fund. You point out that under this provision every insurer writing policies insuring against legal liability arising out of the ownership, operation or maintenance of motor vehicles (auto liability insurance) is assessed one-quarter of one per cent of its net direct written premiums each quarter to support the Motor Vehicle Liability Security Fund. The specific issue which you raise is whether a company may take as a tax credit in one quarter, taxes paid in a previous quarter on premiums which were returned to insureds due to cancellations occurring during that previous quarter but not processed by the insurer's home office in time to be included in that previous quarterly report.

It is our opinion that an insurer may so use the returned premiums as a tax credit in the following quarter.

Section 482A (c) (1) and (2) provide as follows:

"(c)

(1) Every insurer shall, on or before November 15, 1965, file with the Commissioner a return, under oath, on a form to be prescribed and furnished by the Commissioner stating the amount of net direct written premiums charged during the months of July, August and September preceding; as defined in subsection (a) (6) of this section. On or before February 15, 1966, and con-

tinuing consecutively thereafter, on or before the fifteenth day of May, August, November and February of each year, each such insurer shall file, quarterly, a similar return as to such premiums charged by such insurer during the quarter year ending on the last day of the second month preceding that in which the report is required to be filed.

(2) For the privilege of issuing policies insuring against legal liability arising out of the ownership, operation or maintenance of motor vehicles which are principally garaged in this State, and in addition to all other requirements of law, every insurer shall pay into the fund on or before November 15, 1965, ¼ of 1% of its *net direct written premiums* as shown by the return hereinbefore required for the three months ending September 30, 1965, and thereafter each such insurer during the three years immediately following November 15, 1965, upon filing each quarterly return as hereinbefore required, shall pay ¼ of 1% of its net direct written premiums as shown for the period covered by such return into the fund; and for such privilege, every foreign or alien insurer subject to the provisions of this section shall be deemed to have consented to the adjudication of all claims secured by this section in a proceeding under Sections 132 through 164A of this article, subtitle 'Rehabilitation and Liquidation'." (Emphasis supplied).

There can be no doubt that under the facts as you have described them the insurer would have been entitled to such a credit if the information concerning cancellations could have been processed more promptly by the insurer and included in the earlier report. Indeed, see subsection (a) (6) of Section 482A which defines "net direct written premiums" as gross premiums less return premiums and dividends. In view of the quarterly filing requirements con-

tained in the statute we do not believe it reasonable to conclude that the Legislature intended to prohibit any adjustment in the payment of the tax as more accurate information on the applicable premiums was developed. Taking a credit for the overpayment in the following quarter is in reality no different from filing an amended or adjusted report for the previous quarter. To prohibit any such amendment in the absence of an explicit statutory requirement seems to us to be unreasonable. Therefore, we are of the opinion that such a tax credit should not be prohibited if promptly filed in the following quarterly report.

There can be no doubt that taxing statutes are to be strictly construed against the taxing authority and in favor of the taxpayer whenever there is a reasonable question concerning the coverage of the taxing statute. See 3 Sutherland *Statutory Construction* (3rd Edition) Section 6701, p. 293, *et seq.* See also *State Insurance Commissioner v. Nationwide Mut. Ins. Co.*, 241 Md. 108 (1966). In light of these factors we believe that a tax credit is authorized for premiums reported for one quarter which were returned to insureds during that quarter but not processed until the following quarter.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

INSURANCE—SOLICITING INSURANCE—OFFERING TO PURCHASE INSURANCE TO CREATE GOOD WILL CONSTITUTES UNLAWFUL SOLICITATION THEREOF.

November 12, 1968.

Mr. Newton I. Steers, Jr.

In your recent letter you have requested our opinion as to whether a proposed program, under which a local bank not licensed as an insurance agent would offer to provide a year's life insurance coverage to new-born children whose parents live in certain defined geographical areas of the State without cost to the child's parents, would violate Sections 167, 223, 224 or 224A of Article 48A (The Insurance Code).

The stated purpose of the program is to obtain good will for the bank. You have informed us that the proposed program would be initiated with a letter written by an officer of the bank on its own stationery to the parents of these new-born children which would read as follows:

"XYZ BANK OF MARYLAND
Baltimore, Maryland

Dear Parent:

The XYZ Bank of Maryland, and its affiliates, have taken the liberty of purchasing for you as a start toward a secure future for your new-born child a new life insurance policy. This policy is underwritten by the ABC Insurance Company, a sound life insurance company licensed to do business in this state, and is offered to you with no obligation and at no cost to you.

The Bank feels that the financial security and future of our community is dependent on, a well-founded, financially secure future of the children of today, who of course are the adults of tomorrow.

You will, of course, be afforded the opportunity of continuing this life insurance policy in future years, should

you so desire, at a very nominal cost. However, there is no obligation on your part to do so.

In order that the policy might be provided in keeping with the life insurance rules of this state, should you desire to receive this gratuitous coverage through the courtesy of the XYZ Bank of Maryland, please complete the enclosed application and return it in the envelope provided.

Very truly yours,

JOHN DOE,
Vice President."

Enclosed with the letter will be some promotional literature pointing out the services offered by the bank. If the parents submit the application and if the answers to the questions in the application are satisfactory to the insurer, it will issue a term insurance policy insuring the life of the child and naming one or both of the parents as beneficiaries. The policy is to be effective no earlier than one month after the child is born and will be for an amount which will increase monthly until the maximum of $1,000 is reached. The bank will be charged for the initial premium and any commission payable for the coverage will be paid to a licensed agent. Near the end of the first policy year a licensed agent of the insurer will write a second letter to the child's parents reminding them of the courtesy of the bank in affording a life insurance policy to the child during its first year and pointing out that the policy is renewable on a permanent policy basis. Also enclosed with the letter would be a statement of the premiums payable and the cash values which would accrue. If the parents pay these premiums, commissions would be payable to the licensed agent responsible for effecting the renewal.

The insurer is of the belief that a good number of these policies will be renewed, and thus, make it feasible and profitable for the insurer to underwrite such a program.

We turn then to the question as to whether the program would violate Section 167 of Article 48A.

Section 167 provides in pertinent part:

> "(a) No person shall in this State act as or hold himself out to be an agent or broker, nor shall any person in any manner solicit, negotiate, make or procure insurance covering subjects of insurance resident, located or to be performed in this State, unless then licensed therefor, pursuant to this subtitle. . . ."

As we have pointed out in previous opinions, the provisions of Section 167 (a) prohibit an unlicensed person or entity from in any manner soliciting insurance regardless of whether or not that person or entity is to receive payment therefor. See 49 Opinions of the Attorney General, 273 (1964). The question then is whether the participation by the bank in the program constitutes solicitation.

Of course, in construing this section it must be remembered that it is part of the licensing provisions of the Insurance Code designed for the protection of the public and as such should be interpreted liberally. See *Nuger v. State Ins. Comm'r.*, 238 Md. 55 (1965). Solicitation is defined in Black's Law Dictionary, Third Edition, as "asking; enticing; urgent request. Any action which the relation of the parties justifies in construing a serious request."

The offer to purchase the policy for the parents is admittedly designed to engender good will on behalf of the bank and to encourage the parents to use the services of the bank. Such a motive is certainly not invidious. However, Maryland has established a legislative policy which prohibits any unlicensed person from soliciting insurance coverage regardless of the motive of that individual. It is certainly true that the primary, and indeed exclusive motivating force behind the submission of the application, is the bank. It appears, therefore, that the net effect of the proposed program is to constitute the bank the agent of the insurer in the promotion and sale of these insurance policies, for the mutual benefit of the bank and the insurer. For this the bank is not licensed. It is true that the bank

will pay the initial premium as an advertising cost, but this does not exempt it from the licensing requirements of Section 167.

We are of the opinion that the letter from an officer of the bank on the bank's own stationery offering to purchase on behalf of the parent a term life insurance policy, constitutes solicitation of insurance in Maryland without a license.

In defense of the proposed program it is asserted that the bank is no more than a "good will benefactor" similar to a friend or member of the family who purchases an insurance policy for a child. We do not agree. The prohibition in Section 167 is on the solicitation of insurance for commercial purposes by an unlicensed person, not the purchase of insurance on someone else's behalf.

We conclude, therefore, that the proposed program would violate Section 167 (a) of the Insurance Code. In light of our conclusion, we have no need to discuss whether or not this proposed program would violate Sections 223, 224 or 224A of the Insurance Code.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

INTEREST AND USURY

HOUSE BILL 11 (CHAPTER 453, LAWS OF 1968), SECTION 5 RE CHARGING OF INTEREST NOT IN EXCESS OF 12% AND LICENSING OF CERTAIN LENDERS, DOES NOT APPLY TO PURCHASE MONEY MORTGAGES OF REAL ESTATE OR TO LAND INSTALLMENT CONTRACTS.

May 22, 1968.

Honorable Steny H. Hoyer.

In your letter of May 10, 1968, you ask that we advise you with regard to two provisions of the Interest and Usury bill (House Bill 11, Chapter 453 of the Laws of 1968). You first ask whether Section 5 (b) of Article 49 applies to builders who take back purchase money mortgages or deeds of trust for part of the purchase price on sales of real estate and to those owners of real estate who sell it on land installment contracts.

Section 5 of Chapter 453 provides for the charging of interest at a rate not in excess of 12% per annum (rather than the standard 6%, or 8% permitted by special agreement) on certain conditions with regard to loans not secured by mortgage or deed of trust on real property and certain other types of security. Section 5 (b) requires that any person who engages in the business of making loans for a consideration "under this section, which includes any person making more than five loans hereunder per year, other than a banking institution, national banking association, building and loan association, . . . credit union or licensee under any Maryland lending provision" shall obtain a license from the Bank Commissioner to do lending business. We think it clear from the terms of Section 5 as a whole that it would not apply to a purchase money mortgage or deed of trust either to permit the charging of interest at 12% or to require that the seller be recognized as a lender and become licensed. We feel further that a person making sales under land installment contracts is

not required to become licensed nor is he entitled to charge interest at 12%.

We call your attention to the fact that the provisions of Maryland Code Article 21, Section 112 have not been repealed and, therefore, interest on land installment contracts is limited to 6%. While it is possible that it might be argued that Chapter 453 has some collateral or inferential effect on the Land Installment Contracts Act with regard to interest, it would still not change the character of the transaction from that of a sale to that of a loan. We feel that, while there may be circumstances in which a practice might arise of using land installment contracts to mask usurious loans, it is not proper to anticipate such conditions for the purpose of construing Chapter 453 to apply to sales situations as well as to the loan situations clearly intended to be covered. Any abuse of the interest and usury laws by devices intended to obscure usury would be open to review in the courts. *Cf. Rothman v. Silver,* 245 Md. 292.

Your second questions relates to the meaning of the term "enactment" as used in Section 2 of Chapter 453. The last two sentences of Section 2 provide as follows:

> ". . . No agreement executed for consideration advanced prior to the enactment of this Act which is contingent on the passage of this Act shall be enforceable by the parties thereto. Agreements executed for consideration advanced on the date of enactment of this Act and thereafter but prior to the effective date hereof which are contingent on the passage of this Act shall be valid and enforceable by the parties thereto after the effective date of this Act."

In our opinion the first sentence prohibits loan agreements from being entered into in anticipation of its passage by the Legislature. The second sentence, however, does permit loan agreements after passage by the Legislature but prior to signature by the Governor which provide for

interest at the new rate from and after July 1, 1968. Obviously, this same sentence also permits similar loan agreements to be entered into after signature of the Governor.

A further question has arisen; namely, whether this provision would permit the present execution of an F.H.A. mortgage at the current rate of 6% to escalate to a rate in excess of 6% after July 1, 1968. It is not answerable solely from the terms of Chapter 453. While we see no prohibition in Chapter 453 against such an agreement, the regulations of F.H.A. or any similar federal agency participating in a loan must be examined and a separate determination made as to them. It is not appropriate for us to comment as to such regulations.

We hope that these comments are entirely responsive to your questions and that you will not hesitate to call on us if they are in need of further clarification.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

INTEREST AND USURY—CODE ARTICLE 49—HOUSE BILL 11 (CHAPTER 453, LAWS OF 1968)—GENERAL ANALYSIS RE "POINTS"—WHEN MAY BE CHARGED—EFFECTIVE INTEREST RATE—HOW COMPUTED; USURY—WHAT CONSTITUTES.

June 7, 1968.

Honorable Thomas Hunter Lowe.

I have your recent letter raising certain questions relating to House Bill 11 (Chapter 453, Laws of 1968), which repealed and re-enacted Article 49 of the Maryland Code relating to interest and usury. You have asked that we examine the new provisions and advise you of the probable judicial construction of certain of its language so that the Legislative Council might study the revision of any portion of the law which fails to reflect the intent of the Legislature.

You first ask whether the law effectively precludes the charging of "points" to sellers. We think that, except in those cases enumerated in Section 2, it does and would be so construed if subjected to judicial review.

Section 2 (a) provides that, except for loans made under Section 7 (for business or commercial purposes, in excess of $5,000.00) and loans guaranteed by FHA, VA or other federal instrumentality where the maximum interest rate is not over 7%, "a charge or fee, commonly called 'points' or mortgage origination fee, and extracted by a lender *from either the borrower or any other person* as additional compensation for the loan of money *is specifically prohibited* under this act" (emphasis supplied). Obviously, the seller in any transaction fits the definition of "any other person". In the instance of conventional loans, the collection of "points" is "specifically prohibited" and the effect in such cases is to contrast "points" with (1) those charges which, though permissible, are to be treated as interest under Section 1 (a) and (2) those charges which are permitted and are not to be treated as interest under the pro-

visions of Section 1 (b). The collection of any charge not specified in Section 1 (b), of course, would be permissible but it would be classified as interest and cause the effective interest rate to be computed under Section 2 (b) on the basis of the stated principal ("face value") of the loan after subtracting the amount of any such charge. Section 2 (b) provides:

> "In the event that charges or fees which under this article are deemed interest, are assessed at the inception of a contract of indebtedness, the rate of interest required in Section 10 of this article shall be determined in the same manner as if fees and charges had not been assessed except that the principal of the loan used in determining the rate of interest shall be the face value of the loan less any fees or charges which are interest."

Thus, if a loan of $10,000.00 for one year is made at a stated interest rate of 7% and a charge deemed interest is made in the amount of $500.00, payable at the time of the loan, Section 2 (b) declares that the principal shall be $9,500.00. As we read it, Section 2 (b) would require the true or "effective" rate of interest to be computed by comparing the *amount* of interest required by the loan instrument (7% stated interest on $10,000.00 stated principal or $700.00 for one year) to the legal principal, $9,500.00, resulting in an effective rate of 7.36% in this instance. The same rule is not applicable to "points", however, since collection is specifically prohibited in the case of conventional loans.

It has been suggested that the charging of sellers' "points" is permissible so long as the "effective rate" of interest is not thereby caused to exceed 8%. We disagree. Not only does the express language of Section 2 (a) contraindicate such a situation but if sellers' "points" were permitted generally merely because Section 1 (a) includes "points" in the definition of interest, then the limitation on the charging of "points" on FHA, VA, etc. to loans at not more than 7% would effect a restriction on those loans. The

obvious intent is, on the contrary, to give a special exemption to the class of loans excepted from Section 2 (a).

The second question is: When dealing specifically with FHA and VA loans and assuming the actual effective interest rate on any such loan at 6¾%:

a. Does a loan become usurious, when sellers' "points", the 1% origination fee to the buyer, and other fees and charges treated as interest by the Article, total an amount exceeding 1¼% of the face amount of the loan?

b. May such fees, charges, sellers' points and origination fee be treated as a combined discount from the face amount of the loan, computing the effective rate of interest by dividing the stated dollar amount of interest by the discounted principal amount?

c. May all total charges and fees over the 6¾% stated interest rate be computed as a percentage of the discounted principal amount, then be divided by the number of years in the term of the loan, finally adding that resulting quotient to the interest rate on the discounted principal amount?

The question properly assumes, we think, that "points" collected from sellers on loans excepted from Section 2 (a) still constitute interest under the Act. Section 1 (a) classifies "points" and origination fees as among those charges which shall be deemed interest. The applicability of these provisions to such charges collected from a seller of property is indicated by the express terms of Section 1 (a) defining interest as "any compensation imposed *directly or indirectly* by a lender . . . including . . . *any amount* payable under a point . . . system" (emphasis supplied). It should be noted that the original language of the Act defined interest as "any compensation paid *by a borrower* to a lender" (emphasis supplied). This was changed, however, by the final language of Section 1 (a), defining interest as above, without limiting it to that "paid by a borrower". Further, the definition of "usury" in Section 6 is "the collection by a lender of either interest or other

charges in amounts greater than allowed by this article". This definition is, again, the result of an amendment which deleted from the original draft the words "from a borrower". We think it obvious that the Legislature has considered the totality of any given sale-loan situation as a unitary transaction in the contemplation of Chapter 453 and has made it clear that it considers interest to be the lender's overall compensation from any and all sources whatsoever. It seems to us that it is the clear purpose of the Act to control all compensation and its influence, *direct and indirect,* regardless by whom it is ostensibly paid. The protection of the "borrower" from "indirect" as well as "direct" charges would seem to be an obvious intendment of the Act. In other words, it would seem that the Legislature recognized that the practice of charging sellers' points has contributed to an escalation of prices to buyers-borrowers and the limitations imposed by the Act on such practice were intended to be for the benefit of the borrowers.

It might be argued that the exception of certain types of loans from the provisions of Section 2 (a) indicates that as to those loans "points" do not constitute interest. Such an argument, however, fails to take into account the express inclusion of "points" among the charges enumerated as interest in Section 1 (a) on the one hand, and the exclusion of "points" from the enumerated permissible non-interest charges set out in Section 1 (b) on the other.

Turning now to your specific questions and assuming the circumstances to be those of a federally-insured loan, an exception to Section 2 (a), at 6¾%, our views are as follows:

a. Even though the collateral charges which are considered as interest under Section 1 (a) may exceed 1¼% of the stated principal, the loan will not necessarily be usurious. As noted and illustrated above, the formula of Section 2 (b) dictates the treatment of such charges as a deduction from the stated principal. In the illustration above, the loan of $10,000.00 for one year, subject to charges of

$500.00 plus 7% interest per annum, results in an effective *interest rate* of 7.36%, even though the compensation actually received by the lender for the first year is $1,200.00, or 12% of the stated principal. While this may seem to be an extraordinary departure from the reality of the situation, it is compelled by the express terms of Section 2 (b). The percentage disparity is diminished considerably over the full course of a long-term loan.

The definition of usury contained in Section 6 is not simply a matter of a stated *rate*. The specific language of the law makes usury "the collection by a lender of either interest or other charges in *amounts greater* than permitted by this act" (emphasis supplied). Under the terms of Section 2 (b) there seems to be an interrelation between the charges permitted to be collected and treated as interest and the stated interest rate. Under Section 3 the interest rate applicable to normal loan transactions may not exceed 8% "simple interest" and the "effective" rate of simple interest must be set out in the statement required to be furnished to the buyer. Under Section 2 (b) all charges considered as interest are to be factored in determining "the rate of interest required in Section 10 of this article". Thus, if the *amount of charges* treated as interest causes the effective interest *rate* to be computed on the basis of a legal principal amount so low that the figure, when divided into the *amount* of true interest charges required to be paid, causes the rate to be more than 8% on the unpaid balance, usury will result because the amount of the lender's compensation exceeds that permitted by the Act. For example, consider the case of the loan of $10,000.00 at 7% for one year. If the collateral charges treated as interest are $1,500.00 and the legal principal amount is, for that reason, $8,500.00, the payment of $700.00 in interest over the term of the loan will result in an effective interest rate under Section 2 (b) of 8.23% ($8,500.00÷$700.00). Usury will occur since the lender collects more than $680.00. The amount of charges treated as interest and the amount of true interest charges are legal up to the "effective" interest rate of 8%, in this case $2,180. (Principal of $10,000.00 —

$1,500.00 in charges = legal principal of $8,500.00, 8% of which is $680.00.)

It might be argued that the exact, literal language of the statute could be read to produce a different result. Section 3 of the Act says that "simple interest on the unpaid balance" of a loan may be charged by special agreement. Sections 1 and 2 (b) treat bonus charges as a special category of interest and dictate its treatment. The statement required by Section 10 as to the "effective interest rate" is for purposes of information only and is not *per se* a limitation on the rate. It might be contended, therefore, that simple interest at 8% may be collected on the unpaid balance of a loan regardless of the amount of bonus charges treated as interest and even though the "effective interest rate" computed as above should result in a figure far in excess of 8%. Since such a result completely frustrates the obvious paramount legislative intent in the enactment of Chapter 453 to limit the amount to an effective rate of 8% (including all components going to make up the interest) on the legal principal, that construction should be avoided. If this intent is not given effect by a reasonable application of the Act as a whole, then all the Legislature will have accomplished will be to legitimize and give sanctuary to the collection of the very bonus charges it sought to limit while at the same time increasing the simple interest rate to 8%. We think that the *literal* terms of Section 3 can and must be limited to straight loan transactions without the collection of bonus charges and that, where such charges are collected, the term "rate [of] simple interest on the unpaid balance", as used in Section 3, must be construed as the rate of effective interest computed according to Sections 1 and 2, the latter being the statutory equivalent of simple interest on the unpaid balance.

b. The second facet of the problem presented presupposes the application of the Section 2 (b) formula in computing and stating the interest as required by Section 10.

It is:

> "May such fees, charges, sellers' points and origination fee be treated as a combined discount from the face amount of the loan, computing the effective rate of interest by dividing the stated dollar amount of interest by the discounted principal amount?"

We understand your reference to "the stated dollar amount of interest" to mean the sum required to be stated by Section 10 (a) (1), i.e., "the total amount of interest *to be collected* stated in dollars" (emphasis supplied). This terminology can only refer to the product of what we have called the "state interest rate" applied to the "stated principal" amount, e.g., in our example of $10,000.00 at 7% and five "points", the dollar amount would be $700.00 ($10,000.00 × 7%). The charges considered interest are in contrast and are not part of the calculation since in the contemplation of the Act they will *have been collected.*

We think that the foregoing analysis demonstrates that in the example employed the effective interest rate is to be computed as your question suggests. Of course, on loans payable in installments, a more complicated mathematical formula is necessary. However, the same basic rules apply and the computation can easily be achieved by the employment of published mortgage yield tables commonly used to determine the true interest rate on a mortgage bought at a discount.

c. The third part of the second question would seem to presuppose the computation of a second interest rate (by employment of the charges treated as interest) to be added to the "effective" interest rate as computed on the discounted (or legal) principal amount. The effect of such a double computation would result in a total interest rate in excess of the effective interest rate otherwise indicated by the Act. We think that this cannot be done since, once such collateral charges treated as interest have been employed under Section 2 (a) as a discount from stated principal

and as an integral part of the computation of the effective interest rate, their rate computation utility has been exhausted. Section 2 (b) provides that "the rate of interest required in Section 10 of the article shall be determined in the same manner *as if fees and charges had not been assessed*", except for their deduction from the stated principal (emphasis supplied).

We hope that the above is responsive to your inquiry. We will recognize that numerous applications of Chapter 453 remain to be considered and that little herein discussed is capable of being understood apart from the express terms of the Act or of being applied without an examination of the Act to determine the relevancy of what has been said here to any particular circumstance. If further assistance is required, please feel free to call upon us.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

INTEREST AND USURY—CHAPTER 453 OF ACTS OF 1968—BONA FIDE ASSIGNEE OF MORTGAGE NOT RESPONSIBLE FOR DISCLOSURE STATEMENT—MERE PREPAYMENT OF MORTGAGE AT OPTION OF MORTGAGOR DOES NOT OCCASION USURY EVEN THOUGH EFFECT OF PREPAYMENT INCREASES LENDER'S YIELD TO MORE THAN 8%.

July 11, 1968.

Mr. Allan D. Housley.

This is in response to your recent inquiry regarding House Bill 11 (Chapter 453, Laws of 1968; Maryland Code Article 49). You asked our opinion on the following matters:

1. whether a purchaser (assignee) of an existing mortgage originally executed under the 1968 law is either responsible for the disclosure statement pursuant to Section 10 given by the original mortgagee or required to give a separate statement under Section 10; and

2. whether prepayment of a home mortgage could result in usury and require a refund of interest collected or a reduction of the debt.

As to your first question, it is our opinion that a bona fide assignee is not touched by the provisions of Section 10 in either respect. Section 10 requires "the lender" to supply the borrower with a statement showing the principal amount of the loan, the dollar amount of interest to be collected, the annual effective rate of interest and an itemization of payments in addition to interest collected by the lender "in connection with any loan" at the time the loan is made. The statement is required to be furnished "prior to the execution of a contract of indebtedness" and criminal penalties are imposed for failure to comply.

We think that this section is designed to inform a borrower precisely what obligations the execution of the contract of indebtedness will impose on him in order that he may, if he wishes, decline to accept the terms and look

elsewhere for his loan. The statutory requirement on the "lender" to furnish the statement prior to execution of the instrument creating the indebtedness, the penal provision of Section 10 and the circumstances which may be contemplated with regard to an assignment of mortgage all indicate the inapplicability of Section 10 to the assignee. The mortgage (the "contract of indebtedness", either standing alone or in conjunction with a collateral note) will have been executed and the purpose of Section 10, i.e., to enable the borrower to weigh the terms of his agreement before committing himself to it, will have been passed. An assignee, therefore, does not stand in the position of "lender" in the context of Section 10 dealing with a point in time when the loan is in an executory rather than an executed state.

A further indication of the correctness of this construction is found in Section 9 of the statute, which protects third parties, including assignees of mortgages, from claims or pleas of usury if the third party has taken the debt instrument "for a bona fide and legal consideration, without notice of any usury in the creation or subsequent assignment thereof". Since the only effect of failure to comply with Section 10 is to subject the lender to prosecution for a misdemeanor, the validity of the transaction itself not being affected thereby, an assignee ordinarily would not have cause to even inquire into the giving of the disclosure statement. It is to be noted that the failure to disclose is not keyed to usury. The offense is not in the failure to disclose usurious charges but in the failure to disclose the terms of even the most proper loan. Further, the Legislature, by protecting an assignee for *bona fide* and legal consideration without notice of usury from any claim or plea on that account, has effectively negatived any responsibility on the part of the *bona fide* assignee to retrace the steps of the original lender by reconstructing and confirming all prior dealings between the lender and borrower. If it were otherwise, then there could be no such person as a *bona fide* purchaser for value as Section 9 obviously contemplated. Negotiable debt instruments could not exist and even the transferability of a debt instrument would be

impaired as a practical matter. Obviously, the Legislature meant what it said in Section 9 and no more than it said in Section 10, the latter being penal and subject to strict construction.

In answer to your second question, it is our opinion that usury cannot result from prepayment of a loan by a borrower. The example has been cited of a $10,000.00 FHA-insured loan at 6¾%, subject to a charge of five "points" or $500.00 at inception, for a term of twenty years. Mortgage yield tables indicate that the effective interest rate for the loan is 7.41% if paid at maturity. If the loan is prepaid at the end of five years, however, the effective interest yield is 8.05%. We think that the holder of the mortgage, whether the original mortgagee or an assignee, is entitled to the full yield under the contract of indebtedness even though that may exceed 8%.

Usury is defined in Section 6 as "the collection by a lender of either interest or other charges in amounts greater than allowed by this Article". The question, in essence, is: what does the article allow to be collected?

We have previously expressed and explained in detail our opinion that charges collected at settlement and required to be treated as interest must be computed as a discount from principal so as to establish an effective interest rate for the life of the loan. (Opinion letter of June 7, 1968, to Delegate Lowe—53 Opinions of the Attorney General 348.) We then indicated the employment of yield tables as in the present example. The contract of indebtedness is the focal point of the usury provision of the Act relating to secured loans. In Section 8 specific exoneration from liability for accepting a contract of indebtedness which requires usurious payments is available to a lender who, within thirty days, notifies the borrower of the usury and agrees to an appropriate modification of the contract. A loan contract which is prospective in its application is necessarily viewed in the anticipation that its terms will be complied with. Thus, in the above example, the loan was a legal transaction calling for an effective interest rate of 7.41%. On the

basis of that arrangement the collection of the "points" was allowed by law, the collection of the amortizing interim payments would have been legal and there can be no question that the lender is entitled to accept payment of the outstanding principal. These items would be collectible under the loan contract in the event of foreclosure of the mortgage lien.

Section 1 (b) (2) is in point here. Subsection (2) specifically allows the collection of a prepayment penalty, *where provided for in the original loan contract,* during the first three years of a loan secured by certain types of property (including homes), etc., and prohibits prepayment penalties thereafter. Thus, the Legislature has not only given specific recognition to the possibility of prepayment in the circumstances of the cited example without requiring a rebate [contrast the rebate provision with regard to unsecured loans in Section 5 (a)] but has directly authorized the exceeding of the 8% maximum in limited instances. For example, a loan may be made by agreement at 8% for ten years. If the loan is prepaid at the end of one year, the lender may impose a penalty charge and under Section 1 (b) (2) the imposition of that charge shall not be deemed interest or usurious.

It is our opinion, therefore, that with regard to such loans, when it should occur as a result of the borrower's exercise of an option to prepay rather than comply with the specific terms of the loan contract that the effective interest yield is greater than 8%, the transaction is not usurious and the lender is not required either to refund interest or charges treated as interest previously collected or to reduce the indebtedness to bring the yield to 8%.

We trust that this analysis is helpful to you and that, if further clarification is needed, you will not hesitate to call on us.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

LANDLORD AND TENANT

RENT ESCROW BILL—PUBLIC LOCAL LAW—HOME RULE AMENDMENT—LAWS IMPAIRING THE OBLIGATION OF CONTRACT.

March 19, 1968.

Delegate Thomas J. S. Waxter, Jr.

You have requested our opinion as to the constitutionality of Senate Bill 130, now pending before the General Assembly of Maryland, which establishes a "rent escrow" procedure for Baltimore City. The bill would add a new section to the landlord and tenant subtitle of the Code of Public Local Laws of Baltimore City.

We have reviewed the bill both from a procedural as well as a substantive standpoint and we find no constitutional infirmity in it.

From the procedural standpoint, the bill necessarily raises questions concerning the applicability of the provisions of Article XI-A of the Maryland Constitution, i.e., the Home Rule Amendment.

The first question is whether Senate Bill 130 is a Public Local Law on a "subject covered by the express powers granted" to the City of Baltimore. If it is, it violates Section 4 of Article XI-A, which prohibits the Legislature from passing a Public Local Law for a charter county or Baltimore City on a subject covered by the express powers granted to the political subdivision. While the bill is, in our opinion, a Public Local Law,* it does not deal with a subject covered by the express powers granted to the City either in its charter or pursuant to Article 25A of the Annotated Code of Maryland, and therefore does not violate Article XI-A, Section 4 of the Maryland Constitution. *Church Home v. Baltimore,* 178 Md. 326 (1940). See and compare *State v. Stewart,* 152 Md. 419 (1927). The City of Baltimore would have power to enact an ordinance in

this area, if not in conflict with a public general law, only as part of its general police powers now contained in Section 27 of Article 2 of the Charter of Baltimore City (1964 Revision). *Heubeck v. City of Baltimore,* 205 Md. 203 (1954).

The second question concerns the effect of any conflict between Senate Bill 130 and Article 53 of the Annotated Code of Maryland, the latter dealing with the relationships between landlords and tenants on a state-wide basis. We need not resolve the question as to whether there is any conflict between Senate Bill 130 and the provisions of Article 53 since if there is, Senate Bill 130, if passed, would prevail over Article 53 in Baltimore City. This is so because a Public Local Law prevails over an inconsistent Public General Law (Article 1, Section 13, Annotated Code of Maryland) and acts as an implied repealer of the Public General Law to the extent of such inconsistency. *Heubeck v. City of Baltimore, supra.* However, we point out that under the provisions of Article XI-A, Section 3 of the Maryland Constitution, the City of Baltimore would be prohibited from passing such an ordinance if in conflict with Article 53 of the Annotated Code.

For the reasons stated above, we find no procedural impediment to the enactment of Senate Bill 130.

We turn then to the question as to whether the subject matter of the bill violates any substantive constitutional provision. As noted above, we are of the opinion that the bill is not unconstitutional on its face. In the *Heubeck* case the Maryland Court of Appeals recognized that rent control legislation may be enacted pursuant to the police power. See also *Jones H. W. Co. v. State Roads Com.,* 134 Md. 103 (1919), where the Maryland Court of Appeals recognized that the constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals or the public safety. We do not believe that it could be successfully argued that the rent escrow provisions of Senate Bill 130 had no reasonable relationship to the public

health, morals or safety. Consequently, we are of the opinion that Senate Bill 130 is not unconstitutional on its face.

We point out that subsection (c) (3) of proposed Section 459A ends with a semicolon and the word "or". This apparently is an oversight since the provisions of subsection (c) (4) have been stricken and, therefore, the semicolon and the word "or" should be removed and replaced with a period.

ROBERT F. SWEENEY, *Deputy Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* See *Kimball-Tyler v. Baltimore City*, 214 Md. 86 (1957).

LOAN LAWS, ADMINISTRATOR OF

AMENDMENTS TO ARTICLE 58A, SECTION 19 (A) RELATING TO LOANS BY MAIL DOES NOT AUTHORIZE OMISSION FROM INSTRUMENT AT TIME OF EXECUTION OF INTEREST RATE, AMOUNT OF LOAN, AND TIME FOR WHICH MADE.

July 31, 1968.

Mr. Robert J. Gerstung.

We have reviewed proposed Regulation 7 relating to loans by mail. We are unable to approve the regulation in its present form since we believe that it overstates the effect of the changes made in Article 58A, Sections 9 and 19 (a), by Chapter 439 of the Acts of 1968.

Proposed Regulation 7 (d) would require only that promissory notes be filled in completely in all respects "before the proceeds of the loan are delivered to the borrower". This provision would allow the omission from the note as executed by the borrower of the rate of interest, the amount of the loan and the time for which it is made. We believe that a careful reading of Article 58A, Section 19 (a), as amended, reveals that it was the Legislature's intention that lenders be precluded from taking notes in which the "actual amount of the loan . . . the time for which it is made . . . [and] the rate of interest contracted for" are omitted at the time of execution. We believe that the Legislature's action in striking the word "execution" and substituting the words "the proceeds of a loan are delivered" in Section 19 (a) was intended only to authorize the lender to fill in the blanks relating to matters other than the three vital matters specifically adverted to in Section 19 (a).

In short, we think it evident that the 1968 amendments were intended to continue the prohibition against the omission from notes at execution of interest rates, actual amount, and duration, while allowing collateral matters

such as exact inception and maturity dates to be filled in later prior to the date the proceeds of a loan are delivered.

We think it evident that, in amending Section 19 (a) in order to effectuate the authorization of loans by mail contained in Section 9, the Legislature did not intend to go beyond the necessities of the situation in authorizing the omission of items from the note at the time of execution. We note that in your recent explanatory article dealing with the recent amendments (Gerstung, "Maryland Consumer Loan Law Improved by Amendments", 22 Personal Finance Law Quarterly Report 94 [1968]) you explained the change in the law prohibiting the taking of instruments in which blanks were left to be filled after execution by stating that:

> "It is nearly impossible for a licensee to state the correct inception date, maturity date, and other such information in an instrument sent through mails because the lender has no way of knowing when the borrower will execute the instrument. . . ."

We agree with you that the new amendment was intended to allow lenders to take instruments in which the inception date and maturity date were omitted. We do not consider, however, that the 1968 amendments were intended to authorize the "taking" of instruments in which the amount, rate and duration were omitted at the time of execution. To so interpret the 1968 Act would render the disclosure provisions in the Small Loan Law almost nugatory as applied to loans by mail and would not accord with the tightening of the disclosure requirements under the law made by Chapter 439 of the Acts of 1968.

We note the difference in language between Section 17 (a) as amended and Section 19 (a) as amended and consider that the note at the time of execution need not contain a statement of "the total amount of interest to be collected stated in dollars" as required in Section 17 (a), although this item must, of course, be filled in before the proceeds of the loan are delivered to the borrower.

We believe that three other changes should be made. First, the statutory language "note, promise to pay or security" seems preferable to the language "promissory notes, mortgages and vouchers" used in the regulations particularly in view of Article 58A, Section 20, prohibiting the taking of liens on real estate. Second, the wording of the regulation could be improved by stating in a separate subparagraph the limitation that loans can be made only as an accommodation to persons who cannot be physically present on the licensee's premises by reason of sickness or hours of employment. Third, we see no basis for treating the proceeds as received on the day of mailing, rather than the day after.

Accordingly, we are unable to approve the regulation in its present form. We are enclosing herewith a suggested revised form of regulation* which meets with our approval and which you may promulgate without the necessity of seeking further advice from this office.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

**REGULATION 7*
Loans By Mail

Any licensee desiring to make consumer loans by mail to borrowers or prospective borrowers may do so, provided that the negotiations for such loans are consummated directly between the lender and the borrower without the assistance of any merchant and provided that the following subsections are strictly adhered to:

(a) Loans shall be made only to persons who by reason of sickness or hours of employment cannot be physically present on the licensed premises.

(b) Any such mail loan may be made only at the request of an individual borrower or prospective borrower.

(c) If such request, referred to in (a) above, be in writ-

ing, such writing shall be maintained in the file of original papers in accordance with Regulation 3 (c). If such request be made by telephone, the same shall be duly noted in the file of original papers.

(d) Credit applications, insurance requisition forms and other papers, soliciting credit information and/or information concerning a borrower's or prospective borrower's financial stability, may be mailed directly to the borrower or prospective borrower—to be filled in and returned to the licensee.

(e) All notes, promises to pay or security instruments must contain at the time of execution by the borrower a statement of the actual amount of the loan, the time for which it is made and the rate of interest contracted for.

(f) All notes, promises to pay, or security instruments must be filled in completely, in all respects, before the proceeds of the loan are delivered to the borrower.

(g) All notes, promises to pay, or security instruments shall have clearly stated thereon words indicating that the loan was made by mail.

(h) All cancelled checks or copies thereof shall be maintained in the licensed office.

(i) The inception date of a loan made by mail shall be the date after a check or draft is placed in the mail for delivery to the borrower. The date of such mailing shall be duly recorded in the disbursement record in accordance with Regulation 3 (d).

LOAN LAWS, ADMINISTRATOR OF—REGULATION PERMITTING LICENSEE TO TAKE RENEWAL NOTES INCLUDING INTEREST FROM PRIOR LOANS INVALID—1968 AMENDMENT CONSTRUED.

July 31, 1968.

Mr. Robert J. Gerstung.

You have asked our approval of a regulation (proposed regulation 8) to be promulgated pursuant to the Consumer Loan Law (Article 58A of the Maryland Code). The proposed regulation reads as follows:

REGULATION 8
Renewal Loans

Upon renewing a loan in the regular course of business, every licensee shall:

(a) Calculate the refund due on the insurance premium and apply same, if any, to the interest due on the unpaid principal balance of the prior loan.

(b) Apply the proceeds of the new loan agreement to:

(1) the accrued interest on the prior loan
(2) the unpaid principal balance of the prior loan
(3) the premiums incurred for life insurance
(4) the premiums incurred for health and accident insurance
(5) the amounts paid to other creditors, if any,
(6) the remainder to borrower

(c) Mark indelibly every note, contract or other evidence of obligation signed by the borrower, in connection with the prior loan, with the word "paid" or "cancelled", and release any mortgage, any security agreement, or any other security instrument that was taken in connection with the prior loan, and return same to the borrower.

(d) Where the prior notes have been hypothecated, return same to the borrowers within a reasonable time.

(e) For purposes of this regulation, a "reasonable time" shall be deemed to be within ten (10) days from the time the borrower signs the new loan agreement.

(f) Notwithstanding regulation 8 (b) (1), above, if the new loan agreement provides a cash advance to the borrower of less than ten percent (10%) of the unpaid principal on the prior loan, the accrued interest may not be included in the principal of such new loan agreement.

(g) Any renewal loan entered into after the scheduled maturity date of the prior loan shall exclude from the principal of the new loan agreement all accrued interest on the prior loan.

Section (b) (1) of the new regulation is intended to authorize the charging of interest on a renewal note, a portion of which is given to cover the interest on an outstanding note. As you have noted under Article 58A, Section 16, as it existed prior to 1968, the inclusion of accrued interest in a new loan by a lender licensed under Article 58A constituted prohibited compounding of interest. In 19 Opinions of the Attorney General 430 (1934), we construed Section 14-A of the Uniform Small Loan Law, which in substance is identical to Article 58A, Section 16 as it existed prior to the amendments by Chapter 439 of the Acts of 1968, to prohibit the charging of interest on that portion of new notes representing accrued interest on prior notes. We there stated:

> "Section 14-A of the Small Loan Law provides that 'interest shall not be payable in advance or compounded, and shall be computed on unpaid balances.' The object of the above provision is very clear. It was designed to protect borrowers from being required to pay interest upon interest within the limits prescribed by the Act.

> "Where the borrower is indebted to the loan company in the sum of $200.00 for principal, and $14.00 for interest, and desires to borrow an additional $50.00 in cash, the loan company may not lawfully create a new loan for $264.00 and take out the $214.00 due on the former transaction, so as to leave $50.00 in cash for the borrower. Such a course would involve the compounding of interest as the borrower has only received $250.00 in cash by way of a loan, and the charge of interest upon $264.00 is in such a case expressly prohibited by the above section of the law. Where the loan is increased the only permissible course for the borrower to follow is to add the amount of cash actually advanced to the borrower, to the amount previously due on account of principal only. Amounts due for interest should be excluded from any sum upon which interest is computed, as the statute very clearly contemplates that interest cannot be charged except upon such amounts as are actually advanced to the borrower."

The result reached in our prior opinion is in accord with the construction of the Uniform Small Loan Law adopted in the leading case of *Madison Personal Loan v. Parker*, 124 F. 2d 143 (2nd Cir. 1941). That opinion (per Clark, J., L. Hand and Frank, JJ. concurring) stated as follows:

> "Considering the source of the New York statute, it is only fair to assume that the Legislature intended to do just what the act says—prohibit any interest beyond that specifically provided for.
>
> "This fits in with the major purpose of small loan acts and the general history of this type of remedial legislation.
>
> "It is admitted, however, that appellant here is a bona fide small loan company; and we do not mean to imply that it in any way intentionally seeks to flout the New York statute. It is equally

> obvious that this case is not one of abuse; the interest added to principal is only $1.10 out of a total of $158.19. But the fact remains that if this transaction is legal, others less bona fide will also be legal. Interest at 3 per cent a month soon becomes substantial, and constant renewal of the loans would increase the principal until the interest on the original principal would reach the proportions formerly found when only loan sharks operated. Loopholes in statutes are best closed by complete closing. Halfway measures are dangerous. Since the Russell Sage Foundation and others interested in the legislation appear to have recognized these loopholes and by constant revision sought to close them completely, it ill befits a court to reopen them by attenuated reasoning based on cases decided under entirely different circumstances."

Madison Personal Loan v. Parker, supra, is not only in accord with our prior opinion but also with what still appears to be the majority rule throughout the country. See *Frazier v. City Investment Co.,* 42 Ga. App. 585, 157 S.E. 102 (1930); *Lanier v. Consolidated Loan & Finance Co.,* 47 Ga. App. 148, 170 S.E. 99 (1933); *Commonwealth Finance Company v. Livingston,* 12 So. 2d 44 (La. App. 1943); *Securities Finance Co., Inc. v. Maranto,* 119 So. 2d 120 (La. App. 1960); *Vaughn v. Graham,* 234 Mo. App. 781, 121 S.W. 2d 222 (1938); *Commonwealth v. State Loan Corp.,* 116 Pa. Super. 365, 176 A. 516 (1935). See generally 10 A.L.R. 3d 421, 430-34; Hubachek, *Annotations on Small Loan Laws* (1938), p. 85. See also *Vann v. Accounts Supervision Co.,* 88 S. 2d 548 (Fla. 1956).

In promulgating the proposed regulation, you have placed reliance on the proposition that the amendments made to Article 58A, Section 16 by Chapter 439 of the Acts of 1968 are effective to change the rule announced in our prior opinion. A review of the 1968 amendments (to which we will refer) indicates, however, that the provision on which

our prior opinion was based has not been amended in any material respect. Indeed, inspection of the legislative history of the 1968 amendments and particularly the provisions of House Bill 13 which were stricken out by the Legislature conclusively negates any intent to change the preexisting rule with respect to compounding of interest on successive notes.

The memorandum submitted in support of the regulation does not rely on any specific change made by the 1968 amendment but upon authority in other jurisdictions adopting a minority construction of the pertinent provisions of the Uniform Small Loan Act and upon certain Maryland cases announcing the general rule that "money due for interest, may by agreement be changed into principal to bear interest in futuro, but not otherwise" *Banks v. McClellan,* 24 Md. 62, at 82 (1866).

We do not dispute that the *Banks* case and other Maryland cases including *Fitzhugh v. McPherson,* 3 Gill 408 (1845); *Brown v. Hardcastle,* 63 Md. 493 (1885) and *Hooper v. Hooper,* 81 Md. 155, 177 (1895) containing similar language state the common law rule in Maryland. However, the rule announced in our prior opinion rests upon the language and policy of the Uniform Small Loan Law and, as shown in *Madison Personal Loan v. Parker, supra,* 124 F. 2d at 145, the common law rules relating to the compounding of interest are not controlling. As there observed, "since the act itself denounces compounding as illegal, it seems gratuitous to assume that the Legislature meant to make illegal only illegal [at common law] compounding of interest".

We are likewise not persuaded by the "minority rule" cases cited in the memorandum. The New York Court of Appeals in the case of *Household Finance Corp. v. Goldring,* 263 App. Div. 524, 33 N.Y.S. 2d 514 (1st Dept. 1942), affirmed without opinion, 289 N.Y. 574, 43 N.E. 2d 715 (1942), declined to follow the rule laid down by the Federal Court in the *Madison Personal Loan* case. The *Goldring* ruling was a three-to-two decision in the Appellate Divi-

sion. The dissenting judges, however, in defending the *Madison Personal Loan* rule, observed that:

> "It seems obvious that any other holding will easily enable unscrupulous lenders to make short-term notes which cannot possibly be paid off and which will need similar renewing. It would not be long under such conditions before the unpaid interest far exceeded the principal. The avoidance of such a state of things is the primary purpose of the statute * * *."

Reliance is also placed on the "minority rule" case of *Beneficial Finance v. Fusco,* 160 Me. 273, 203 A. 2d 457 (1964). In *Fusco* the court relied in part on a Maine statute (Chapter 141 of the Maine Public Laws of 1963) modeled after a New York statute (Chapter 605 of the New York Laws of 1942) which the Maine court read as approving the result in *Household Finance Corp. v. Goldring.* The statute in question added to the pertinent section of the Uniform Small Loan Law the words: "Provided that, if part or all of the principal amount of any loan contract is the principal balance of a prior loan, the unpaid interest, consideration or charges for the use of money on such prior loan which have accrued within sixty days before the making of such loan contract may be incorporated as interest bearing principal in the principal amount of such loan contract and for the purposes of this paragraph any such new loan shall be deemed a separate loan transaction."

We, unlike the Maine court, read the statutes as not confirming but limiting the result reached in the *Household Finance* case. See Curran, *Trends in Consumer Credit Legislation* (1965), at 30. We find of special significance the fact that a proposal to add to the Maryland law a similar but more limited statutory provision (omitting the last eighteen words of the New York law quoted above) was included in Section 16 (c) of House Bill 13 but was stricken out by the Legislature during the course of enactment of Chapter 439 of the Acts of 1968, and that the 1968 amendments struck from Maryland law an even more limited

provision (former Section 16 (a)) stating that "in refinancing a loan in due course of business, the deduction of not more than one month's interest shall not be considered as compounding of interest".

The case of *Barutio v. New York Life Ins. Co.*, 177 S.W. 2d 685 (Mo. App. 1944), also relied upon in the Memorandum, is concededly not in point, since it did not arise under the Uniform Small Loan Act. The case of *Vaughn v. Graham*, 234 Mo. App. 781, 121 S.W. 2d 222 (1938), which arose under the Uniform Small Loan Act, has not been overruled. The court in *Barutio* pointed out that the *Vaughn* "case was decided under the provisions of a special statute, relating to small loans." (177 S.W. 2d at 688). Consideration of the other authority supporting the minority rule, *Rouse v. Jenkins*, 263 Mich. 609, 249 N.W. 10 (1933) does not change our view. See *Madison Personal Loan, supra*, at 146.

Nor do we find material the fact that the Maryland Act, unlike the New York Act construed by the Court in the *Madison* case, refers to "unpaid balances" rather than "unpaid principal balances". The Court in the *Madison* case pointed out that "all the courts which have ruled against compounding were construing statutes which used the phrase 'unpaid balances' " (124 F. 2d 143, 145 n. 3).

Likewise we are of the view that the attempt made by the proposed regulations to distinguish between loans entered into after the maturity date of the prior loan and loans entered into before such maturity date does not validate the regulations. Such a distinction was expressly rejected in the *Madison Personal Loan* case (see 124 F. 2d at 146-47) and it seems to have been generally rejected elsewhere. See Annotations 10 A.L.R. 3d at 421, 430 n. 12.

We thus find nothing in the case law, in Maryland or elsewhere, which would lead us to regard our holding in 19 Opinions of the Attorney General 430 (1934) to be in error. That ruling constitutes a settled administrative construction of the statute which should not be departed from

in the absence of a clear expression of legislative intention to change the law. When Chapter 439 of the Acts of 1968, and the changes made in it in the course of enactment, are examined in detail, it seems clear to us that the most recent expression of legislative intent is directly contrary to the premise of the new regulation. House Bill 13, in substantially the form in which introduced, appears to have been recommended by you to the Interest and Usury Subcommittee of the Legislative Council. See 1968 Legislative Council Report, Vol. I, p. 110. We have already noted the action of the Legislature in striking from Section 16 (c) of the Bill as introduced those provisions allowing the partial inclusion of accrued interest in new loans. We also allude to the action of the Legislature in adding to Section 16 (a) of the Bill as introduced the words "simple interest * * * on the unpaid balances". We further note the addition by the Legislature to Section 17 (a) of the Bill as introduced of language requiring a disclosure of the "rate of interest contracted for and the total amount of interest to be collected stated in dollars". Nor can we overlook the fact that the Legislature struck from Section 17 (a) of the Bill as introduced the words "if the loan would refinance a prior loan made by the licensee under this article, the statement shall also show any deduction or payment for interest or charges on the prior loan". In the face of this legislative history, we find it very hard, indeed, to see how the 1968 amendments can be read as authorizing the regulations proposed and note that your recent article on the 1968 amendments (Gerstung, "Maryland Consumer Loan Law Improved by Amendments", 22 Personal Finance Law Quarterly Report (1968)) does not include such a change among the changes stated to have been made by the new amendments.

The proposed regulation would thus appear to be contrary to the manifest legislative intent. We deem our prior ruling in 19 Opinions of the Attorney General 430 (1934), which is in accord with the majority rule elsewhere, still controlling and in accordance with the purposes of the statute and the most recent expression of legislative intent.

We are not unmindful of the situation, to which the court in *Household Finance Corp. v. Goldring* referred, arising where the loan company advances the entire amount of a new note to a borrower and then immediately accepts back from him the interest due on the prior note, thus reducing the net proceeds of the new note. The fact that this might be permissible under given circumstances does not alter our view of the statute as herein expressed. As the court in *Madison Personal Loan v. Parker, supra,* observed:

> "This prohibition, if read quite literally, may perhaps mean that a loan company will simply have to forego an increased loan to a current borrower. Perhaps, however, it does not go so far as to forbid a loan company from making a new loan and either leaving the interest on the old loan an outstanding debt not bearing interest or allowing the borrower to discharge the interest out of his own pocket. Questions as to this provision are not before us; we indicate the possibilities involved merely to point out that it must be dealt with on its merits. Certainly we should not construe the compounding clause loosely in order to enable a loan company to avoid a difficulty in the interpretation of another provision. And by indicating these possibilities, we are, of course, not suggesting their use; a loan company is undoubtedly best advised to move cautiously along these lines and to exercise the utmost good faith." (124 F. 2d at 147).

For the reasons made clear in this opinion, we must advise you that we cannot approve proposed regulation 8.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

LOAN LAWS, ADMINISTRATOR OF—RENEWAL LOANS—DURATION OF INITIAL NOTE, NUMBER OF RENEWALS, AND AMOUNT OF NOTE IN RELATIONSHIP TO MEANS OF BORROWER ARE FACTORS TO BE CONSIDERED IN DETERMINING WHEN SMALL LOAN LICENSEE MAY ALLOW BORROWER TO DISCHARGE ACCRUED INTEREST FROM PROCEEDS OF RENEWAL NOTE.

August 13, 1968.

Mr. Robert J. Gerstung.

We have your letter of August 2, 1968, relating to our opinion of July 31, 1968, in which we declined to approve, as submitted, your proposed regulation 8 relating to renewal loans.

The proposed regulation was predicated upon the amendments to Chapter 439 of the Acts of 1968 which were approved by the Governor on April 19, 1968, and which became law on July 1, 1968. Your request for approval of the proposed regulation was received in this office on June 24, 1968, four working days prior to the effective date of the new amendments. While we regret, as you do, that it was not possible to pass on the regulation prior to July 1, and while we appreciate the assistance rendered by your office in submitting an extensive legal memorandum (which arrived at conclusions opposite to those which we felt compelled to reach), you will appreciate that the complexity of the questions involved and their importance required more extensive consideration.

In your letter of August 2, 1968, you questioned the conclusions reached in our opinion of July 31, and you suggest that "an administrative agency in the absence of any law to the contrary within the state, has the authority to decide between alternative rules * * *." This office is cognizant of the discretion vested in administrative agencies by statutes such as the Consumer Loan Law, and it is only with the greatest reluctance that we pronounce invalid any regulation proposed by any administrative agency. Our conclu-

sion, in this instance, was founded on a number of factors not least of which was the existence of "law to the contrary within the state" in the form of our opinion at 19 Opinions of the Attorney General 430 (1934) referred to on pages 2, 3, 7 and 8 of our opinion of July 31. Our recent opinion further regarded as extremely persuasive the amendments made by the Legislature in the language in Chapter 439 of the Acts of 1968 as originally introduced. We note that your letter of August 2 does not touch upon the latter subject. We are certain that on reviewing the course of enactment of Chapter 439 of the Acts of 1968, you will be led to the same conclusion as this office.

In your letter you further suggested that the decision of the Second Circuit (per Clark, L. Hand, and Frank, JJ.), in the *Madison Personal Loan* case, discussed in our opinion, has been robbed of its authority by the subsequent *per curiam* decision of the New York Court of Appeals in the case of *Household Finance Corp. v. Goldring*. While the decision of the New York Court of Appeals constitutes the last word on the construction of the Uniform Small Loan Law in force in New York (save as that decision was modified by Chapter 605 of the New York Laws of 1942), we cannot regard a decision of a distinguished commercial tribunal sitting not only for New York but for other states, with respect to the construction of an important piece of uniform legislation, as completely lacking in weight. Be that as it may, our opinion rested primarily on our prior ruling and the legislative history of the 1968 amendments.

In your letter of August 2, you suggested that our decision construing the special provisions of the Uniform Small Loan Law with their accompanying legislative history and background is necessarily dispositive of similar questions relating to compounding of interest arising under the new interest and usury bill (Article 49, Section 5). Without expressing any opinion with respect to questions under the interest and usury bill, we would suggest that knowledge of the special history and purposes of small loan legislation is sufficient to rebut any such inference.

You further inquire as to our interpretation of the qualifications of the *Madison Personal Loan* rule stated on page 8 of our opinion relating to the situation which arises where, after payment over of the proceeds of a new note, the borrower promptly "discharge(s) the interest out of his own pocket" (124 F. 2d at 147). You inquired as to what "given circumstances" will render this course of action lawful. We believe this question is answered by consideration of the purposes of the *Madison Personal Loan* rule. That rule was designed to guard against a situation in which lenders took a series of short-term notes not repayable by the borrower in the time provided in order to evade the prohibition against compounding. In light of this purpose, the duration of the initial note and the number of renewals entered into between the lender and the borrower as well as the amount of the note in relation to the known means of the borrower would certainly be important factors to be considered in determining whether the *Madison Personal Loan* rule was applicable in a situation in which the borrower paid over accrued interest from the proceeds of the renewal note. The Second Circuit in its opinion in the *Madison Personal Loan* case admonished that "a loan company is undoubtedly best advised to move cautiously along these lines and to exercise the utmost good faith". We express no opinion as to whether any elaboration of this admonition by regulation is necessary or appropriate or as to the validity of any such regulation.

You further inquire as to whether the remaining portions of the Regulation submitted to us, Sections 8 (a), (b) (2) through (6), (c), (d), and (e) meet with our approval. These regulations have not hitherto been submitted to us for separate approval, but we herewith indicate that we find no objection to their validity if separately promulgated and they may be separately promulgated without the necessity of seeking further approval from this office.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

MARKET AUTHORITY

RELATIONSHIP TO POLITICAL SUBDIVISION IN WHICH IT IS TO BE LOCATED.

February 28, 1968.

Mr. Joseph H. Rash, Chairman.

In your letter of February 13, 1968 you have requested our opinion concerning the relationship between the Authority and the political subdivision in which it is proposed to be located. Specifically, you request our opinion on the following questions:

a. Would the food distribution center be subject to real property taxes in the county in which it is located?

b. Would the construction of the center be subject to local zoning laws?

c. Assuming the local zoning laws were satisfied, could the county authorities prohibit the building of the center?

With respect to the question as to the payment of real property taxes, Section 15 of the Act which creates the Authority (Chapter 145 of the Laws of Maryland 1967) provides:

> "The establishment of the Market under the provisions of this subtitle is in all respects for the benefit of the inhabitants of the State of Maryland or its political subdivisions and is a public purpose, and the State of Maryland and its political subdivisions and the Authority will be performing an essential governmental function in the exercise of the powers conferred by this subtitle, provided, however, that wherever the Authority sells or leases land or market facilities to any

> private entity or entities such land or market facilities shall be subject to state and local property taxes from the time of such sale."

In light of the above provision, it is our opinion that as soon as the Authority sells or leases land or improvements thereon to private entities, such land or facilities are subject to local property taxes. Further, we might add that until such time as the Authority does sell or lease the land or facilities, the property would not be subject to local property taxes. See Article 81, Section 9 (1) of the Annotated Code of Maryland.

We turn then to the question as to whether or not the distribution center would be subject to local zoning laws. Section 5 (c) of Chapter 145 specifically provides that the Authority shall be subject "to all zoning and subdivision regulations of the political subdivision in which the market is located." In light of this, it seems clear to us that the construction of the center is subject to zoning and subdivision regulations of the county in which it is located.

The third question which you raise concerns the power of the local officials to prohibit the building of the Distribution Center even though the local zoning and subdivision laws are satisfied. Section 5 (e) provides, in part:

> "The Authority shall have perpetual existence and may:
>
> * * *
>
> (e) Acquire in its own name, by purchase, on such terms and conditions and in such manner as it deems proper, or by condemnation and in accordance with and subject to the provisions of any and all existing laws applicable to the condemnation of property for public use, real property or rights or easements therein or thereover or franchises or licenses convenient for its corporate purposes; * * * and provided further that the powers herein contained and conferred in this subsection shall not be exercised nor applicable to the acquisition of any site for the establishment or con-

> struction of the Market, nor shall the Market be established or constructed unless the site therefor shall have been first approved, in the case of the City of Baltimore, by the Board of Estimates, or in the case of any other political subdivision within the Greater Baltimore Region, the county commissioners or county executive as the case may be."

This provision is somewhat inconsistent with the provisions of Section 5 (c) of the Act, which concern the Authority's power to construct the Center, and provide:

> ". . . The Authority shall not be subject to the provisions of Article 78A of the Annotated Code of Maryland (1957 Edition) as amended, and shall have the right to construct the Market without obtaining the consent of any department, division, commission, board, bureau or agency of the State or of any political subdivision of the State, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions, or things which are specifically required by this Act; except that the consent of the Regional Planning Council shall be obtained and except that the Market shall be subject to all applicable laws and regulations of the State Health Department and shall be subject to all zoning and subdivision regulations of the political subdivision in which the Market is located . . .".

Although it places the Authority in a less favored position than a private developer, we believe that because of the specific language in Section 5 (e) quoted above, this section controls and the establishment and construction of the Distribution Center may not be consummated unless the site is approved by the County Commissioners or County Executive of the county in which the Center is to be located. Obviously, this approval should be obtained prior to the time the Authority binds itself to the purchase of a particular site. If it was not the intention of the Legislature to require approval of the site by the County Commis-

sioners or County Executive, then we believe the Legislature should make this clear by an appropriate amendment to the Act.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

MARKET AUTHORITY—MEANING OF THE TERM "LOCAL PROPERTY TAXES" AS USED IN MARKET AUTHORITY ACT.

September 4, 1968.

Mr. Joseph H. Rash.

In your recent letter you have requested our opinion concerning certain provisions of the Act creating the Market Authority. (Chapter 145, Laws of Maryland, 1967). Specifically, you inquire as to whether purchasers or lessees of property in the Market, which is to be located in Howard County, would be subject to ad valorem taxes and front foot assessments payable to the Howard County Metropolitan Commission under Sections 170 and 173 of the Code of Public Local Laws of Howard County (1965 Edition). The question arises because of Section 15 of the Market Authority Act which provides:

> "The establishment of the Market under the provisions of this subtitle is in all respects for the benefit of the inhabitants of the State of Maryland or its political subdivisions and is a public purpose, and the State of Maryland and its political subdivisions and the Authority will be performing an essential governmental function in the exercise of the powers conferred by this subtitle, *and with the exception of state and local real estate taxes as required below the Authority shall not be required to pay any taxes or assessments upon the Market or any part thereof or upon its activities in the operation and maintenance of the Market* or upon any revenues therefrom, and the bonds of the Authority issued under this Act, and the interest thereon are forever exempt from all state, municipal, and local taxation; *provided, however, that wherever the Authority sells or leases land or Market facilities to any private entity or entities such land or Market facilities shall be subject to state and local property taxes from the*

time of such sale." (Emphasis supplied). (See also Section 5 (f) of the Act.)

From the above, it is clear that if the ad valorem tax and the front foot assessment charge are "local property taxes" within the meaning of Section 15 of the Market Authority Act, the purchaser or lessee must pay these charges.

We consider first the question of whether or not the ad valorem tax is a local property tax. Section 170 authorizes the Metropolitan Commission to levy this tax "against all assessable property within [the] Metropolitan District" so long as certain bonds are outstanding and not paid. The Metropolitan Commission is required to determine the amount of money necessary to pay the principal and interest due within the year on these bonds taking into consideration certain other expenses and credits and to determine the number of cents per $100 of assessable property necessary to raise this amount of money. When this determination is made, it is certified to the Board of County Commissioners who "in their next annual levy [are required to] levy said tax on all land and improvements and all other property assessed for county tax purposes within the Metropolitan District, which tax shall be levied and collected and have the same priority, right, bear the same interest and penalties and in every respect be treated the same as county taxes."

In light of these provisions and in light of the fact that this is a tax based upon the assessed value of all of the assessable property within the district and payable by all persons within the district, we conclude that it is a local property tax within the meaning of Section 15 of the Market Authority Act. See Section 2 (14) and Section 7 of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume). See also *Gould v. Baltimore*, 59 Md. 378 (1883).

We turn now to a consideration of the nature of the front foot assessment as provided for under the provisions of

Section 173 of the Howard County Code. Initially, it must be pointed out that Section 15 of the Market Authority Act recognizes the difference between taxes and special assessments. Section 15 grants the Market Authority an exemption from the payment of "any [State or local] taxes or assessments".* However, in setting forth the obligation that entities purchasing or leasing real estate from the Market have, that same section provides only that state and local "property taxes" are to be paid. There can be no doubt that the front foot assessment imposed under the provisions of Section 173 of the Howard County Code is a special benefit assessment or charge and not a general tax. In *Gould v. Baltimore,* 59 Md. 378 (1883), the Court of Appeals of Maryland held that assessments for the cost of paving streets were not taxes within the meaning of a statute which provided that "taxes" had to be collected within four years after being levied. The Court there pointed out the distinction between a special benefit assessment and a general tax, noting:

> "The question on this appeal, is whether an assessment made upon the owner of adjacent property to defray the expenses incident to paving streets, is a tax within the meaning of this Act, the collection of which must be enforced within the time prescribed by the statute.
>
> "The right to make such assessments is undoubtedly an exercise of the taxing power, but an assessment thus made differs from a general tax levied for State and city purposes. The latter is a tax imposed on all persons within the territorial limits according to the value of their property, in consideration of the protection, which the government affords alike to all. A local assessment, on the other hand, is a tax levied occasionally as may be required upon a limited class of persons interested in local improvement, and who are presumed to be benefited by the improvement over and above the ordinary benefit which the commu-

> nity in general derive from the expenditure of the money. In the payment of the assessment thus made, the adjacent owner is supposed to be compensated by the enhanced value of his property, arising from the improvement. *And hence, it has been uniformly held that the word taxes, whether used in an Act of the Legislature, or the charter of a company exempting it from taxation, does not embrace such local assessments, unless there be something in the statute or charter to indicate such an intention.* (Emphasis supplied).

Indeed, the provisions of Section 173 of the Howard County Code make this distinction clear. Subsection (h) of Section 173 provides in part that, "The annual benefit assessment . . . shall be a first lien upon the property against which they are assessed until paid, any statute of limitations to the contrary notwithstanding, *subject only to prior State and County taxes.*" (Emphasis supplied). See also *St. Paul Bldg. Co. v. Baltimore,* 149 Md. 685 (1926).

We have, therefore, concluded that the ad valorem tax imposed by the Metropolitan Commission is a local property tax within the meaning of Section 15 of the Market Authority Act, but that the front foot assessment is not such a local property tax.

Accordingly, under Section 15 purchasers or lessees of property in the Market are subject to ad valorem taxes, but are not subject to front foot assessments. We trust this information will answer your inquiry.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

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* For a discussion of the difference between taxes and assessments on the one hand and service charges on the other, see *Jersey City, etc. Auth. v. Housing, etc.,* 40 N.J. 145, 190 A. 2d 870 (1963).

MEDICAL EXAMINER

DEPUTY MEDICAL EXAMINER MAY NOT APPOINT A MEMBER OF ARMED FORCES INSTITUTE OF PATHOLOGY TO ACT IN HIS PLACE—DEPUTY MEDICAL EXAMINER MAY APPOINT A MEMBER OF THE INSTITUTE AS AN ASSISTANT—INVESTIGATIONS CONDUCTED BY INSTITUTE ARE NOT PART OF OFFICIAL RECORD.

January 3, 1968.

Dr. Russell S. Fisher, M.D.

You have set out in your letter of November 21, 1967, three questions concerning the accident investigation project which the Armed Forces Institute of Pathology would like to conduct in the State of Maryland. We will respond to those questions in the order presented in your letter.

(1) You ask whether a Deputy Medical Examiner may deputize a member of the Armed Forces Institute of Pathology to perform or assist in post-mortem examinations. It is understood that certain investigations intended to furnish the more detailed information needed in an accident investigation project being conducted by the Armed Forces Institute would require examinations and provide information that the Deputy Examiner might not develop in his written case investigation.

Section 3 of Article 22, Annotated Code of Maryland, 1957, (1966 Replacement Volume) in part reads as follows:

> ". . . such deputy medical examiner, *when it becomes necessary,* shall have the power to deputize any other physician in the county to act as deputy medical examiner *in his place and stead.*" (Emphasis added).

In accordance with the above section, we believe that a deputy medical examiner may deputize another physician to act in his place only under unusual or extreme circumstances and that the Legislature did not intend his author-

ity to be absolute or to be discretionary under normal circumstances. We must, therefore, conclude that a deputy medical examiner may not appoint a member of the Armed Forces Institute of Pathology to act in his place.

Section 3 of Article 22, supra, provides:

> "The said Commission is hereby authorized to appoint a deputy medical examiner, who shall be a licensed doctor of medicine, for each county in the State; provided, however, that an *additional* deputy medical examiner *or examiners* may be appointed for any county whenever, in its discretion, the said Commission shall deem it necessary or desirable to do so." (Emphasis supplied).

We believe that although the above section would appear to authorize the Maryland Post-Mortem Examiners Commission to appoint members of the Armed Forces Institute to act as examiners, the spirit and intent of the act is to the contrary. Certain police powers are exercised by the examiners and these are not lightly delegated. "Medical examiner(s) . . . licensed doctor(s) . . . for each county" exercising the police powers of this State are officers of this State and we think it implicit in Article 22, Section 3 that they be residents of this State.

However, we can find nothing in your Act which would prohibit an examiner from employing an assistant to perform part of his functions under his immediate directions. Section 8 infers as much. A member of the Armed Forces Institute working along with a Deputy Medical Examiner as an assistant to perform certain investigations at his direction would not be without legal status and the practice would be proper. But practical considerations may dictate a contrary result. The admissibility of the records as evidence under the terms of Article 22, Section 8 would seem to be dependent upon their having been compiled by the proper appointed officers. Unofficial examinations or compilations may strip the reports of their evidentiary value, as such, and it would seem to be unsatisfactory to the Institute to content itself with mere assistance in the

ordinary examination. The first person testimony of the examiner is also often required and the infusion of strangers into the system of examinations may reduce the examiner's testimony to hearsay. Such testimony could be required at a time when the stranger examiner has been transferred to a remote point by the military authorities.

In our opinion Armed Forces Institute of Pathology may assist in the examinations by the performance of any medical function committed to the examiner and under his direct supervision. We suggest, however, that if the Institute wishes to have an independent role, then, at the discretion of the Board it may be permitted (1) to observe the performance of examinations and (2) after the official examination is completed and with the express written consent of the next of kin, to use the examiners facilities to perform whatever further examinations may be material to it. In exercising this discretion or determining whether to exercise it, the Board's first criterion should be to assure the avoidance of any interference with the proper function of the examiner.

(2) You ask if the team investigators acting in the medical history investigations should develop information otherwise not available to the Deputy Medical Examiners must this information become part of the official record. Section 8 of Article 22, supra, in part provides as follows:

> ". . . The *records* of the office of the chief medical examiner, and of the several deputy medical examiners, *made by themselves or by anyone under their direction or supervision,* or transcripts thereof certified by such medical examiner, *shall be received as competent evidence in any court in this State* of the matters and facts therein contained. . . . The records which shall be admissible as evidence under this section shall be *records of the results of views and examinations of or autopsies upon the bodies of deceased* persons by such medical examiner, or by anyone under his direct supervision or control, and shall *not* include state-

ments made by witnesses or other persons. . . ." (Emphasis supplied).

We believe that in accordance with our answer to the first question, any investigation conducted by the Armed Forces Institute of Pathology other than as an "assistant" will not be a part of the official record unless some observation of theirs is brought to the attention of the examiner under such immediate circumstances that he may make a similar finding as his own and include it in his report. In that situation the inclusion of the finding in the report will be attributed to the examiner's personal observations. Independent determinations of the armed forces team cannot be part of the report.

(3) You ask may engineering or mechanical investigation reports (where supposedly the work of the team would be in the role of assistants to the police accident investigators) be made privileged, either to the extent it becomes a part of the police record, or to a certainty by withholding it from the police files. Since the investigators would be working in conjunction with county police, we believe that the matter concerning their reports and the relationship with the police is properly answered directly by the county solicitor involved or by this office for the State Police or Baltimore City Police on their inquiry. We would observe, however, that we see no marked differences between the problem as it relates to them and we feel that the reports should be independent of one another.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

MEDICAL EXAMINERS—ADVERTISING—SIGN READING "PERRY HALL MEDICAL CENTER" WOULD VIOLATE MEDICAL PRACTICE ACT.

January 3, 1968.

Walter C. Merkel, M.D.

This is in reference to your recent letter wherein you enclose a letter to the Medical and Chirurgical Faculty from the Perry Hall Medical Building Center, Inc. You ask whether or not a sign proposed to be erected by the *Perry Hall Medical Center, Inc.* violates the Medical Practice Act. It is our understanding that the sign will be 5 feet high by 6 feet wide and will contain wording as follows:

PERRY HALL MEDICAL CENTER (letters 8½" high)
APOTHECARY, PHYSICIANS, DENTIST (letters 4½" high).

Advertising by physicians is controlled by Section 146 of Article 43 of the Annotated Code of Maryland (1957 Edition, 1967 Supplement), which reads as follows:

> *"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 3½" 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.*

(d) In all professional uses of his name, one licensed under this subtitle who holds the degree of doctor of osteopathy, shall designate his school of practice by 'D.O.', 'osteopathic physician and surgeon', or some similar term." (Emphasis supplied).

We note that in a similar situation contained in 43 Opinions of the Attorney General 144 (1958) this office held that the use of the name "Dental Health Center" or "Dental Health Center Building" violated the provisions of the Act regulating dentists in this State, which provisions are quite similar to Section 146 (c) of Article 43. In that opinion, Deputy Attorney General Stedman Prescott reasoned as follows:

". . . The only purpose the group of dentists could have in using either name for the building which is solely occupied by that group of dentists is to advertise the business carried on therein by them as dentists. Since that is their purpose, it is my opinion that it is a violation of the statute. The Legislature has clearly shown that it was its intention that dentists be limited in their use of signs for the purpose of advertising. The only signs permitted by the statutes for use by a dentist to advertise his business are signs containing his name and title or degree. Such signs may only be written in letters which do not exceed three inches square in size, placed upon the door or wall, or both, of the building wherein the dentist practices. He also may place the same type of sign on the

door of his office within the building. No other signs are permitted."

Following the reasoning in the above opinion, we must conclude that the proposed sign in the instant case would violate the provisions of the Medical Practice Act and, accordingly, it should not be approved by your office.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

MEDICAL EXAMINER—ADVERTISING—EAR PIERCING SERVICES.

January 17, 1968.

Walter C. Merkel, M.D.

This is in reference to your letter of December 20, 1967 and previous correspondence in this matter wherein you ask whether or not the proposed ear piercing services plan, as set forth below, would violate the advertising provisions of the Medical Practice Act.

All advertising by physicians in this State in general is prohibited by the Annotated Code of Maryland (1965 Replacement Volume) in accordance with Section 146 of Article 43 as follows:

> "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 3½" 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. (d) In all professional uses of his name, one

> licensed under this subtitle who holds the degree of doctor of osteopathy, shall designate his school of practice by 'D.O.,' 'osteopathic physician and surgeon,' or some similar term. . . ."

It appears that the physicians involved in the ear piercing services in instant case will do no direct advertising themselves. However, we believe that they could possibly directly benefit by the advertising done by captioned subject's client. Theoretically, if subject's client did not advertise, the physicians involved would receive no remuneration for doing ear piercing services, and again, theoretically, the greater the amount of advertising, the greater would be the need for services of the physicians involved.

We realize that Section 146, supra, pertains to direct acts by the physician himself. However, we believe that the advertising of ear piercing services in the case before us transgresses the spirit of the law, which we interpret to mean that no physician should benefit from advertising, in the accepted sense, of any means other than that specifically allowed by Section 146. Accordingly, your Board should not approve the request in this matter.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

MENTAL HYGIENE

NARCOTIC DRUGS—METHADONE—PRESCRIBING AND/OR ADMINISTERING OF BY PHYSICIANS.

January 16, 1968.

Mr. David Nurco.

You have asked for an opinion from us whether Methadone, a synthetic drug, may be prescribed by a licensed physician in Maryland for the purpose of maintaining someone in an addictive state.

Methadone has been used by physicians on those addicted to stronger drugs to ease them off of the stronger drugs. Apparently, it has been left to the discretion of the physician to determine the length of time Methadone should be given to an addict.

Section 285 of Article 27 of the Annotated Code of Maryland (1967 Repl. Vol.) provides in part as follows:

> "A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe on a written prescription, administer or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision."

The above is not an absolute prohibition against prescribing or administering narcotic drugs, nor can any such prohibition be found anywhere in our Maryland statutes. In our opinion, under Section 285, a licensed physician or dentist, in the course of his professional practice, may prescribe narcotic drugs at his discretion. It is obvious, however, that a physician or dentist when prescribing a narcotic drug must exercise "good faith" and it is his "good faith" that is the controlling factor.

Some states, notably California, specifically provide by statute that prescribing any narcotic drug for a narcotic

addict is unprofessional conduct within the meaning of their medical practices act. Further, California, by statute, lists specific ways of treating a narcotic addict.

In *Elder v. Board of Medical Examiners,* 50 Cal. Rptr. 304 (1966), a physician sought review of the revocation of his license to practice medicine. He had been charged by the Board of Examiners with prescribing Methadone in violation of the statute. He denied that he ever knowingly treated a narcotic addict in his office, or at any other place. The principal issue before the court was whether the physician's patients were "narcotic addicts" at the time he prescribed Methadone. The court set out what it considered to be the requisites of addiction and found that the physician's patients were, in fact, addicts at the time he prescribed Methadone, and he had thus violated the California law.

The California case is clearly distinguishable from the matter we are here considering, since the California statute specifically prohibits prescribing narcotics for known addicts, whereas our statute, as above noted, contains no absolute prohibition against prescribing narcotics, but leaves the same within the "good faith" of the physician.

It is our opinion that a licensed physician in Maryland, in good faith, may prescribe Methadone in the course of his professional practice, for a narcotic addict.

FRANCIS B. BURCH, *Attorney General.*

EDWARD R. JEUNETTE, *Spec. Assistant Attorney General.*

GEORGE B. CAVANAGH, *Spec. Assistant Attorney General.*

MOTOR VEHICLES

NO POINTS MAY BE LEVIED FOR CONVICTIONS OF TRAFFIC VIOLATIONS IN FEDERAL JURISDICTION—FEDERAL AUTHORITIES NOT REQUIRED TO REPORT CONVICTIONS—WHERE SUCH CONVICTIONS VOLUNTARILY REPORTED BY FEDERAL AUTHORITIES, DEPARTMENT OF MOTOR VEHICLES MAY MAKE SAME PART OF INDIVIDUAL'S DRIVING RECORD, AND COMMISSIONER, AFTER HEARING, MAY TAKE ADMINISTRATIVE ACTION ON VIOLATOR'S DRIVING PRIVILEGE.

May 7, 1968.

The Honorable Gerald F. Bracken.

Your letter of March 13, 1968 concerning the application of sanctions under the Motor Vehicle Code growing out of convictions as the result of violations occurring within Federal jurisdiction, has been referred to me for reply.

Previous Attorneys General have consistently ruled that the State of Maryland has no authority to take action as the result of traffic violations resulting in convictions under Federal jurisdiction. (See 40 Opinions of the Attorney General 356; 47 Opinions of the Attorney General 75; and 22 Opinions of the Attorney General 451).

In the latter opinion, it was determined that the Commissioner could take an administrative action under his broad general powers governing what amounts to "the unsafe" operation of a motor vehicle, but only after a hearing.

There is no question, with regard to the specific references set out in your letter, that those sections concerning the requirement of law enforcement officers to report convictions of the motor vehicle laws of *this State* (Maryland) to the Department of Motor Vehicles do not apply to Federal authorities. The theory behind this is that the Maryland Legislature has no power to require Federal authorities or those of sister states to report violations of their motor vehicle statutes to the Maryland Department.

This is not to imply, however, that such violations cannot voluntarily be reported by other state or federal authorities. In fact, I am advised that in instances where violations of Federal, State or local motor vehicle violations are reported to the Department of Motor Vehicles, such violations are made a part of the individual's driving record although no point assessment is levied since Section 114A permits assessment of points only for convictions of violations of the motor vehicle laws of this State (Maryland).

Concerning your reference to Section 114A (a) of Article 66½, which provides for the assessment of points in military cases, I believe this refers to violation of the Maryland motor vehicles law by military personnel which are not prosecuted, but rather turned over to military authorities for further action and upon being advised of such action by the military authorities, an assessment is imposed.

I am assured that should the United States Park Police voluntarily submit records of convictions to the Department of Motor Vehicles, such records will be included in the operating records of the respective drivers and appropriate administrative action will be taken, if possible.

I share your concern that convictions of Federal Motor Vehicle Statutes and local ordinances do not carry with them a point assessment and I believe that some action may be taken to amend Section 114A in the next session of the General Assembly.

It would appear that at present a Maryland operator could conceivably be convicted several times for Drunken Driving under a Federal Statute and continue to operate in Maryland when, had even one violation occurred within the State's jurisdiction, a mandatory suspension or revocation would have been imposed. This certainly appears to be a grave injustice.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Spec. Asst. Attorney General.*

MOTOR VEHICLES—DEALERS IN MOBILE HOMES FALL WITHIN THE LICENSING AND REGULATION PROVISIONS OF THE MOTOR VEHICLE CODE.

September 26, 1968.

Honorable James Clark, Jr.

I have your letter of September 19 asking whether or not the Motor Vehicle Code authorizes the Department of Motor Vehicles to exercise control over mobile home dealers.

Article 66½, Section 2 (63) (63a) of the Annotated Code of Maryland, defines Trailers and Trailer Dealers and Section 61, commonly referred to as the Dealer Licensing Law, and empowers the Department of Motor Vehicles to license and regulate Trailer Dealers.

The Motor Vehicle Code does not specifically refer to mobile homes but I am advised that under Section 2 (b) which gives the Department the authority, in disputed cases, to determine the extent of the applicability of the definitions, the Commissioner has ruled that the definition of Trailer includes mobile homes. I am further advised that mobile homes as manufactured and delivered to authorized franchise dealers are equipped with wheels and otherwise constructed so as to fall within the contemplation of the definition of a trailer.

Section 29 which imposes an excise tax for the issuance of a certificate of title for motor vehicles, specifically excludes house and office trailers and, therefore, a sales tax is imposed which is to be remitted to the Comptroller's office.

Further, a recent opinion of the U. S. District Court for the Northern District of New York (Matter of Winarski, March 29, 1968) has found house trailers and mobile homes to be synonymous.

Therefore, I must advise that a dealer in mobile homes does fall within the licensing and regulation provisions of the Motor Vehicle Code.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Spec. Asst. Attorney General.*

MOTOR VEHICLES—DEALER LICENSING LAW—SALE OF NEW AUTOMOBILE THROUGH A CONSUMER BUYING SERVICE FOR WHICH THE SERVICE RECEIVES A FEE FROM THE DEALER VIOLATES MARYLAND'S AUTOMOBILE DEALER LICENSING LAWS.

November 12, 1968.

Mr. Gordon N. Wilcox.

You ask whether the purchase of a new automobile through a consumer buying service, for which the service receives a fee from the dealer, violates the Dealer Licensing Laws of the State of Maryland.

The facts submitted indicate that a prospective new car buyer is solicited by memoranda displayed on various governmental, military or industrial agency bulletin boards advertising dramatic savings by purchase of consumer items through a buying service. The prospective buyer contacts the service and pays a minimal subscription fee, in most cases. In return, he receives a detailed brochure outlining prices for the particular car and accessories in which he is interested. When the purchaser has decided upon the make of vehicle he desires, the buying service provides him with a purchase certificate and the name of a participating franchised new car dealer. Presumably, the purchase can be made only with a certificate and only through the participating dealer, to realize the dramatic savings involved.

The buying service instructs the dealer to take the purchase certificate from the customer, write the certificate number on the purchase order, and return the certificate and a check in favor of the service.

The 1967 General Assembly enacted Chapter 222, which rewrote the laws governing the regulation and licensing of new and used automobile dealers and salesmen, now codified as Article 66½, Section 61, Annotated Code of Maryland, (1967 Repl. Vol.).

You advise that the participating franchised new car dealers are licensed in accordance with the aforementioned section while the buying service is licensed neither as a dealer or salesman.

Article 66½, Section 2, definitions, subsection (10) defines "dealer" as a sales branch or agency of a manufacturer of motor vehicles or a dealer in new motor vehicles who holds an unexpired appointment as such in writing from the manufacturer of such vehicles or from an authorized distributor of such vehicles.

Subsection 49a defines "salesman" as any person who sells or offers to sell any motor vehicle, or solicits or otherwise endeavors to procure in any manner the sale of a motor vehicle on behalf of a dealer or himself, if he is also a dealer, whether or not such individual is licensed or subject to the licensing requirements of this Article.

Section 61 (b) (4) of the same Article states:

> "No person may engage in or transact any business of selling motor vehicles or trailers, or hold himself out to the public as doing any selling of motor vehicles or trailers, in this State, except in compliance with the applicable provisions of this Article. No person, whether subject to licensing by any law or otherwise, may engage in this State in any trade practice or other act which is a violation of subsection (b) (2) (ii) above. Every person who wilfully participates in a prohibited act or violation with knowledge of the same is subject to the criminal penalty therefor provided in this Article."

Since the buying service brings together the buyer and seller, and, in effect, secures a purchase for a fee paid to the buying service; to that extent, the buying service "solicits or endeavors to procure in any manner the sale of a motor vehicle" within the above definition of salesman, and is, therefore, subject to the dealer licensing laws of this State.

Further, Section 61 (d) (4) (viii) prohibits:

> "Doing any vehicle sales business with or through any person who is subject to the licensing requirements of this subtitle with the knowledge that subject person is not licensed as required."

Consequently, any dealer knowingly participating in an automobile sales transaction with an unlicensed buying service is also violating the dealer licensing laws of Maryland.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Spec. Asst. Attorney General.*

MOTOR VEHICLES—POWER OF MUNICIPALITY TO ENACT MOTOR VEHICLE AND TRAFFIC REGULATIONS AND DISPOSITION OF FINES.

December 10, 1968.

Raymond S. Smethurst, Jr., Esq.

We have your recent inquiry concerning the authority of the Pocomoke City Council to enact a new vehicle and traffic section of the Pocomoke City Code (1968 Edition). We have reviewed the draft submitted by you and since this is not entirely a local problem, but one of general application, we are glad to state our opinion in connection with this matter.

The Motor Vehicle Law of this State, Article 66½, Section 1, 1968 Supplement, expressly states that its provisions are intended to be state-wide, and that local subdivisions shall have no right to make or enforce any local law, ordinance or regulation upon any subject for which provision is made in Article 66½, but it does authorize local subdivisions with respect to streets and highways under their jurisdiction, and within the reasonable exercise of the police power, some latitude with regard to the operation of motor vehicles.

The proposed Code generally appears to be within the purview of your police powers and not in contravention of any sections of Article 66½. Indeed, Sections 185, 186 and 186A of Article 66½ specifically grant to the local authorities the power to regulate the standing or parking of vehicles, regulation of traffic by police officers or traffic control devices, regulation of pedestrian traffic, regulation of speed on streets not designated or maintained as a part of the State or Federal highway system, and the regulation of through truck traffic.

Section 191 permits the erection of traffic control devices in conformity with the State manual and specifications. Section 242 (a) authorizes the erection of stop signs and

Section 245 (a) permits municipalities to make exceptions with regard to the state-wide regulation of stopping, standing and parking on local highways.

The Court of Appeals has sustained the subdivisions' right to erect parking meters and set rates within the police power to control and regulate traffic. *Baltimore County Revenue Authority v. Baltimore County*, 1958, 216 Md. 553.

With regard to the responsibility of Trial Magistrates to pay over to the City any fines or collateral for violations of this Traffic Code, such authority appears in Article 38, Section 2:

> "All fines, penalties, and forfeitures, when recovered, shall be paid to the County or City where the offense occurred . . . unless directed to be paid otherwise by law . . ."

Such disposition is also provided for in Article 52, Section 104 (a) and (c).

This is further supported in a 1947 opinion by then Attorney General Hall Hammond, who ruled that fines levied for violations of ordinances should be remitted to local authorities. 32 Opinions of the Attorney General 282.

We note that the Code does not contain a severability clause and we would recommend the inclusion of such a provision in situations where, as in this case, an entire chapter is being revised.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM T. S. BRICKER, *Spec. Asst. Attorney General.*

NATIONAL GUARD OF MARYLAND

UNDER SECTION 32 OF ARTICLE 65 OF THE CODE THE STATE MUST PAY NATIONAL GUARDSMEN FOR A FULL DAY OF STATE MILITIA SERVICE WHERE DURING A TWENTY-FOUR HOUR PERIOD THE GUARDSMEN PERFORMED FEDERAL DUTY, RECEIVING A FULL DAY OF FEDERAL PAY THEREFOR AND THEN WERE CALLED OUT BY THE GOVERNOR FOR FIVE HOURS OF STATE SERVICE.

July 30, 1968.

Major General George M. Gelston.

You ask the legality of the State paying National Guardsmen for a day of duty during a 24 hour period where both state and federal service was performed and where the Guardsmen involved have received federal pay for a full day of federal service. The day in question was April 6, 1968, a Saturday, during which several National Guard units had performed their minimum required federal drill period of four hours pursuant to Section 502 of Title 32 of the United States Code and then received a call to State duty at 6:45 p.m. The call to State service was by the Governor pursuant to Section 8 of Article 65 of the Annotated Code of Maryland (1968 Replacement Volume) and the Guardsmen called were required to perform State service for at least the balance of the day of April 6, 1968; that is, from 6:45 p.m. to 12:00 midnight.

The question posed is whether these Guardsmen are entitled to payment by the State for their more than five hours of State service on April 6, 1968, in light of the fact they have already been paid by the federal authorities for the scheduled federal drill. The National Guard Bureau, you advise in your letter, has no objection to a state paying for duty during a period for which federal compensation was also made, but leaves this decision up to the state.

Section 32 of Article 65 of the Annotated Code of Maryland provides in pertinent part that ". . . when the organ-

ized militia, or any part thereof, shall be ordered out for active duty or training by the Governor, or by his authority . . ." officers, warrant officers, and enlisted men ". . . shall receive the same per diem pay, including longevity pay, subsistence and allowances, as officers, warrant officers and enlisted men of the regular Army of like grade and length of service, but no such persons ordered to active duty other than for training shall be paid a per diem of less than ten dollars ($10.00)."

In our opinion the above quoted language of Section 32 of Article 65 is applicable to the circumstances of the call-up for State duty of April 6, 1968. We find no provision in either Article 65 or any other State statute which would make the obligation of the State to pay for State militia duty depend upon whether or not Guardsmen had also received federal pay for service during the same 24 hour period. It is our view, therefore, that those Guardsmen called up by the Governor on April 6, 1968, were entitled to a full day's pay for State service under the provisions of Section 32 of Article 65 in accordance with your normal procedure for calculating a single day's pay. In the instant case, the Guardsmen served under State authority for a minimum of five hours, which we believe is sufficient to qualify for a full day of State pay. We need not pass at this time upon the question of whether there is implied within the language of Section 32 of Article 65 some requirement for a minimum period of State service to qualify for a full day of State pay.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

PHARMACY BOARD, STATE

PHARMACY—ADVERTISING—BOARD MAY INSTITUTE REVOCATION PROCEEDINGS AGAINST A PHARMACY FOR VIOLATION OF ADVERTISING UNDER SECTION 266A.

January 12, 1968.

Mr. F. S. Balassone, Secretary.

This is in reference to your recent letter wherein you ask whether the Maryland Board of Pharmacy could institute revocation proceedings against a pharmacy for violation of Advertising, as defined in Section 266A of Article 43 of the Annotated Code of Maryland (1965 Replacement Volume). Section 266A, in empowering the Board to suspend or revoke the license of a pharmacist for certain causes, has this to say:

> "(c) The Board's power either to reprimand a pharmacist or assistant pharmacist or to suspend or revoke his license shall be for any of the following causes:
>
> * * *
>
> "(4) Upon proof satisfactory to the Board of Pharmacy that a pharmacist or assistant pharmacist is guilty of grossly unprofessional conduct. The following acts on the part of a pharmacist or assistant pharmacist are hereby declared to constitute grossly unprofessional conduct:
>
> * * *
>
> "(iv) The advertising to the public by any means, in any form or through any media, the prices for prescriptions, dangerous or non-proprietary drugs, or fees for services relating thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices, or by the use of the terms 'cut rate', 'discount', 'bargain' or terms of similar connotation.

> "(v) The advertising or claiming to the public of professional superiority in compounding or filling of prescriptions or in any manner implying professional superiority which may undermine public confidence in the ability, character and integrity of other pharmacists."

Article 43 is not as clear with respect to advertising by a pharmacy, but it does provide at Section 268 (g) that the Maryland Board of Pharmacy *may issue a permit* to such person, co-partnership, association or corporation on satisfactory evidence "that said pharmacy shall not violate any of the provisions of Section 266A (c) (4) of this Article."

In addition, Section 268 (c), in part, reads as follows:

> "The said Maryland Board of Pharmacy shall make such rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of this section, and is hereby authorized, after due notice and opportunity for hearing, to revoke any permit when examination or inspection of the pharmacy shall disclose that such pharmacy *is not being conducted according to law* or is being so conducted as to endanger the public health or safety." (Emphasis supplied).

It is the cardinal rule in the construction of Maryland statutes that a statute should be construed so as to ascertain and give effect to the intention of the Legislature expressed in the statute. 20 MLE Statutes Sec. p. 423, *Casey Development Corp. v. Montgomery Co.*, (1957) 212 Md. 138. We believe that the above sections together with Section 249 quoted below form a sufficient basis for us to recognize the intention of the Legislature to apply the restrictions on advertising to pharmacies. Section 249 of Article 43, supra, provides:

> "No person shall open, conduct or keep a pharmacy in this State, either as a principal or agent, unless such a person shall have obtained a phar-

macist's certificate, as hereinafter provided, *and no pharmacy shall be at any time left in charge of any person who is not a registered pharmacist.*" (Emphasis supplied).

Since every pharmacy must have a registered pharmacist in it, we believe that the legislative intent becomes abundantly clear that a pharmacy is held to the same degree of responsibility or is subject to the same restraints in advertising as is a pharmacist, and that it would be unreasonable to expect that a pharmacy must give evidence that it has not violated the advertising sections of the Act only at the time of the issuance of its permit. In this connection, we affirm the opinion of Assistant Attorney General R. Randolph Victor in his letter of May 3, 1965, and, accordingly, we conclude that your Board may suspend or revoke the license of a pharmacy for any act of advertising in violation of Section 266A of Article 43.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

PHARMACY BOARD, STATE—ADVERTISEMENT MENTIONING PRESCRIPTIONS IN CONNECTION WITH OTHER ARTICLES BEING OFFERED AT DISCOUNT PRICES VIOLATES SECTION 266A.

April 9, 1968.

Mr. F. S. Balassone, Secretary.

This is in reference to your recent letter wherein you ask whether or not two advertisements of Drug Fair that appeared in a local newspaper on October 18, 1967, and January 10, 1968, violate any of the provisions of the Maryland Pharmacy Law. In essence, both advertisements reflect in large letters the word "Discount" and the statement "Every day is discount day at . . . Drug Fair", and list certain proprietary drugs which are not prescription drugs. Both advertisements also state at the top "Don't say drug store . . . say Drug Fair . . . there's a Big Difference". In addition, the advertisement of October 18, 1967, contains the added copy, "Let Us Fill Your Next Prescription".

Section 266A (c) (4) of Article 43 of the Annotated Code of Maryland (1965 Replacement Volume), the provisions of which have been determined by this office to be applicable to a pharmacy, lists at subsection (c) (4) (iv) as an act of unprofessional conduct for which a license may be suspended or revoked the following:

> "(iv) The advertising to the public by any means, in any form or through any media, the prices for prescriptions, dangerous or non-proprietary drugs, or fees for services relating thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices, or by the use of the terms 'cut rate,' 'discount,' 'bargain' or terms of similar connotation."

Although neither advertisement makes a direct reference to the price of prescriptions, or to the discounting of pre-

scriptions or ethical drugs, the one of October 18, 1967 creates a direct inference that prescriptions are being discounted and, as such, transgresses the terms of the law. We believe that this inference is deduced and established as a logical consequence of the fact that the statement "Let Us Fill Your Next Prescription" appears under a large general heading at the top of the page which reads "Discounts", and "Every Day is Discount Day At . . . Drug Fair", and that several items are being specifically offered at reduced prices.

We realize that there are other items on the page as to which there is no specific statement that they are being offered at a reduced price, but we believe that the same inference intentionally applies to them and an impression is created that the price listed is a bargain.

It is our opinion that nothing contained in the advertisement of January 10, 1968, violates subsection (c) (4) (iv) of Article 43, Section 266A.

As indicated above, both advertisements contain the statement "Don't Say Drug Store . . . Say Drug Fair . . . There's A Big Difference". The question arises whether this statement violates the provisions of subsection (c) (4) (v) of Section 266A, which forbids:

> "The advertising or claiming to the public of professional superiority in the compounding or filling of prescriptions or in any manner implying professional superiority which may undermine public confidence in the ability, character and integrity of other pharmacists."

We believe that the statement "Don't Say Drug Store", etc., when used in close connection with "Let Us Fill Your Next Prescription", as contained in the advertisement of October 18, 1967, definitely implies that Drug Fair is superior to other pharmacies in the compounding of prescriptions and is violative of Section 266A (c) (4) (v). We find nothing, however, violative of the section in the advertise-

ment of January 10, 1968, since that advertisement does not solicit prescription business.

We find nothing violative in the mere statement that "Every day is discount day at . . . Drug Fair" standing alone.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

PLANNING AND ZONING

BILL AMENDING THE ZONING LAW OF PRINCE GEORGE'S COUNTY TO EMPOWER THE COUNTY DISTRICT COUNCIL TO GRANT ZONING MAP AMENDMENTS ON CONDITION THAT APPLICANT COMPLY WITH REASONABLE REQUIREMENTS TO PROTECT SURROUNDING PROPERTIES FROM ADVERSE EFFECTS OR TO FURTHER THE COORDINATED DEVELOPMENT OF THE REGIONAL DISTRICT IS CONSTITUTIONAL.

February 28, 1968.

Honorable Eric I. Weile.

You have asked our opinion upon the legality of a bill proposed by the Prince George's County delegation which would amend the bi-county Regional District Act that governs planning and zoning in Montgomery and Prince George's counties. The proposed bill, Prince George's County No. 23, would add a new Section 59-83 (g) to the Public Local Laws of Prince George's County and a new Section 70-89 (g) to the Montgomery County Code. These new sections augment the powers of the Prince George's County District Council in making zoning map amendments and generally would permit the Council to impose restrictions upon the use of an applicant's land as a precondition to the granting of a zoning reclassification.

The bill provides that in approving any local map amendment, pursuant to existing standards, from and after the effective date, the Council may adopt also such "reasonable requirements, safeguards, and conditions, as may in its opinion be necessary either to protect surrounding properties from adverse effects which might accrue from such zoning amendment, or which might further enhance the coordinated, harmonious, and systematic development of the Regional District". The statements of conditions are to be set forth in the resolution granting the amendment. The applicant may accept or reject the reclassification, as con-

ditionally approved, within 90 days and, in the event of rejection, the property involved reverts to its original zoning status. It is further provided that no conditions shall be imposed which would require the dedication of land for public use except for roads, streets, alleys, and easements.

In our opinion the General Assembly has the constitutional power to enact the submitted bill. The bill is apparently designed to counteract the effect of a line of decisions handed down by the Court of Appeals, commencing with *Baylis v. City of Baltimore,* 219 Md. 164 (1959). These decisions have held invalid the practice referred to as "contract zoning" where, as in the *Baylis* case the City Council granted a reclassification contingent upon an applicant executing a contract to impose certain restrictions upon the land sought to be rezoned. In our view, the *Baylis* case, as well as its successors, were not decided on constitutional grounds but rather on the ground that the power sought to be exercised was not authorized nor could it be implied from the enabling act or the local zoning ordinances. In this connection, we note that two states have upheld the practice of contract zoning even where no statutory authority existed. See *Sylvania Electric Products, Inc. v. City of Newton,* 183 N.E. 2d 118 (Mass. 1962); *Church v. Town of Islip,* 203 N.Y.S. 2d 866 (Ct. App. 1960).

In your letter you suggest the proposed bill may constitute an illegal delegation of legislative authority. We believe that a case decided by the Court upon a closely analogous point resolves this question in favor of the proposed bill's constitutionality. In *Huff v. Board of Zoning Appeals,* 214 Md. 48 (1957), the Court found constitutional, as against a claim of improper legislative delegation, the so-called floating zone regulation enacted by the Baltimore County Council. The zoning commissioner of the county was permitted to reclassify tracts of designated sizes for light industrial use in any residential section of the county where a plan submitted by the applicant showed that development in accordance with the plan would help to "protect the uses and neighboring residential zones" and would not ad-

versely affect "vicinal properties". Judge Hammond wrote that this ordinance did not constitute an improper legislative delegation since

> ". . . as in the case of a special exception, there has been a prior legislative determination, as part of a comprehensive plan, that the use which the administrative body permits, upon application to the particular case of the specified standards, is prima facie proper in the environment in which it is permitted. This prior determination and the establishment of sufficient standards effectively refute the claim of improper delegation of legislative power."

It is our view that the proposed statute, if enacted, would constitute a prior legislative determination that conditions might be imposed under specified standards, that is, to prevent adverse effects upon surrounding properties, or for the purpose of furthering the "coordinated, harmonious and systematic development" of the Regional District.

Similarly, we do not believe the bill on its face creates a classification in contravention of the equal protection clause of either the State or Federal Constitutions. The test for the denial of equal protection in a legislative classification made pursuant to the state's police power is that it must be purely arbitrary and have no reasonable basis. If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed. *Wampler v. Lecompte,* 159 Md. 222 (1930). It seems manifest that a statute permitting reasonable requirements and restrictions to be imposed upon property subject to zoning reclassification so as to preclude adverse effects to neighboring properties and so as to further the coordinated and systematic development of the county would not deny equal protection of the laws under this test. See also *Creative School v. Board,* 242 Md. 552 (1966).

In this opinion we hereby pass upon the constitutionality of the proposed bill upon its face. The constitutionality of such a statute, if enacted, in any of its particular applications would be a matter, of course, for judicial review.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

PODIATRY EXAMINERS, BOARD OF

RECIPROCITY—INDIVIDUAL WHO IS LICENSED BY WASHINGTON, D. C. BOARD, BUT LACKS ESSENTIAL REQUIREMENT OF MARYLAND BOARD, MAY NOT BE LICENSED IN MARYLAND BY EXAMINATION OR UNDER RECIPROCITY.

March 4, 1968.

S. Jack Kleger, D.S.C.

This is in reference to your recent letter wherein you ask whether or not an individual, who is licensed to practice in Washington, D. C., but who graduated and began practice prior to a 1945 amendment to the Maryland Podiatry Law which required an applicant to have two years pre-podiatry education prior to attending podiatry college, and who does not have such education, may be licensed to practice in Maryland under examination or by reciprocity.

Since June 1, 1945, under the provisions of Section 488 of Article 43, Annotated Code of Maryland (1965 Replacement Volume), no person can apply for examination by the Board of Podiatry Examiners unless that person is 21 years of age, of good moral character, has 4 years instruction in a high school, *2 years of instruction in a college of liberal arts or sciences* and is a "graduate of a reputable and legally incorporated school or college of chiropody or podiatry, acceptable to the Board." It is obvious that in the matter before us that the individual lacks the 2 year requirement of instruction in a college of liberal arts or sciences and, therefore, cannot be licensed in the normal manner by examination.

Section 485 of Article 43 above, controls the manner in which licensees of other jurisdictions may be licensed by the Board without examination under reciprocity. The applicable parts of that section read as follows:

> "Applicants certified or licensed by the state board of chiropody or podiatry examiners of other states, territories *or the District of Columbia,* . . .

> on filing with the Board of Podiatry Examiners a copy of said license, certified by the affidavit of one of the members of said board, which affidavit must show to the satisfaction of the Board of Podiatry Examiners that the standard of requirements adopted by the said board of examiners is *substantially* the same as is provided by this subtitle, *may in the discretion of the Board,* without further examination receive a certificate conferring on the holder thereof all the rights, and privileges conferred by this subtitle. *Provided, however, that the provisions of this section shall be applicable and extended only to those non-residents whose states by law extend to residents of Maryland the privileges conferred upon non-residents under this section.*" (Emphasis supplied).

The key to Section 485 as it applies to the problem before us is the use of the word "substantially", and the question arises as to whether or not the requirements of the District of Columbia Podiatry Board are substantially the same as those of the Maryland Board. An individual seeking a license to practice in the District of Columbia is governed by Chapter 7, Section 2-705 of Title 2, District of Columbia Code (1967 Edition), subtitle "Podiatry", which provides as follows:

> "Any person who desires to begin the practice of podiatry within the District of Columbia shall file . . . satisfactory proof that he is a citizen of the United States or has duly declared his intention to become a citizen of the United States, not less than twenty-one years of age, of good moral character, and is a graduate of a podiatry college recognized by the National Association of Chiropodists and approved by the Board."

This section does not contain the requirement that the applicant must have two years of instruction in a college of liberal arts or sciences, which in our opinion is a material qualification. The lack of this requirement reflects a

substantial difference between the requirements of the Maryland Board and the District of Columbia Board.

In 34 Opinions of the Attorney General 228 (1949) this office considered whether nurses qualified for registration in other states should be registered in Maryland when they lack certain qualifications prescribed by the Board of Examiners of Nurses Rules. There it was stated:

> "It is our opinion that when your Board, by rule and regulation, establishes the minimum requirements of a course of study for nurses training in schools located in the State of Maryland, it may compel an applicant from a sister State to take any required courses which were omitted from the curriculum of the school of which that applicant was a graduate, in the event the Board determined that the curriculum of the school from which the applicant graduated was not the equivalent of that required by its rules."

While the above opinion is not controlling, it does offer some guidelines in the present matter. Accordingly, since by legislative enactment the two year college of liberal arts and sciences is an essential requirement of the Maryland Board of Podiatry Examiners, an individual who is duly licensed by the Washington, D. C. Board of Podiatry, but who lacks this requirement, may not presently be licensed in Maryland under reciprocity, regardless of the date when he was admitted to practice in the District of Columbia.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

POLICE

MARYLAND POLICE TRAINING COMMISSION—MARYLAND PORT AUTHORITY—POLICE TRAINING ACT OF 1966—ACT APPLIES TO PORT AUTHORITY'S MARINE SECURITY FORCE IF ENGAGED IN DETECTION OF CRIME AND ENFORCEMENT OF GENERAL CRIMINAL LAWS.

January 25, 1968.

Mr. Robert L. Van Wagoner.

You have asked us to advise you whether the mandatory provisions of the Police Training Act of 1966, Maryland Code (1967 Cumulative Supplement), Article 41, Section 70A, apply to members of the Marine Security Force of the Maryland Port Authority, including the requirement of a course of police training at an approved police training school for all permanent appointees as police officers.

A "permanent appointment" is any appointment having permanent status as a police officer in a law enforcement unit (Section 70A (6)). A "law enforcement unit" is "any governmental police force or organization of the state, county or municipality which has by statute or ordinance, the responsibility of detecting crime and enforcing the general criminal laws of this State" (Section 70A (4)). A police officer is defined by Section 70A (a) (8) as a "member of the police force or other organization of the state, county or municipal government who is responsible for the prevention and detection of crime and the enforcement of the laws of the state . . .". The coverage of the Marine Security Force (the Force) of the Maryland Port Authority by the provisions of Section 70A turns upon whether the Force is a law enforcement unit and its members police officers as defined therein.

Article 62 of the Maryland Code designates the Port Authority as a governmental agency of the State of Maryland. This statute confers broad powers for the adminis-

tration of extensive port facilities throughout the State. The Port Authority must protect valuable property upon the premises of these facilities and it organized the Marine Security Force for the purpose of providing such protection. We have no difficulty in finding that the Force is a governmental police organization. However, to be a law enforcement unit within the meaning of Section 70A (4) it is also required to assume the responsibility of detecting crime and enforcing the general criminal laws.

The Marine Security Force is organized under published Rules and Regulations which require its members to qualify for appointment by the Governor as special police officers in accordance with Article 23, Sections 342-348, of the Maryland Code (1957 Edition). Special police officers possess the power and authority of peace officers when performing their duties upon the property of their employer. We have consistently held that special policemen are clothed with full police power to the extent necessary for the protection of the property of the business for which their appointment was made and for the preservation of peace and good order on its premises. 49 Opinions of the Attorney General 353. Such authority includes the enforcement of the general criminal laws of the State and the power of arrest.

The members of the Marine Security Force, as special police officers, in and upon the facilities of the Maryland Port Authority, have the same power and authority as any other police officers. The Rules and Regulations of the Force recognize the extent of that authority. The duties of a peace officer are set forth in detail therein (page 15). The use of the authority that they have is determinative of whether the members of the Force are subject to the mandatory provisions of Section 70A. The Police Training Act applies if the Force exercises full police powers on Port Authority property, including procedures for the enforcement of the general criminal laws and the detection of crime. On the other hand, if they engage in specialized police activities that do not include duties necessary and

appropriate to the enforcement of the general criminal laws, the members of the Force are exempt from the application of the mandatory provisions of the Training Act.

Possessing insufficient data to evaluate the actual performance of its duties, we pass no opinion as to whether or not the Force is presently subject to the requirements of the Training Act. The application of the guidelines herein set forth, however, should resolve the issue.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—POLICE COMMISSIONER OF BALTIMORE CITY—DOCTRINE OF SOVEREIGN IMMUNITY NOT APPLICABLE TO CREWS OF FOREIGN WARSHIPS—PERSONNEL OF VISITING FOREIGN NAVAL VESSELS SUBJECT TO ARREST FOR OFFENSES AGAINST LOCAL LAW.

January 25, 1968.

Commissioner Donald D. Pomerleau.

An inquiry originating with Deputy Commissioner Wade H. Poole seeks our advice regarding the legal sufficiency of Police Department Special Order 67-248, dated October 26, 1967, subject: Venezuelan Destroyer ARAGUA D-31 at Key Highway Yards. We are informed that this warship is undergoing major repairs and will be in port through February. Of particular concern is the provision that its crew members "have the same exemption from arrest as foreign diplomats and their retinue". It is said to be authorized by the Department's Digest of Laws (1961 Edition), page 12, which, in turn, relies upon Hochheimer on *Criminal Law*, Section 11, that "ships of war belonging to foreign nations are exempt from the local jurisdiction of the country whose ports they are permitted to visit, but merchant vessels and their crews are not thus exempt". We think that such reliance is misplaced.

Hochheimer says that a visiting friendly warship has an exemption from local jurisdiction. But he does not say, nor may it be reasonably inferred, that the members of the crew of a foreign naval vessel in a local port are cloaked with immunity from criminal process. It is an unwarranted extension of Hochheimer's statement to say that the crew members of a foreign warship are immune from arrest for breaking our laws. Hochheimer's authority for his immunity rule (page 16, n. 3) is the case of *The Parlement Belge*, 5 P.D. 197. A study of the opinion in that 1880 case confirms that nothing contained therein refers to any immunity from local law of the members of the crew of a foreign warship. The extent to which sovereign immunity

is granted is there stated to be "the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador (of another state) . . ." (p. 217).

On the other hand, however, there is substantial authority that foreign naval personnel do not enjoy sovereign immunity. In the case of *United States v. Deutches Kalisyndicat Gesellschaft*, 31 F. 2d 199 (1929), the United States District Court for the District of Maryland expressed the view that the principle of sovereign immunity has not been extended to the officers or crew of foreign warships, citing in support 2 Moore's *Digest of International Law*, pages 573, 585. See also *United States v. Thierichens*, 243 F. 419 (1917), in which the United States District Court for the Eastern District of Pennsylvania refused to dismiss indictments for smuggling and violation of the Mann Act returned against the captain of the German cruiser, Prinz Eitel Friedrich, interned in the Port of Philadelphia in peacetime. The persons, agencies, or instrumentalities of a foreign sovereign that are immune from criminal prosecution do not include the officers and crew members of naval vessels. These are not protected. 48 *Corpus Juris Secundum* 27.

For the reasons stated, we are of the opinion that so much of Special Order 67-248 as pertains to the immunity from criminal process of the crew members of a foreign warship and the section of the Department's Digest of Laws upon which it is based are bad in substance and do not accurately reflect the prevailing law.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—POLICE COMMISSIONER OF BALTIMORE CITY—VALIDITY OF POLICE OMNIBUS ACT NOT AFFECTED BY NEW MARYLAND CONSTITUTION.

March 7, 1968.

Commissioner Donald D. Pomerleau.

Your recent letter seeks clarification of the status of the Baltimore Police Department should the new Maryland Constitution be approved by the voters on May 14, 1968. Specifically, you ask whether the Police Omnibus Act, Chapter 203 of the Laws of Maryland of 1966 (hereinafter called "Omnibus Act") will be invalidated by adoption of the new Constitution. If so, you would like to know (a) whether it will be vacated automatically or require special nullifying legislation, (b) the effective date of invalidity or of any required change in the law, (c) the requirements for an orderly transfer of the Police Department from State to City agency, and (d) whether or not any provisions of the present Omnibus Act will continue to bind Baltimore City. If it does not invalidate the Omnibus Act, you ask how the new Constitution affects the status or operation of your Department.

We do not reach the questions predicated upon nullification of the Omnibus Act by the new Constitution because we believe that the validity of the Omnibus Act will not be affected by the adoption of the new Constitution. We reach such conclusion from the clear implication of Section 10.02 of the new Constitution that "all legislation, including local legislation, and all other law, including common law, in force on June 30, 1968, insofar as it is not in conflict with this Constitution, shall continue in force until it expires by its own limitation or is lawfully changed". We found no provision of the new Constitution that is offended by the Omnibus Act and the latter would continue in status quo unless duly changed by legislative action.

The conclusion reached herein should not be taken to mean that we consider the objects and purposes of the

Omnibus Act to constitute the subject of local legislation. The duties and responsibilities of the Police Department of Baltimore City are to enforce State laws and City ordinances, to provide safety and equal protection for all, to prevent and detect crime generally and to apprehend offenders. The performance of these duties has many extra-local ramifications. It goes beyond the sphere of purely local action, and is clearly within the ambit of legislative power authorized to the General Assembly.

S. B. 239, presently under consideration in the Legislature, proposes to terminate the Baltimore City Police Department as a State agency and assign its operation and control to the Mayor and City Council. You inquire whether the General Assembly may require Baltimore City to comply with the provisions of the Omnibus Act upon relinquishment of control of the Department by the State. In the event that S. B. 239 is passed by the Legislature and signed by the Governor, it will be the law of the State and entitled to compliance in the same manner and to the same extent as any other State law.

Assuming the enactment into law of S. B. 239, you ask how it would be affected by the subsequent adoption of the new Constitution. Again referring to Section 10.02 which controls, the answer is that it would remain in full force and effect until lawfully changed. The establishment and operation of a police department is not included in the specific Home Rule powers authorized to Baltimore City. See Article II of the Charter of Baltimore City (1964 Revision). Recognition of "the police power" of the State within the limits of Baltimore City appears in Article II (27) which also provides for the City to have the right to exercise police power "to the same extent as the State has or could exercise." Additional acknowledgment of the broad power of the State to legislate in the area of the Omnibus Act is implicit in Article II's delineation of the general powers of Baltimore City. As to powers not specifically set forth in the Charter, the Mayor and City Council are

authorized to exercise the powers granted by the Constitution or by any Public General or Public Local Laws of the State of Maryland.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—BALTIMORE CITY POLICE DEPARTMENT—INTERPRETATION OF THE PROVISIONS OF BALTIMORE CITY ORDINANCE 1909, 1958-59 "INTEREST AND CHARGES BY PAWNBROKERS", SET FORTH IN SECTIONS 65, 68 OF ART. 15 OF THE BALTIMORE CITY CODE (1966 EDITION).

April 8, 1968.

George J. Helinski, Esquire.

You have requested an interpretation of the provisions of Baltimore City Ordinance 1909, 1958-59, "Interest and charges by pawnbrokers", as set forth in Section 65 of Article 15 of the Baltimore City Code (1966 Edition).

In your letter you describe a complaint made to the Pawn Shop Squad of the Baltimore City Police Department concerning the action of a pawnbroker regarding charges made by him. In the complaint, an article was pawned and the principal amount advanced on the pledged item by the pawnbroker was $50.00. A pawn ticket was issued by the pawnbroker to the customer calling for the payment of a 3% interest charge per month on the principal amount advanced in addition to a storage charge of $1.00 per month.

The question is whether the charges by the pawnbroker were proper within the terms of the Ordinance. Section 65 of Article 15 provides:

> "It shall be lawful for the said pawnbroker, in view and by reason of the necessity of extensive storage, labor incident thereto, porterage, insurance and other expenses inseparable from the nature of the business hereby authorized, as affording a desirable and advantageous facility to the commercial and other classes of society, to charge therefor in addition to interest, at a reasonable rate, in no case to exceed two and one-half (2½%) per centum each month or fraction thereof, to be computed on the principal advanced as aforesaid; and for any month or fraction thereof in which

> the total amount of legal interest and additional charges of any loan are less than the minimum rates as hereafter set forth, it shall be lawful to charge, in lieu of such interest and additional charges, a minimum rate of $.25 on loans less than $4.00; $.50 on loans of $4.00 or more but less than $8.00; $.75 on loans of $8.00 or more but less than $12.00 and $1.00 on loans of $12.00 or more."

The language of this section unequivocally states that it shall be lawful to charge, *in addition to interest, a maximum of 2½% each month* to be computed on the principal advanced, for necessary expenses incident to the operation of a pawnshop. The legal rate of interest in Maryland is 6%, unless otherwise provided by the General Assembly. Article III, Section 7 of the Constitution of Maryland. There is no provision by the General Assembly specifically applicable to pawnbrokers operating in the City of Baltimore providing for any other rate of interest. Hence, the maximum charge allowable under the laws of Maryland and the Ordinances of Baltimore City on any loan made on items pledged to a pawnbroker is 6% per annum, or ½% monthly plus up to 2½% for expenses, or a total of 3% per month. This limitation is subject to an exception in that Section 65 further provides for minimum rates which would be lawful to charge on specific amounts as set forth therein, such as the example cited in your letter, $1.00 on loans of $12.00 or over. But the terms of Section 65, which provides for these minimum rates, only allow such a charge when "for any month or fraction thereof in which the total amount of *legal interest and additional charges* of any loan *are less*" than the minimum rates provided, then "it shall be lawful to charge, *in lieu of such interest and additional charges*", the minimum rate.

By using the words "in lieu of", it is clear the Ordinance intends that the minimum charges apply only in the alternative to the legal rate of interest and the additional charge allowable. See Black's Law Dictionary, 4th Edition, which defines the phrase "in lieu of" in the following terms:

"Instead of; in place of; in substitution of."

We, therefore, are of the opinion that any charge by a pawnbroker in the City of Baltimore made over and above 3% each month on the principal advanced would not be permissible. Although, of course, the minimum rates aforementioned may be charged in substitution of the maximum 3% rate in accordance with the amounts specified in the Ordinance when the total charge for interest and additional charges (not to exceed 2½%) equals an amount less than the stated minimum rates.

Your letter also inquires whether it would be proper under Section 68 of the same Article, entitled "Penal provision", to institute criminal proceedings for violation of Section 65. Section 68 provides in part as follows:

> "Any person, firm or corporation offending against any or either of the aforegoing provisions of this subtitle, for a violation of which no penalties are therein expressly prescribed shall forfeit a sum not exceeding fifty dollars for each and every offense."

That the intent of this section is to impose a criminal penalty is evident from its title "Penal provision" and from the words "for a violation of which no penalties are therein expressly prescribed", "shall forfeit" and "for each and every offense". The verb, "forfeit", itself, in common speech strongly implies penalty, being regarded under statutes providing that the party shall forfeit a particular sum in case he does not perform an act required by law, not as a contract with a delinquent party but as punishment for an offense. 37 C.J.S., *Forfeit,* p. 2.

The Maryland Court of Appeals in *The State v. B. & O. R. R. Co.,* 12 G. & J. 399, 432, construing an Act of the Maryland Legislature which provided that the B. & O. R. R. Co. shall forfeit $1,000,000 to the State of Maryland for the failure to locate a railroad through each of several places directed by the Act, held as follows:

> "[W]e think the conclusion is well warranted, that penalty and not contract was in the contemplation of the Legislature when they enacted the fifth section of the Act of 1835, upon which this suit has been instituted, in case of non-compliance with the requirements of the law, the company is to forfeit one million of dollars to the State, for the use of Washington County. The term forfeit, in common parlance, strongly implies penalty, and such appears to be the import ascribed to it by lexicographers of the highest respectability, in giving with precision and accuracy, the meaning of our language. Mr. Webster defines the word forfeit to be that which is forfeited or lost by neglect of duty, or in other words, a fine, a mulet, a penalty. The language, moreover, is not that of convention or contract, but is mandatory in its character. It is the language of the creator to the creature, enjoining a duty to be performed, and imposing a penalty or forfeiture for disobedience or neglect. It is therefore, we think, in every view and aspect under which it could be considered, penal and not conventional, according to its sound and true interpretation."

Similarly the forfeiture under Section 68 is penal. Moreover, we note that Article 38, Section 1 of the Annotated Code of Maryland (1965 Replacement Volume) states in pertinent part:

> "When any fine or penalty is imposed * * * by any ordinance of any incorporated city * * * in this State enacted in pursuance of sufficient authority, for the doing of any act forbidden to be done by such * * * ordinance, or for omitting to do any act required to be done by such * * * ordinance, the doing of such act or the omission to do such act shall be deemed to be a criminal offense."

Since, as we believe, the forfeiture here is clearly a penalty, any violation of Section 65 should be deemed to be a

criminal offense subject to the forfeiture of a sum not to exceed $50.00.

Accordingly, you are advised that it is our opinion that Sections 65 and 68 should be construed to constitute a penal statute punishable by the aforesaid forfeiture. Also, be advised that for the reasons first stated herein, we are of the opinion that the additional storage charge of $1.00 per month charged in the transaction described by you appears to be impermissible under the provisions of Section 65.

FRANCIS B. BURCH, *Attorney General.*

ALFRED J. O'FERRALL III, *Assistant Attorney General.*

POLICE—THE PARK POLICE OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION ARE NOT UNDER THE TERMS OF SECTION 1 (39) OF CHAPTER 780 OF THE LAWS OF 1959 AUTHORIZED TO EXERCISE POLICE JURISDICTION OUTSIDE OF THE BOUNDARIES OF THE PARK SYSTEM UNDER THE COMMISSION'S JURISDICTION.

June 6, 1968.

Harry W. Lerch, Esq.

Your letter of May 2, 1968, asks this office to determine whether the Park Police of The Maryland-National Capital Park and Planning Commission are authorized by Section 1 (39) of Chapter 780 of the 1959 Laws of Maryland to exercise police jurisdiction in Montgomery and Prince George's County beyond the boundaries of the Commission's park area. It is our opinion that the Park Police are not authorized to exercise police jurisdiction outside of the boundaries of the park system.

Section 1 (39) of Chapter 780 of the 1959 Laws of Maryland reads as follows:

> "39. Park Police; Jurisdiction; County Police.
>
> The Commission may appoint such park police officers as may be necessary to protect the park system. They shall have concurrent general police jurisdiction with the Montgomery and Prince George's County Police within the parks and other areas and within buildings under the jurisdiction of the Commission. They shall possess all the powers and authority vested by existing law in the Montgomery and Prince George's County Police; but they shall be responsible to and under the supervision of the Director of Parks and shall exercise supervisory jurisdiction over the park system. The Montgomery and Prince George's County Police shall have the same general police jurisdiction and responsibility for the apprehen-

> sion of criminals and detection of crime within the parks and other areas and buildings under the Commission's jurisdiction as they have elsewhere in their respective counties."

It is our view that the jurisdiction granted by the Legislature to the Park Police is set forth in the second sentence of the above quoted provision and that Park Police jurisdiction exists concurrent with the general police jurisdiction of the Montgomery and Prince George's County Police "within the parks and other areas and within buildings under the jurisdiction of the Commission". It is our further view that the first clause of the third sentence which provides, "[t]hey shall possess all the powers and authority vested by existing law in the Montgomery and Prince George's County police; . . ." describes the powers that the Park Police have within the jurisdiction of the park system, which jurisdiction area is expressly delineated in the second sentence of the section. We do not believe it would be proper, therefore, for the Commission's Park Police to exercise their police authority outside park property.

We are cognizant of the fact that your request for an opinion regarding the jurisdiction of the Commission's Park Police was prompted by the desire of the police of Montgomery and Prince George's County to draw upon your forces in the event of local civil disturbances. Our suggestion is that if such assistance be required, individual members of the Park Police be deputized by the police of the two respective county jurisdictions, assuming, of course, that the local law of the counties provides for such deputization.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

POLICE—LAW ENFORCEMENT—THE LAW OF ARREST AND "STOP AND FRISK."

July 5, 1968.

Commissioner Donald D. Pomerleau.

TO: All Police Departments and Agencies charged with the enforcement of the General Criminal Laws of the State of Maryland

SUBJECT: The Law of Arrest and of "Stop and Frisk"

There have been no recent changes in the law of arrest. An arrest is the detention of an offender for the purpose of prosecuting him for a crime. A person is said to be under arrest when he is given to understand by the words or conduct of the police officer that he is under arrest and he submits. The detention of a person may be accomplished by restricting his freedom or liberty of movement in some significant manner.

An arrest without a warrant for a felony may be made when the police officer has probable cause to believe that a felony has been or is being committed and that the arrestee is criminally involved.

An arrest without a warrant for a misdemeanor may be made only for a crime committed in the presence or view of the officer. The power of arrest of a police officer has not been enlarged in any manner but the Supreme Court in *Terry v. Ohio,* decided June 10, 1968, has approved the practice of "Stop and Frisk", not simply as a tool of law enforcement, but for the protection and safety of police officers and others, under the following circumstances:

A suspect may be stopped by a police officer upon "reasonable suspicion" that he has committed, is committing, or is about to commit a crime.

The right to stop a suspect does not automatically give the police officer the right to "frisk" or search him. A

suspect stopped by a police officer upon reasonable suspicion may be "frisked" or searched, in the manner hereinafter described, when the officer reasonably suspects that the suspect is armed and presently dangerous; and such "frisk" or search may be made only for deadly or dangerous weapons.

The police officer must be prepared to justify both his action in stopping a suspect and in "frisking" the suspect. He must be able to satisfy a court of law (1) that he had sufficient grounds to arouse "reasonable suspicion" of criminal activity by the suspect, and (2) that he had reason to believe the suspect a threat to the safety of the officer or another person so as to sanction a search for weapons. In other words, a police officer must be prepared to give reasons for a "stop and frisk" that a judge will consider sufficient in the light of *Terry v. Ohio*. Some guidelines to "reasonable suspicion" (what it is and what it is not) are the following:

Reasonable suspicion is more than unsupported suspicion but less than evidence that amounts to probable cause of reasonable belief that the suspect has committed, is committing, or is about to commit a crime.

There must be adequate observation or investigation by the police officer or information in his possession before any stop of a suspect upon "reasonable suspicion". This will depend upon the circumstances in each case.

A mere "hunch" or intuition is not sufficient to amount to reasonable suspicion.

A person ought not to be stopped *only* because he is found near the scene of a crime.

A person ought not to be stopped *only* because he is known to have a prior criminal record.

The following circumstances may be considered by the police officer in determining whether reasonable suspicion exists so as to justify a stop. This list is not intended to be all-inclusive:

1. The appearance or demeanor of the suspect.
2. His actions.
3. The hour.
4. The neighborhood.
5. Does the suspect's clothing or person bulge in a manner suggesting a concealed weapon?
6. Whether the suspect is carrying anything and, if so, the nature thereof.
7. Proximity to a known crime scene.
8. Prior knowledge of the officer including:
   (1) Suspect's prior record.
   (2) Information from an informer or third party.
   (3) Any overheard conversation.

The following practices should be observed in making an authorized stop of a suspect:

1. Clear identification of the police officer to the suspect:
   a. By being in police uniform.
   b. If not in uniform, by announcing that he is a police officer and at the same time displaying his badge or other police credentials.
2. Courtesy in word and in deed in the initial accosting and throughout any questioning of the suspect.
3. Careful consideration for the rights of the citizen.

A suspect who has been stopped upon reasonable suspicion, as described above, may be questioned by the police officer to discover his or her

1. Name.
2. Address.
3. An explanation of the person's actions.

The suspect may not be compelled to supply the answer to these or any other questions.

Upon refusal of the suspect to answer the officer's questions or identify himself, he (she) may be questioned further but may not be unduly detained nor may the suspect be deprived of freedom of movement in any significant way unless the officer is prepared to make a formal arrest

in accordance with the legal requirements for an arrest without a warrant.

The failure or refusal to answer questions, or answers considered unsatisfactory, however, are not alone sufficient to constitute probable cause for an arrest without a warrant. There must be sufficient reasons, in addition to such failure or refusal to answer, to legally justify an arrest. But the failure or refusal to answer questions does not bar a "frisk", if the police officer *reasonably* suspects danger to his own or another's safety.

In determining whether reasonable suspicion exists sufficient to support the search or "frisking" of the suspect, the following factors may be considered:

1. The type of crime suspected—whether or not a crime of violence or involving the use of a deadly weapon.
2. Reasonableness of the officer's fears for his safety or the safety of others. Where the officer must deal with more than one suspect, or where the officer does not have help close at hand, the situation may constitute a greater danger than otherwise.
3. The hour.
4. The neighborhood, considering the hour.
5. Prior knowledge of the officer. Is the suspect known to him? Does he have a record? Is he disposed to violence?
6. The appearance or demeanor of the suspect.
7. Does the suspect's clothing or person bulge in a manner suggesting a concealed weapon?
8. Age of the suspect and whether male or female.
9. Any other information provided the police officer by his senses or otherwise as to the suspect's potential for violence.

When the officer has knowledge or information regarding one or more of the above factors, or any other information sufficient to justify a reasonable suspicion that the person he has stopped is presently armed and dangerous, he may "frisk" such person.

The search or "frisk" that is permissible is a patting down of the outside of the suspect's clothing for the discovery of deadly or dangerous weapons and for no other purpose.

If the patting down or external feeling of the clothing fails to disclose evidence of a weapon, no further search may be made.

If the "frisk" indicates that the suspect has an object on his person that could be a weapon, the police officer is authorized to search that part of the suspect's clothing containing such object, but he may not search any further.

If the object felt and found in the course of search is in fact a dangerous or deadly weapon, and the evidence is that the possession thereof is in violation of law, the police officer may then and there arrest the suspect for a crime committed in his presence. As incident to such lawful arrest, the police officer may make a further search of the suspect and his immediate surroundings and seize anything in the nature of contraband.

On the other hand, if the police officer searches in or beneath the clothing of the suspect in the belief that an object felt in patting him down is a weapon, and it turns out not to be a weapon, the object may not be used in any manner to justify the arrest of the suspect, whether or not said object is contraband.

The police officer has a duty to cease and desist from any further search or "frisk" when he fails to detect a weapon by an external patting down of clothing or when an object he believes to be a weapon is found not to be a weapon.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—POLICE DEPARTMENT OF BALTIMORE CITY—DEPARTMENT OF MENTAL HYGIENE—DIVISION OF ALCOHOLISM CONTROL—INTOXICATION AND ALCOHOLISM—CHAPTER 146, ACTS OF 1968.

July 8, 1968.

Deputy Commissioner Wade H. Poole.

This will confirm and amplify our advice regarding Chapter 146 of the Laws of Maryland of 1968, and suggest procedures for the implementation of the statute required of the Baltimore Police Department.

Chapter 146 (Art. 2C of the Annotated Code of Maryland, as amended), entitled the Comprehensive Intoxication and Alcoholism Control Plan, effective July 1, 1968, in summary provides as follows:

1. For the establishment of a comprehensive intoxication and alcoholism program for the State and its local subdivisions.

2. For the formation of a Division of Alcoholism Control within the State Department of Mental Hygiene to administer the Act and carry out its purposes.

3. For the elimination as a criminal offense of simple public drunkenness by repealing so much of Article 27, Sections 122 and 123 as makes it a crime to be found drunk in described public places. Also eliminated is that part of Section 123 providing for a fine of not more than One Hundred ($100.00) Dollars and/or imprisonment for not more than ninety (90) days for habitual offenders described as persons convicted five times within the past year for violation of the public intoxication provision of Section 123.

4. For the creation of a misdemeanor described as "disorderly intoxication".

It is the stated purpose of Chapter 146 that chronic alcoholics shall be considered as sick people to be treated

as such medically and otherwise, and that intoxicated persons who do not create a public disturbance or directly threaten the safety of another person or property shall be placed in protective custody, taken or sent home or to a public or private health facility, and furnished appropriate treatment.

Section 201 of the Act, in creating the misdemeanor of disorderly intoxication, provides that the offense shall consist of (1) being intoxicated and endangering the safety of another person or property, or (2) being intoxicated or drinking alcoholic beverages in a public place and making a public disturbance. A penalty is provided of a fine of not more than One Hundred ($100.00) Dollars and/or imprisonment for not more than ninety (90) days.

Persons found intoxicated who are not chargeable with the offense of disorderly intoxication or any other crime, that is to say, persons found drunk in a public place without violation of any criminal law, are to be cared for as directed by the statute by authorized personnel activated and supervised by the Division of Alcoholism Control (Sections 301-303). This responsibility is to be shared by the police until the Division is able to assume its statutory function. The police may, under Section 303, take or send home or to a public or private health facility a person found intoxicated in a public place. They are authorized to arrange for commercial transportation for such purpose and they make take reasonable measures for the intoxicated person to pay in advance the cost of transportation.

According to the statute, the inebriate, if incapacitated, a condition defined as the state of being incapable of making a rational decision, or if required as an emergency measure occasioned by a threat to his health or safety, should be taken to a detoxification unit. This procedure should also be followed when an intoxicated person charged with a crime appears to need emergency medical treatment. The intent of the statute is stated to be that the police shall make every reasonable effort to protect the health and safety of intoxicated persons.

Plans for the transportation of inebriates should include provision for the care of homeless drunks. In such cases it is provided by the law that the individual be taken to the nearest detoxification unit or other available medical facility. At the present time the necessary facilities are in short supply. In some areas they do not exist at all. It is a realistic prospect that for some period of time until the program begins to function properly, there will not be facilities available for homeless alcoholics and hospitals may deny them admittance. For homeless alcoholics where there is no other available facility the police station has to be utilized in conformity with the provisions of Chapter 146.

It is there provided (Section 303 (e)) that if no criminal charge is filed against the inebriate, there shall be no entry on his Arrest Record or any other criminal record. This rule is applicable to all persons brought into the station merely because they are drunk and homeless. The recommended procedure in these cases is to keep the intoxicated person in protective custody until sober and then release him.

Section 303 (f) imposes the duty upon the Division of Alcoholism Control to promptly develop, in cooperation with local authorities and State and local police, procedures for the handling and disposition of intoxicated persons by authorized personnel other than the police, and it is the stated objective of the section that police involvement in this area be reduced to a minimum at the earliest practicable time. This office is presently seeking to coordinate the efforts of the agencies concerned so that the reach of the statute may be achieved.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE — MARYLAND STATE POLICE — NON-SUPERVISORY POLICE EMPLOYEES ENTITLED TO OVERTIME COMPENSATION—SUPERINTENDENT MAY COMPENSATE FOR OVERTIME BY ALLOWANCE OF COMPENSATORY TIME AND/OR CASH PAYMENT.

July 9, 1968.

Col. Robert J. Lally.

Your recent letter asks whether the Department of Maryland State Police may, if funds are available, pay overtime compensation to police officers required to work hours in excess of normal hours of work due to the exigencies of civil unrest. You state that large numbers of men under your command have to be assigned for the control of "any extraordinary emergency situation such as a civil disturbance" and that although generally overtime work may be taken care of by the allowance of reciprocal compensatory time, such procedure is not feasible where groups of police officers simultaneously pile up many hours of overtime.

The legality of the payment of overtime compensation to State employees derives from the provisions of Maryland Code (1964 Replacement Volume), Article 100, Sections 76 and 77. The construction of those sections is determinative of your authority to pay overtime compensation to police personnel of the Department.

Section 76 (a) provides generally for the payment of overtime compensation as described therein for all State employees except employees specifically excepted. Section 76 (b) excepts supervisory employees of State agencies from entitlement to overtime pay.

Prior to the enactment of the section that is presently Section 76 (d), the Department of Maryland State Police and certain other State agencies were also excepted from the provisions for payment of overtime. A 1966 amendment eliminated "Department of Maryland State Police"

and made the exception applicable to "police employees of the Department of Maryland State Police". This exception of police officers was eliminated by 1967 amendment and the present Section 76 (d) provides that "said Maryland State Police shall be allowed compensatory time as provided by Section 77 of this article".

Section 77 (a) delineates the paid holidays to which State employees shall be entitled and subsection (b) provides for equal compensatory time to be given for working on such holidays. The subsection concludes: "In the alternative the employees shall be paid overtime compensation for such time worked on any of said designated days." This alternative is significant in the context of your inquiry. The mandate in Section 76 (d) for overtime compensation in accordance with the provisions of Section 77 must be considered to authorize the alternative procedures described in Section 77 (b).

We must be duly attentive to the General Assembly's 1967 elimination of the exception of police employees of the Department from compensation for overtime. Chapter 207, Laws of 1967. Such action has to be considered as indicative of the intent of the Legislature to compensate State Police officers for excess hours worked. Furthermore, the mandate of alternative methods of compensation, compensatory time or cash payment, as described in Section 77 (b), appears to reflect the Legislature's thoughtful realization that under some circumstances, civil unrest for example, there could be such a proliferation of overtime hours worked that it would be in the best interests of the people of the State to pay overtime compensation rather than to allow police officers an equal amount of time off. Experience has demonstrated that it takes many men many hours to cope with an emergency situation. Any schedule of compensatory time for a large group who have accumulated substantial overtime may create an imbalance of police manpower that would dangerously weaken the Department's operational efficiency and constitute a serious threat to public safety.

We believe it should be made clear that police employees of the Department entitled to overtime compensation under Section 76 are not entitled to elect the method of compensation therefor. The choice of the alternative methods described in Section 77 (b) lies within the sound discretion of the Superintendent. He may direct payment for accrued overtime, or allow compensatory time, or order the use of a combination of these methods of compensation. He may order some personnel to be paid overtime and others to receive time off. Accordingly, we advise that, with due consideration for the funds available for the purpose, the Superintendent may direct the compensation of overtime as herein stated and in accordance with the needs and best interests of the Department.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—SPECIAL POLICEMEN OF UNIVERSITY OF MARYLAND AND STATE COLLEGES—SCOPE OF POWERS AND AUTHORITY—EXCHANGE OF INFORMATION WITH STATE POLICE —APPLICABILITY OF POLICE TRAINING ACT OF 1966.

August 12, 1968.

Dr. Wilson H. Elkins.

You have asked us to advise you concerning the status and powers of the Campus Police of the University of Maryland.

Chapter 462 of the Acts of 1967 added a new section, designated "Section 60A" under the subheading "Special Policemen" to Article 41 of the Annotated Code of Maryland. The new section reads as follows:

> "Upon the application of the highest official or governing body of the University of Maryland or any of the State colleges, the Governor or any officer, council, or agency to whom or which he may delegate his powers and duties under this section, hereinafter referred to as the appointing authority, may appoint and deputize as special policemen, with the powers and duties hereinafter prescribed, such number of persons designated in the application as may be deemed necessary for the additional protection of such property, and the keeping of the peace thereon. Any special policemen heretofore appointed and presently serving such public institutions pursuant to other statutory authority shall henceforth be considered as appointed hereunder and bound solely by the provisions of this section, except that this section shall not apply to any policemen appointed pursuant to Article 59, Section 30, of this Code, or by any political subdivision of this State."

The "powers and duties" of these special policemen are described in Section 64:

> "Each person appointed as a special policeman under this subtitle shall be charged with the duty of protecting and preserving the property described in the application for his appointment. He shall have power to arrest all persons trespassing or committing offenses or crimes thereon. He shall have and may exercise the powers of a peace officer, but only upon the property or in connection with the property described in the application for his appointment. When on duty he shall wear an appropriate metallic badge upon which shall be inscribed the words "special policeman." He shall have power to possess and carry such firearms and other weapons while on duty as may be prescribed by the appointing authority. Whenever he shall change his residence address, he shall forthwith give notice of his new address to the appointing authority."

Section 65 further stipulates:

> "Each person appointed as special policeman under this subtitle shall for all purposes be, and be deemed to be, the employee of the state, political subdivision, department, agency or district requesting his appointment. His compensation shall be fixed in such amount as may be agreed upon between him and such state, political subdivision, department, agency or district, as the case may be, and the latter shall be liable for the payment thereof.

The status of special policemen and of the University of Maryland Campus Police has been the subject of several previous opinions of the Attorney General. Prior to the action of the 1967 Legislature, there was no specific authority for the appointment of special policemen on the campus of the University. In 20 Opinions of the Attorney General 367 (1935), it was held that the language of the provisions of Article 23, Section 344, authorizing the employment of special police for any corporation, firm, or individual main-

taining or operating "any plant of any kind" and giving them "all the authority and powers held and exercised by constables at common law, and under the statutes of this State," in the county where the premises were located to which they had been appointed, was broad enough to authorize the appointment of special officers upon the request of the University of Maryland. That opinion further held that these special officers may pursue an offender beyond the physical limits of the University properties, may make an arrest for an offense committed in the officer's presence, and may serve a warrant beyond the University properties, and may enforce the State traffic laws and make arrests while directing traffic on the Baltimore-Washington Boulevard. This opinion was reaffirmed in 21 Opinions of the Attorney General 285 (1936). See also 49 Opinions of the Attorney General 353 (1964).

Any doubts as to the legitimacy of the appointment of the Campus Police for lack of statutory authority, have been laid to rest by Chapter 462 of the Acts of 1967 which clearly and specifically recognizes the right of the University of Maryland and other state colleges to appoint "special policemen." We believe it is significant that the section containing this new matter was not included in Article 23, Section 344 upon which the authority for the appointment of campus police had previously been founded, but rather was inserted in Article 41, under a subheading "Special Policemen," and following a provision (Section 60) authorizing the appointment of special policemen upon the application of other states, or of the political subdivisions or agencies of other states, having an interest in property situated in this State. Whereas the special police appointed pursuant to Article 23, Section 342 are assigned the "authority and powers held and exercised by constables at common law and under the statutes of this State, and also all the authority and powers conferred by law on policemen in the City of Baltimore," the special policemen appointed pursuant to Article 41 are given the following very specific and clearly delineated powers and duties:

1. The duty of protecting and preserving the property described in the application for his appointment;

2. The power to arrest all persons trespassing or committing offenses or crimes on the protected property;

3. The powers of a peace officer on the property described;

4. The power to possess and carry firearms and weapons while on duty as prescribed by the appointing authority.

Thus the effect of the new statutory provision is to make it unequivocably clear that there is statutory authority for the appointment of special police to protect and preserve the property of the University and the State colleges, and to clarify the power of these special police to make arrests and to bear arms. Noteworthy too is the fact that the special police are given the "powers of a peace officer" on the property to which they are appointed. A useful definition of the term "peace officer" is found in the *Restatement of Torts*, Section 114, where it is stated:

> "A peace officer is a person designated by public authority, whose duty it is to keep the peace and arrest persons guilty or suspected of crime."

It would appear, therefore, that these special police are specifically charged with the responsibility and duty of keeping the peace and arresting persons suspected of violations of State law. It should be kept in mind, however, that the authority of the special police is strictly limited to the premises of the campus for which their appointment is sought. They do not have either duty or authority to exercise peace-keeping functions in the surrounding community or county.

Your inquiry also requested clarification of the right of the Campus Police to obtain information from the Maryland State Police and the Prince George's County Police. Chapter 547 of the Acts of 1968 extensively amended Article 88B, titled "State Police." Sections 9 and 10 of

Chapter 547 govern the collection and dissemination of criminal information:

> "9. Criminal information.
>
> The Department shall collect, analyze, and disseminate information relative to the incidence of crime within the State, the identity of known and suspected offenders, and the arrest, disposition, and incarceration of such offenders. All law enforcement agencies of the State and all places for the confinement of persons convicted of crime, including Patuxent Institution and hospitals for the criminally insane, shall furnish such information at such times, in such form, and to such extent as may be prescribed by rule of the Superintendent.
>
> "10. Dissemination of information to participating agencies.
>
> Any information, records, and statistics collected pursuant to this subtitle shall be available for use by any agency required to furnish information, to the extent that such information is reasonably necessary or useful to such agency in carrying out the duties imposed upon it by law. The Superintendent may by rule establish such conditions for the use or availability of such information as may be necessary to its preservation, the protection of confidential information, or the circumstances of a pending prosecution."

The words "any agency" and "such agency" in Section 10 of Chapter 547 obviously refer back to the words "law enforcement agencies of the State" in Section 9. The term "law enforcement agency" is defined in Section 2 (e) of Chapter 547 as follows:

> " 'Law enforcement agency' means any law enforcement agency of any department, county or municipality of the State, including sheriffs, and

> unless otherwise limited also includes similar agencies of other states and the United States of America."

The question then remains as to whether the Campus Police of the University of Maryland may be considered a "law enforcement agency" within the meaning of this statute.

The University of Maryland is an agent and instrumentality of the State of Maryland, Annotated Code of Maryland, Article 77, Section 249; *University of Maryland v. Murray*, 169 Md. 478 (1935). The University is given broad authority to govern its internal affairs. Pursuant to its obligation to protect its extensive properties, and to keep the peace and enforce University regulations on its premises, the University organized and sought the appointment of Campus Police. The provision in Article 41, Section 60A of the Annotated Code of Maryland leaves no doubt as to the University's authority to have such a special police force. We must conclude, therefore, that the Campus Police of the University of Maryland constitutes a "law enforcement agency of the State" within the meaning of Sections 9 and 10, Chapter 547 of the Acts of 1968. We do not believe that the fact that the peace-keeping authority of the Campus Police is limited to the University premises diminishes its status as a law enforcement agency of the State.

We hold, therefore, that the State Police may furnish to the Campus Police of the University of Maryland such information as "is reasonably necessary or useful" to the Campus Police to enable them to carry out their duties on the premises of the University of Maryland. This does not mean, however, that the Campus Police have the unlimited right to demand *any* information. In addition to the statutory condition that the information disclosed to the Campus Police be "reasonably necessary" for the performance of their duties, the statute also gives the Superintendent of the Department of Maryland State Police the right to promulgate rules establishing conditions for the use or availability of criminal information "necessary to its preserva-

tion, the protection of confidential information, or the circumstances of a pending prosecution." Requests for information by the Campus Police must necessarily be governed by the rules regarding dissemination of information promulgated by the Superintendent of the Department of Maryland State Police.

We expect that this clarification of the status of the Campus Police as a law enforcement agency for purposes of securing information from the State Police will also suffice to ensure a reasonably free flow of information to and from any local police force.

Although not mentioned in your letter, we believe that a further matter regarding the status of the Campus Police of the University of Maryland warrants attention. As the Campus Police appear to be a law enforcement agency, it is pertinent to inquire whether the mandatory provisions of the Police Training Act of 1966, Article 41, Section 70A of the Annotated Code of Maryland (1967 Supplement), including the requirement of a course of police training at an approved police training school for all permanent appointees as police officers, are applicable to them.

Article 41, Section 70A (6) defines a "permanent appointment" as any appointment having permanent status as a police officer in a "law enforcement unit." Section 70A (4) defines the term "law enforcement unit" as "any governmental police force or organization of the state, county or municipality which has, by statute or ordinance, the responsibility of detecting crime and enforcing the general criminal laws of this state." The term "police officer" is defined by Section 70A (a) (8) as a "member of the police force or other organization of the state, county or municipal government who is responsible for the prevention and detection of crime and the enforcement of the laws of the state."

The Campus Police appear to meet the definition of a "law enforcement unit" in Section 70A (4), and the members of the Campus Police appear to meet the definition of the term "police officer" in Section 70A (a) (8) by virtue

of the authority given them by Article 41, Section 60A to arrest all persons trespassing or committing crimes on the University property and to exercise the powers of a peace officer on that property. The authority of the Campus Police necessarily includes the enforcement of the general criminal laws of the state. In an opinion of the Attorney General dated January 25, 1968, where consideration was given to whether the Police Training Act applies to the Marine Security Force of the Maryland Port Authority, it was stated that:

> "The use of the authority that they have is determinative of whether the members of the Force are subject to the mandatory provisions of Section 70A. The Police Training Act applies if the Force exercises full police powers on Port Authority property, including procedures for the enforcement of the general criminal laws and the detection of crime. On the other hand, if they engage in specialized police activities that do not include duties necessary and appropriate to the enforcement of the general criminal laws, the members of the Force are exempt from the application of the mandatory provisions of the Training Act."

Similar principles must be applied to the University Campus Police. If these policemen are in fact charged with the duty and responsibility of exercising full police powers on University property, "including procedures for the enforcement of the general criminal laws and the detection of crime," then the Police Training Act is applicable to them.

FRANCIS B. BURCH, *Attorney General.*

ESTELLE A. FISHBEIN, *Assistant Attorney General.*

POLICE — POLICE COMMISSIONER OF BALTIMORE CITY — WIRETAPPING AND INTERCEPTION OF ORAL COMMUNICATIONS, AUTHORIZATION UNDER MARYLAND AND FEDERAL STATUTES.

October 8, 1968.

Commissioner Donald D. Pomerleau.

In accordance with a request originating with the Director, Inspectional Services Division, you have asked us to review existing Maryland law with respect to wiretapping and electronic surveillance in the light of recently enacted federal legislation, and to delineate the legal authority of the Baltimore Police Department in that area.

Title III of the 1968 Federal Omnibus Crime Act adds a new chapter, Sections 2510-2520 inclusive, "Wire Interception and Interception of Oral Communications", to Part I of Title 18, United States Code. The provisions of the new chapter apply to the enforcement of both State and Federal criminal laws. Section 2516 (2) authorizes the interception of wire and oral communications in investigations of Maryland offenses upon the application of the Attorney General of Maryland, or the State's attorney of any county, or the State's attorney for Baltimore City, to a state court judge of competent jurisdiction, and the issuance of a court order authorizing or approving the interception "in conformity with Section 2518 and with the applicable State statute".

In violations of State law, a judge of competent jurisdiction is any judge of a court having general criminal jurisdiction and authorized by State statute to enter an order for the interception of communications. The Federal statute requires that the interception be made by State or local investigative or law enforcement officers having responsibility for the investigation of the particular offense. The order authorizing interception may issue only to obtain evidence in cases of murder, kidnapping, gambling, rob-

bery, bribery, extortion or dealing in narcotic drugs, marihuana or other dangerous drugs or any other crime dangerous to life, limb and property and punishable by imprisonment for more than one year and designated in the applicable State statute which authorizes such interception. The order may also issue in cases of conspiracy to commit the described offenses.

Section 2518 requires the application for an interception order to identify the police officer making the application and the officer authorizing the application, and a full statement of facts and circumstances relied upon to justify the issuance of an interception order, including (1) full details of the offense that has been, is being or is about to be committed, (2) a detailed description of the nature and location of the facilities from which or place where the interception is to be made, (3) the type of communications to be intercepted, and (4) the identity, if known, of the offender whose communications are to be intercepted.

The application is also required to state whether or not other investigative procedures have been tried and failed or if tried why probable failure would result. The period of interception has to be stated and reasons, if any, why the order should not automatically terminate the interception when the described type of communication has been first intercepted. Also required to be divulged is full information regarding all previous applications and the action taken thereon.

On the information submitted in the application, the judge may issue an *ex parte* order authorizing or approving interception of wire or oral communication within the jurisdiction of the court, and under stated conditions, for a period not in excess of 30 days. Extensions for periods of 30 days or less may be granted for good cause shown to the court issuing the original order. The Federal law also makes provision for interception without a court order in described emergencies, provided that application for approval of the emergency interception be made in accordance with the statute within 48 hours thereafter. It should

be noted that there is no provision in Maryland law for any interception for reasons of emergency without a court order.

We proceed now to consider "the applicable State statute" referred to in the Federal Omnibus Crime Law. Maryland law deals separately with wiretapping and electronic or mechanical eavesdropping. Wiretapping is provided for in Maryland Code (1965 Replacement Volume), Article 35, Sections 92-99 inclusive. Penalties for unlawful interception of telephone and telegraph communications, and also a provision for the exemption of employees or authorized agents of a telephone or telegraph company while engaged in the performance of official duties, are contained in Article 27, Section 585.

Article 35, Section 94 authorizes wiretapping pursuant to an order issued by a circuit court judge or judge of the Supreme Bench of Baltimore City upon the verified application of the Attorney General, or any State's attorney, setting forth facts and circumstances that establish good cause for the issuance of the order. The application for the court order is required to state that (1) there are reasonable grounds to believe that a crime has been committed or is about to be committed, (2) there are reasonable grounds to believe that evidence essential to the solution of such crime or which may prevent such crime will be obtained, (3) the information sought is not readily obtainable otherwise.

Statements made upon information and belief of the applicant must indicate the basis thereof. Any prior applications for the interception of communications on the same instrument, or for the same person, are required to be stated, including the current status of such applications. The application and order must identify, if possible, the particular telephone or telegraph line from which the information is to be obtained and the purpose thereof. There is a provision for examination under oath of the applicant and any witnesses having knowledge of the matters stated in the application. The court may, on its own motion, exam-

ine the witnesses. Wiretap authorization is limited to a period of not more than 30 days. In the discretion of the court, the order may be extended one or more times for periods up to 30 days.

The application for the interception order, supporting testimony and documents, are confidential and not to be released except by order of court. Section 97 restricts the admissibility of evidence obtained by the wiretap to the crime or crimes described in the order authorizing the wiretap. Under Section 98, federal agents are exempt from the operation of the statute. It is also provided that an order shall not issue to compel an employee of a telephone or telegraph company to violate any provision of federal law.

Maryland Code (1967 Replacement Volume), Article 27, Sections 125A-125D provide for electronic surveillance or other mechanical eavesdropping. Section 125A makes unlawful the use of any devices or equipment "to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person." However, to prevent a crime or to apprehend a criminal, eavesdropping devices may be employed upon the issuance of a court order authorizing their use. Law enforcement officers are required to submit to the State's attorney the evidence upon which the officer claims that an eavesdropping order should issue. If it appears that there are reasonable grounds to believe a crime has been, is being or may be committed, the State's attorney may apply to any circuit court judge or judge of the Supreme Bench of Baltimore City for an order authorizing the use of eavesdropping devices or equipment. The necessity for the use of eavesdropping equipment to prevent the commission or to secure the evidence of the commission of the crime must be stated. The applicant must identify clearly the equipment to be used, where it is to be used, the person or persons under surveillance, the crime suspected, whether committed or about to be committed, and that the evidence

obtained by eavesdropping is intended to be used only in the investigation and prosecution of the crime. The existence and status of any prior applications are required to be stated.

The applications and orders required by State law are generally consistent with the provisions of the Federal Omnibus Act relating to wiretapping and the interception of oral communications. Where Maryland law is more restrictive than the Omnibus Act, local police should enforce the Maryland restrictions. Where Maryland law is more permissive than Federal law, however, the Federal law will prevail. In summary, the interception of wire and oral communications by Baltimore police officers, or other police officers in Maryland, in connection with the investigation and prosecution of Maryland offenses is lawful if made in compliance with the requirements of both the Federal Omnibus Crime Act and the applicable Maryland statute.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

POLICE—POLICE COMMISSIONER OF BALTIMORE CITY—USE OF HELICOPTERS IN LAW ENFORCEMENT—ARREST WITHOUT WARRANT FOR A MISDEMEANOR—MOTOR VEHICLES—EVIDENCE OF SPEED LAW VIOLATIONS OBTAINED BY HELICOPTER.

October 15, 1968.

Commissioner Donald D. Pomerleau.

Your recent letter asks us to advise you regarding the legal implications of the use of helicopters by the Police Department of Baltimore City. The principal problem attaching to the employment of aircraft to perform law enforcement duties relates to warrantless arrests for misdemeanors.

The helicopter can be extremely effective in the observation of a law violation, particularly in criminal action that develops over a distance of ground. The helicopter crew can frequently see more and better and for longer periods of time than earthbound personnel and they may spot the commission of an offense, the sight of which is denied to police on the ground. At the point where surveillance has revealed that a misdemeanor has been committed, however, it may be impracticable for the men in the aircraft to personally arrest the offenders. In such cases, if an arrest is to be made, it must be made by officers on the ground. Ground based police officers may be informed of the details of the helicopter surveillance, but not having observed the commission of any misdemeanor, an arrest by them for a misdemeanor committed in the presence or view of the helicopter personnel raises a question of the lawfulness of such arrest.

An arrest without a warrant for a misdemeanor is lawful in Maryland for a misdemeanor committed in the presence or view of the arresting police officer, according to the highest courts of our State. *Shipley v. State,* 243 Md. 262; *Thompson v. State,* 4 Md. App. 31; *Salmon v. State,* 2 Md. App. 513. See also Kauffman, The Law of Arrest in Maryland, 5 Md. Law Rev. 125, 155.

An extension of the principles of law relating to arrests for misdemeanors appears in a case recently decided by the Maryland Court of Special Appeals. *Robinson v. State,* 4 Md. App. 415. In that case, a police officer on routine patrol observed that a lock on a gate had been cut in the chain fence around a storehouse. He also discovered that a door had been broken and that four men were inside. They saw him at the same time and escaped amid a fusillade of pistol shots fired by the officer. He put a description of the men and their clothing on the police radio, broadcasting also that they were wanted for breaking and entering a described storehouse, at that time a misdemeanor. A few minutes later another police officer who heard the broadcast arrested two men about three-quarters of a mile from the storehouse. The men were running, their clothes were torn and they answered the description of the wanted men.

The legality of their arrest was objected to on the ground that the misdemeanor charged against them was not committed in the presence or view of the officer who arrested them. The Court of Special Appeals held that the observation of the police officer who discovered the intruders and the cut lock constituted the commission of a misdemeanor in his presence, and that the broadcast of the crime and description of the wanted men, resulting in their prompt apprehension by another police officer who heard the broadcast, was a lawful arrest. The court said that "[w]hen a misdemeanor is committed in the presence of a police officer and information is promptly placed on the police radio that the misdemeanor has been committed and a description of the misdemeanant given, the arrest of the misdemeanant by another police officer within a reasonable time of the receipt of the broadcast information is valid."

We think that the extension of the rule of law relating to warrantless arrest in misdemeanor cases described in *Robinson v. State, supra,* sanctions arrests by ground based police units upon information received from police personnel of a helicopter in whose presence or view a mis-

demeanor has been committed. The criteria for the legality of such arrests is knowledge of the crime based upon personal observation by the helicopter crew, prompt transmission of a description of the crime and the culprits, the reception of that information by the arresting officer or officers and the arrest within a reasonable time upon probable cause to believe the arrestees to be the misdemeanants.

Violations of traffic laws are subject to the application of the principles stated herein. In general, such offenses are misdemeanors. We direct special attention, however, to the enforcement of speed laws. Maryland Code (1967 Replacement Volume), Article 66½, Section 213 provides that "[n]o justice of the peace, trial magistrate, or magistrate of the traffic court shall receive evidence of any alleged violation of the motor vehicle speed laws over a measured course." This section may render inadmissible in evidence any evidence of speeding obtained by timing motor vehicles over a pre-measured section of highway, or any evidence of speeding that clocks the elapsed time of a vehicle in covering the distance between two pre-determined marks. The obtention of evidence of violation of the speed laws in a manner proscribed by law applies equally to the use of helicopters as to any other police equipment.

FRANCIS B. BURCH, *Attorney General.*

FRED OKEN, *Assistant Attorney General.*

PUBLIC WORKS, BOARD OF

(1) No Deed From State Required for Bulkheading and Dredging in Assawoman Bay.
(2) Restrictions and Requirements Relating to Such Bulkheading and Dredging Are Set Forth in Chapters 690 and 757 of the Laws of 1965.
(3) Chapters 690 and 757 of the Laws of 1965 Do Not Divest State of Its Title to the Bed of the Land Under the Navigable Waters of Assawoman Bay.
(4) Board of Public Works May Convey Title to Land Under the Navigable Waters of Assawoman Bay Before Bulkheading and Dredging Is Begun Pursuant to Provisions of Sec. 15 of Article 78A.

June 7, 1968.

Mr. James J. O'Donnell, Director.

You have asked whether a deed must be obtained from the Board of Public Works when an owner of land contiguous to the existing shore line of Assawoman Bay in Worcester County desires to create new fast land by dredging material from the bottom of Assawoman Bay and then use this material as fill between the existing shore line of his land and a bulkhead which he will build in front of his existing shore line.

It is our opinion, for the reasons hereinafter set forth, that no deed is required from the Board of Public Works to permit such owner to bulkhead and dredge if he complies with the provisions of Chapters 690 and 757 of the Laws of 1965.

Chapter 690 of the Laws of 1965 created the Worcester County Shoreline Commission and provides for its members and powers. The Act then provides as follows:

> "(c) The Commission shall have the duty of regulating and determining bulkhead lines, shorelines, and fill lines along the shorelines of Worces-

ter County. No person, association, or corporation may construct or reconstruct a bulkhead, or change a shoreline, or make a fill, along the shorelines, without a permit for such work from the Commission.

(d) Application for any such permit shall be made to the Commission, on forms prepared by it, giving full details of the proposed work or construction. The Commission thereupon shall set a time and place for a public hearing on the application, to be at least fifteen days later, at which the applicant and any other interested person may offer information and testimony.

(e) If on the basis of the application and the hearing the Commissioners determine that the proposed work or construction will be of economic or commercial benefit to the county, will not harm the shoreline or navigation in the waters of the county, will not cause undue damage to the marine life of the county, or will improve the recreational facilities and potential of the county, they shall approve the application and issue a permit for the work or construction. Provided, however, any person, association, or corporation being issued such a permit shall within 90 days from the date thereof, have recorded among the land records of Worcester County a plat certified by a licensed surveyor, or a licensed engineer, showing in detail the work or construction done or to be done as a result of said permit being granted.

(f) Any person aggrieved by an action of the Commission in either issuing or failing to issue a permit for any such proposed work or construction may appeal therefrom, within twenty-one days, to the Circuit Court for Worcester County. The Court shall hear all parties at interest in the appeal and shall consider the case de novo; and shall promptly determine the issue, either approv-

ing, rejecting, or modifying the action of the Commission.

(g) Any person, association, or corporation who proceeds with any of the work or construction to which this section applies, without a permit from the Commission or, upon appeal, from the Circuit Court, is guilty of a misdemeanor; and upon conviction thereof is subject to a fine of not more than fifty dollars for every day on which the work or construction, or any part of it, proceeds or is allowed to stand."

Chapter 757 of the Acts of 1965 defines by metes and bounds a line known as a borrow area limit line and a line known as the fill and bulkhead line in Isle of Wight Bay and Assawoman Bay in Worcester County. The Act then provides for the preparation and recordation of a plat of the borrow line and the fill and bulkhead line and then provides as follows:

"No person, firm, or corporation, may pump, dig, excavate, or remove (herein described as 'borrow') sand or other solid fill materials from Isle of Wight Bay or Assawoman Bay, on whatever in a particular place may be the westerly of two lines described as (1) the westerly or outer side of the line herein described as the borrow area limit line, and (2) the line 1,000 feet westerly from the fluctuations of the bulkhead line.

(d) No person, firm, or corporation may fill in sand or other solid matter or build and maintain bulkheads, in Isle of Wight Bay or Assawoman Bay, on the westerly or outer side of the line herein described as the fill and bulkhead line.

(e) Between the lines in Isle of Wight Bay and Assawoman Bay herein described as whatever in a particular place may be the westerly of the two lines described as (1) the borrow area limit line and (2) the line 1,000 feet westerly from the

fluctuations of the bulkhead line, and the fill and bulkhead line, any person, firm, or corporation may pump, dig, excavate, or remove (herein described as 'borrow') sand or other solid fill materials. Materials dredged in the area between the borrow area limit line and the fill and bulkhead line shall not be excavated to a depth greater than six (6) feet below mean low water until all material existing above elevation six (6) feet below local M L W for a distance of fifteen hundred (1500) feet from the area being filled has been excavated. If all the material above six (6) feet below local MLW has been excavated for a distance of fifteen hundred (1500) feet from the fill operation, the material may be excavated to a depth of twelve (12) feet below MLW. After the supply of materials has been exhausted to elevation twelve (12) feet below M L W, the area may then be excavated to eighteen (18) feet below M L W. The provisions of this subsection concerning the dredging of materials and the excavations permitted shall not be construed or applied to permit any person to borrow material from in front of areas other than those owned or controlled by him, when projected toward the center of the Bay. Also nothing in this section shall be construed or applied to deny to a riparian owner the right to dig a channel to deep water after conforming to any necessary laws, regulations, or requirements therefor."

A different question, but related to the one which you pose, concerning the bottom of Assawoman Bay was the subject of an Attorney General's Opinion dated February 10, 1965, and published in 50 Opinions of the Attorney General 452. The Attorney General was asked by the Board of Public Works for advice generally as to the proper procedure for consideration of an application by a corporation for a permit to dredge some three million cubic yards of material from the bottom of Assawoman Bay and to use the material as fill between the dredge area and the cor-

poration's fast land to the eastward so as to create new fast land contiguous to the existing shoreline. In this opinion the Board of Public Works was advised that it should act pursuant to the authority vested in it by Section 15 of Article 78A of the Code and that the corporation could not interfere with areas covered by the waters of Assawoman Bay until the Board of Public Works had reviewed the corporation's plan, had determined the plan's public benefits, had fixed an adequate consideration upon the State's property interests affected and had contracted with the corporation in a form permitting the project to be undertaken.

In delineating the scope of the opinion, however, the Attorney General noted the distinction between dredging and filling navigable water, on the one hand, and marshland on the other.

> "Finally, in order to avoid any misunderstanding, it should be remarked that there can be no present doubt entertained as to the right of the owner of marshland not inundated by normal high water to fill and reclaim it. We recognize that as a practical matter the filling of marshland may have some adverse effect on fish and wildlife in the area, but the Legislature has not yet considered such effect a sufficient cause for restriction of the property right immemorially accepted in this State. Present concern is not directed, therefore, at that portion of the project which relates to Devil Island itself and the other marsh between it and the sandy fast land to the east; it is limited to that portion of the project which seeks to fill in areas now covered by the waters of Assawoman Bay at mean high tide."

The advice rendered the Board of Public Works in 50 Opinions of the Attorney General 452 was predicated upon the conclusion that (1) Section 485 of Article 27 of the Code[1] gave the corporation no right or privilege generally to dredge ordinary fill from Assawoman Bay, and (2)

neither Section 45 nor Section 46 of Article 54 of the Code[2] gave the corporation any right or privilege to make new land in the navigable waters of Assawoman Bay. The cornerstone of the opinion is contained in the following paragraph:

> "In Maryland, by common law rule, title to all navigable waters and to the soil below the high-water mark of those waters is vested in the State as successor to the Lords Proprietary who had received it by grant from the Crown; 'and so it remains, unless it be included in some grant by the State, made prior to [March 3] 1862'. *Sollers v. Sollers,* 77 Md. 148, 151-152 (1892). See *Hawkins Point Light-House Case,* 39 Fed. 77, 79-80 (1889); see also *Gould on Waters,* Sections 32, 42 (3d Edition, 1900). Waters are deemed navigable for these purposes if and only if they are subject to the ebb and flow of tides. This is still the law of Maryland, to the extent that it has not been modified or abrogated by statute. Cf. *Wagner v. City of Baltimore,* 210 Md. 615, 622, 624 (1956). In the absence of specific statutory authority to the contrary, therefore, the right or privilege of dredging any material from the bottom of any part of the Maryland tidewater depends entirely upon the grace of State action. See *Potomac Co. v. Smoot,* 108 Md. 54, 63 (1908)."

51 Opinions of the Attorney General 452 at 454. We note further that the disposition of title of those lands to which the State holds title as successor to the Lords Proprietor is a matter over which the Legislature has power.

Chapter 690 (Senate Bill 466) and Chapter 757 (Senate Bill 465) of the Laws of 1965 were introduced on February 26, 1965, sixteen days after 50 Opinions of the Attorney General 452 was published. Neither Chapter 690 nor Chapter 757 contain any provisions which would cause us to alter the conclusion reached in 50 Opinions of the Attorney General 452, that ". . . title to all navigable waters and

to the soil below the high-water mark of those waters is vested in the State . . .".

Chapter 757[3] does provide special statutory authority for the right or privilege of dredging material from the bottom of Assawoman Bay and might expand the concept of "improvements" permitted by Article 54, Section 46 to include the making of land within the narrow confines of the bulkhead line off Ocean City. However, it does not divest the State's title to the bottom land under Assawoman Bay absent such "improvement" by dredging.

A careful reading of Chapters 690 and 757 indicates to us that no deed is required from the Board of Public Works for bulkheading, filling and dredging. This, however, does not answer the question of the extent of the owner's title after he has bulkheaded and filled over land which was formerly under the navigable waters of Assawoman Bay.

It might be maintained that after an owner has bulkheaded and filled, thus creating new fast land, he possesses all the necessary incidents of title because Article 54, Sections 45 and 46 of the Code provide that improvements and other accretions in front of a proprietor's land bounding on navigable waters are an incident of the proprietor's estate and pass to the successive owner. The tenor of the opinions of the Court of Appeals which construe this section, however, imply that such improvements as have heretofore been recognized are an incident of the owner's estate which is separate from the soil under it. In *Culley v. Hollis*, 180 Md. 372, the Court of Appeals quoted from *Hess v. Muir*, 65 Md. 586, 598, wherein the Court said:

> "When such improvements are made they become incident to the estate, as not inherently identical in nature with land, but from being joined to it, and contributing to its uses and value legally identified with it as a fixture or a right of way, or other appurtenance that passes with land."

See also *Hodson v. Nelson*, 122 Md. 330.

Of course, after an owner has bulkheaded and filled in front of his land, this new fast land might be construed to be "inherently identical in nature" (*Hess v. Muir, supra*) with the land which it covers. We find no opinion of the Court of Appeals deciding this point, although authority exists for the proposition that a wrongful filling in front of one riparian owner's land by a stranger or a neighboring owner vests title to the filled land in the owner of the shore property. See *Baltimore v. St. Agnes Hospital,* 48 Md. 419 and *Baltimore v. Canton Co.,* 186 Md. 618. We are unwilling to say categorically that after such bulkheading and filling the title of the State is entirely divested in the land which was formerly under navigable waters but we feel certain that there is no possibility that the State can be divested of its interest in the land under water in any event until the filling within the bulkhead line has been completed to the extent that the navigable waters have been caused to recede.

In summary, it is our opinion that in order to carry out the provisions of Chapters 690 and 757 of the Laws of 1965, no deed need be granted by the Board of Public Works so that the land contiguous to the existing shore line of Assawoman Bay may be bulkheaded by an owner, nor need the Board grant a deed to permit the dredging of material by such owner from the bottom of Assawoman Bay located in the area in front of the bulkhead. The restrictions upon and requirements relating to such bulkheading and dredging are as set forth in Chapters 690 and 757 of the Laws of 1965. The granting of a deed by the State is not one of them. Absent any ruling of the Court of Appeals to the contrary, it is likewise our view that the provisions of Chapters 690 and 757 of the Laws of 1965 do not have the effect of divesting the State of its title to the bed of the land under the navigable waters of Assawoman Bay.

We would point out, however, that if the Board of Public Works desires to convey title to this land before any bulkheading or dredging is begun, it is authorized to do so

under the provisions of Section 15 of Article 78A of the Code of Maryland, which empowers the Board to convey land under the waters of the State. Section 15 also provides that the determination of an adequate consideration for any such conveyance is the responsibility of the Board of Public Works and while under that section no consideration is required for a conveyance to a county or municipality, the conveyance may be subject to such conditions as the Board of Public Works may impose.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

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[1] Section 485. Removal of sand, gravel, etc.; rights of riparian owner.

It shall not be lawful for any person to dig, dredge, take and carry away any sand, gravel or other material from the bed of any of the navigable rivers, creeks or branches of this State, under a penalty of a fine not exceeding three hundred dollars ($300), and confiscation of the boat, vessel, dredge and implements used in digging, dredging and carrying away such sand, gravel, or other material, and imprisonment in the county jail for a period not exceeding six months, in the discretion of the court; one-half of said fine and one-half of the proceeds of the sale of such confiscated boat, vessel, dredge and implements, to be paid by the sheriff to the informer, and the other half to the commissioners of public schools for the counties, provided, however, that it shall be lawful for any riparian owner of lands in the State of Maryland bordering on said rivers, creeks or branches, or for any person or corporation with whom such owner shall have a contract in writing for the purpose, or for the agents, servants or employees of such person or corporation, to dig, dredge, take and carry away sand, gravel or other materials from the bed of said river opposite said lands from high water mark on the shore bordering on said lands to the outer line of said channel nearest said shore, subject to the laws of the United States relating to navigation; and where no riparian owner is given by this section the lawful right to dig, dredge, take and carry away sand, gravel or other materials from the bed of said river opposite said lands from high water mark on the shore bordering on said lands to the outer line of the channel farthest from said shore to the opposite shore, subject to the laws of the United States relating to navigation, the Board of Public Works may grant, for an adequate consideration in money, and subject to such conditions as it may impose, to any person or corporation, the right to dig, dredge, take and carry away said sand,

gravel or other materials; and provided further, that none of the provisions of this section shall be deemed to interfere in any manner with the provisions of any law relating to the taking and catching of fish and oysters.

[2] Section 45. Accretion to land on navigable river.

The proprietor of land bounding on any of the navigable waters of this State shall be entitled to all accretions to said land by the recession of said waters, whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable.

Section 46. Right to make improvements in front of land on navigable river.

The proprietor of land bounding on any of the navigable waters of this State shall be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements and other accretions as above provided for shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made.

[3] The metes and bounds description for the line known as the fill and bulkhead line and the line known as the borrow area limit line was amended in House Bill 1332 of the 1968 Session of the General Assembly, being Chapter 405 of the Laws of 1968.

RACING COMMISSION

SUBDIVISIONS SHARE OF REVENUES FROM RACING—APPLICATION OF THE PROVISIONS OF ARTICLE 78B, SECTION 19(D) TO LICENSEE WHICH RUNS ITS DAYS OF RACING AT MORE THAN ONE TRACK.

October 22, 1968.

Mr. Bernard F. Nossel.

The State Auditor's office, after reviewing the records of the Comptroller's office, found that the distribution of racing revenue from days of racing licensed to Baltimore Trotting Races, Inc., which were run at Pimlico and Laurel, was made to the subdivisions of the State on one basis during the calendar years 1964 and 1965, and on another basis during the calendar years 1966 and 1967.

Since 1964 the 24 days of racing authorized Baltimore Trotting Races, Inc. under Section 17 of Article 78B have been run at Pimlico and Laurel by agreements between Baltimore Trotting Races, Inc. and Pimlico and Laurel. Pimlico and Laurel each receive twelve (12) additional days of racing. Statutory sanction for such agreements is provided by Section 18B (a) of Article 78B.

The distribution of racing revenue is governed by Section 19 of Article 78B. Subsection (D) provides that the subdivisions of the State shall not receive "any portion of the (1) revenues or license fees arising out of any days of racing in excess of thirty-three (33) at any one track during any one year, collected by the Maryland Racing Commission from each licensee licensed under Section 7 of this article; . . . (3) revenues or license fees arising out of any days of racing in excess of twenty (20) at any one track during any one year collected by the Maryland Racing Commission from each licensee licensed under Section 17 of this article."

Baltimore Trotting Races, Inc., is licensed under Section 17 of Article 78B (Trotting and pacing races) while Pim-

lico and Laurel are licensed under Section 7 of Article 78B (Licenses generally). Thus a question arose after the execution of the agreements between Baltimore Trotting Races, Inc. and Pimlico and Laurel concerning the application of the limitations contained in Section 19 (D). By letter dated January 29, 1965, this office advised the Comptroller's office that the limitation in Section 19 (D) of 33 or 20 days was dependent upon the type of license which the licensee held and not the type of track where the licensee operated. This office also advised the Comptroller's office that there was a separate limitation for each licensee even though two licensees might operate at the same track. The answer to the question concluded with the following sentence:

> "For example, if all of Baltimore Raceway's days are run at Pimlico, the counties are entitled to receive a distribution of revenues from the first 33 days run under Pimlico's license and also revenues from the first 20 days run under Baltimore Raceway's license."

You state that on the basis of this example and the fact that Section 19 (D) refers to days of racing "at any one track", the Comptroller's office considered the 24 racing days of Baltimore Trotting Races, Inc. as constituting two meetings of 12 days at Pimlico and 12 days at Laurel for the calendar years 1964 and 1965. Consequently, revenues from 24 days of racing under the license of Baltimore Trotting Races, Inc. were distributed to the subdivisions. In 1966 and 1967, however, the Comptroller's office changed its interpretation and the 24 days of racing authorized to Baltimore Trotting Races, Inc. were considered as a single meet. Consequently, revenues from 20 days of racing under the license of Baltimore Trotting Races, Inc. were distributed to the subdivisions and the revenues from the remaining 4 days were considered excess days in which the subdivisions did not share.

You ask which interpretation is correct. It is our opinion that the disposition of the funds made in the calendar years 1966 and 1967 reflects the correct application of Section 19 (D) to the revenues received from the days of racing under the license of Baltimore Trotting Races, Inc. We reaffirm the conclusion of this office in the letter of January 29, 1965 that the limitation in Section 19 (D) of the number of days of revenue from racing distributed to the counties "is dependent upon the type of license which the licensee holds and is not dependent upon the type of track where the licensee operates." We do not believe that the limitation in Section 19 (D) should be construed to provide a distribution to the subdivisions of a greater amount of revenue and license fees in the case where the days of racing of Baltimore Trotting Races, Inc. are run at more than one track. We read the words "at any one track" in Section 19 (D) as meaning at each and every track on which the licensee runs its authorized days of racing. The words "any one" have been held to include each and every one. *Belmont Coal and Lumber Co. v. James F. Wood Builders*, 15 A. 2d 625, 626 (N.J. 1940).

When the Legislature enacted Section 18B which permitted Baltimore Trotting Races, Inc. to run its days of racing at tracks licensed under Section 7, it also provided in subsection (b) of Section 18B that if the days of racing were run at tracks licensed under Section 7, Baltimore Trotting Races, Inc. should pay the same license fee payable by a licensee under Section 7. The Legislature also provided in subsection (c) that Baltimore Trotting Races, Inc. should be treated the same as a licensee under Section 7 with respect to the tax on pari-mutuel wagers, the share of breakage, the percentage of the pari-mutuel pool and the application of provisions as to the Racing Fund. Thus, it is apparent that the Legislature intended the license of Baltimore Trotting Races, Inc. to be treated as a licensee under Section 7 when its days of racing were run at tracks licensed under Section 7. But the Legislature neglected to make any provision for the distribution of revenue and license fees to subdivisions when Baltimore Trotting Races,

Inc. ran its days of racing at tracks licensed under Section 7. We might conclude that the Legislature's silence should be construed to mean that the subdivisions receive no revenue or license fees from Baltimore Trotting Races, Inc. when its days of racing are run at a track licensed under Section 7 when such track generates revenue and license fees from thirty-three days of racing under its own license. Or, we can conclude that it was the intent of the Legislature to treat the distribution of revenue or license fees from days of racing run at a track licensed under Section 7 by Baltimore Trotting Races, Inc. in the same manner as such revenues or license fees were treated prior to the enactment of Section 18B. Since the first interpretation would, in effect, constitute an implied partial repeal of the provisions of Section 19 (D) we have rejected it. The interpretation we have adopted does not conflict with any of the other provisions of Article 78B and there is no practical or mechanical obstacle to its application by the Comptroller's office.

Another factor which favors our interpretation is that the subdivisions' share of revenue and license fees under Section 19 (D) is not affected by the fact that a certain number of days of racing formerly run in one subdivision are subsequently run in two or more subdivisions. The subdivisions' share of revenue and license fees is determined by the subdivision population with respect to the population of the State as a whole and is not determined by the number of days of racing run in a particular subdivision.

You have also asked if there is any limitation which would bar the Comptroller's office from adjusting the distributions made to the subdivisions during the calendar years 1964 and 1965. "The general rule applicable to statutes of limitations is that they ordinarily do not apply to the State, but the Legislature may make them apply if it sees fit to do so." *State v. Cadwalader, Exec.*, 227 Md. 21,

24. We find no statutory bar which would prevent the Comptroller's office from making adjustments for the distributions of revenue from racing made to the subdivisions during the calendar years 1964 and 1965.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

REFERENDA

REFERENDUM—LEGISLATURE MAY ENACT LEGISLATION ON SAME SUBJECT DESPITE FILED REFERENDUM PETITION —RESULT OF REFERENDUM DOES NOT AFFECT BILL NOT PETITIONED TO REFERENDUM—PETITION RELATING TO ONE BILL HAS NO AFFECT ON ANOTHER BILL PASSED BY LEGISLATURE IN SUBSTANTIALLY SAME FORM.

February 7, 1968.

The Honorable Royal Hart.

In your letter of February 2, 1968, you raised various questions relating generally to the power of the General Assembly to reenact, with amendments, a bill similar to previous legislation which has been petitioned to referendum, and the effect of the new enactment on the legislation submitted to referendum. We are pleased to respond to this inquiry.

Fortunately, the situation you describe in your letter is not without precedent. As recently as 1962, the Court of Appeals was faced with a similar situation involving the regulation on the savings and loan industry. In that case, a bill passed by the Legislature had been petitioned to referendum and the Legislature, to fill the void created by the suspension date of the referred bill, passed emergency legislation pending the acceptance or rejection of the referred bill. In sustaining the authority of the Legislature to act, the Court of Appeals observed as follows:

> "The powers of the Maryland Legislature are plenary except as restrained or confined by the Federal or State Constitutions. *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412. There is no provision in the Maryland Constitution forbidding the Legislature to act on the subject matter of a referred law either during the period between its referral and the vote thereon or after approval or rejection by the voters. Sec-

> tion 2 of Art. XVI expressly permits the passage of a law coming within its ambit to be passed, which takes effect upon its passage and is not suspendable by referendum proceedings, provided it be approved by three-fifths of all the members elected to each of the two Houses and be declared to be 'an emergency law and necessary for the immediate preservation of the public health or safety.' *Dinneen v. Rider,* 152 Md. 343 . . .
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> "This conclusion was foreshadowed by the decision in *Hammond v. Lancaster,* 194 Md. 462. There Ch. 86 of the Laws of 1949 enacted the Ober Law, dealing with 'Sedition and Subversive Activities.' It was approved March 31, to be effective, by its terms, on June 1. After March 31, it became apparent that Ch. 86 would become subject to referendum under Art. XVI of the Maryland Constitution, and its operation suspended. On April 1, Senate Bill 528 was introduced for the purpose of changing Sec. 3 of Ch. 86 in order to make it an emergency measure. Senate Bill 528 became Ch. 310 of the Laws of 1949 on April 22." *First Continental v. Director,* 229 Md. 293 at 302-303.

The application of this decision to the questions in your letter would produce, in our opinion, the following results:

(a) The General Assembly may reenact, with amendments, during the 1968 session, a bill passed during the 1967 session which has subsequently been petitioned to referendum.

(b) The amended bill would not go to referendum unless a new petition was filed, in accordance with law, to require referral.

(c) A petition relating to the revised bill would not remove the original bill from referendum.

(d) If the effort to refer the 1968 version to referendum were unsuccessful, the 1968 version would become law until such time as the voters act on the 1967 bill.

Of course, the difficulty in all of this is occasioned by the answer to a question you did not ask. In the event the petition effort with respect to the 1968 bill fails, the 1968 bill would become law on June 1, 1968. Assuming the voters approved the 1967 bill, it would become law, in accordance with the Constitution, thirty days after the general election in November 1968. At that point, we would have two valid bills on substantially the same subject. To avoid the confusion that would result, it would seem advisable to provide for this contingency in the 1968 bill.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

REFERENDA—SECRETARY OF STATE—REFERENDUM PETITIONS—DATE BY WHICH PETITIONS MUST BE FILED—ELECTIONS.

June 19, 1968.

Honorable C. Stanley Blair.

In your letter of June 3, 1968, you request our opinion as to whether the petition to place Chapter 617 of the Acts of 1963 on referendum is legally sufficient. Chapter 617, which is now Section 264B of Article 27 of the Annotated Code of Maryland (1967 Replacement Volume), is the Act which makes it unlawful to operate slot machines in Maryland. You have supplied us with a copy of one of the separate papers which form the petition along with a copy of the Statement of Contributions and Expenditures filed by the Maryland Local Option Association. The petition form contains a formal request to refer the Act to a vote, the text of the Act requested to be referred, spaces for signatures with addresses and place of voter registration, and finally the affidavit of the person procuring the signatures. You have advised us that petitions purporting to contain the signatures of 22,911 registered voters were filed with you on May 31, 1968.

We are of the opinion that the petition form on its face satisfies the formal requirements of Article XVI of the Maryland Constitution and the applicable provisions of Article 33, Sections 23-3 to 23-7 of the Annotated Code of Maryland (1967 Replacement Volume). We are also of the opinion that the Statement of Contributions and Expenditures filed by the Maryland Local Option Association is legally sufficient. We are also of the opinion that if your audit shows that there are over 13,796 valid signatures, with not more than one-half being from Baltimore City or any one County, that this would be a sufficient number to suspend the operation of the law until June 30 when the remaining signatures would be due. However, we are of the opinion that the petitions are not effective to suspend the

operation of Chapter 617 of the Acts of 1963, or to cause you to refer the Act for state-wide referendum because they are not timely filed. Indeed, in our opinion, they are five years late.

The critical language is contained in Section 2 of Article XVI of the Maryland Constitution. This section provides in part:

> "No law enacted 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 contain a section declaring such law an emergency law and necessary for the immediate preservation of the public health or safety, and passed upon a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly; provided, however, that said period of suspension may be extended as provided in Section 3 (b) hereof. *If before said first day of June there shall have been 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. An emergency law shall remain in force notwithstanding such petition, but shall stand repealed thirty days after having been rejected by a majority of the qualified electors voting thereon; . . ." (Emphasis supplied).

When Section 2 is restructured to focus on the issue raised, it becomes clear that petitions must be filed before the "first day of June", "next after the session at which [the Act in question] may be passed". This is true regardless of the date the Act is to go into effect and regardless

of any date or dates contained within the Act providing for a phase-out or other staggered period. The position of the Maryland Local Option Association is that referendum petitions need not be filed until May 31, of the year in which the law becomes fully implemented, regardless of the legislative session at which the bill is passed and regardless also of the stated effective date of the Act. Such a construction, however, in addition to violating the express provision of the Maryland Constitution, would fly directly in the face of the construction given to the Article by the Court of Appeals of Maryland in *Winebrenner v. Salmon*, 155 Md. 563, 565 (1928). There the Court noted:

> "By Article 16 of the Constitution of Maryland, known as 'The Referendum,' the people reserved to themselves power by petition to have submitted to the registered voters of the state, to approve or reject at the polls, any act or part of any act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor. The method of accomplishing this is by a petition signed by the designated number of votes, or percentage (depending upon whether the act to be submitted is a general or a local law), *the petition to be filed before the first day of June following the passage of the act.*" (Emphasis supplied).

We therefore conclude that the petitions filed with you to refer Chapter 617 of the Acts of 1963 to a vote of the people of Maryland are invalid and of no effect.

For the same reasons the petitions filed with you seeking to refer a portion of Chapter 617 of the Acts of 1963 are also ineffective to refer any portion of Chapter 617 to a vote of the people of Maryland.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

REFERENDA—SECRETARY OF STATE—REFERENDUM PETITIONS—LOCAL BOND BILL.

June 19, 1968.

Honorable C. Stanley Blair.

You have requested our opinion as to whether the petition to place Chapter 753 of the Acts of 1968 on referendum in Charles County is legally sufficient. This Act would authorize the County Commissioners of Charles County to borrow not in excess of $2,500,000 for the purpose of making repairs and alterations to the courthouse in Charles County. You have supplied us with a copy of one of the separate papers which form the petition. This paper contains a formal request to refer the Act to a vote, the text of the act requested to be referred, some signatures with addresses and place of voter registration, and the affidavit of the person procuring the signatures. You have advised us that the papers were filed with you on May 31, 1968 and purport to contain 700 signatures of registered voters in Charles County. You have also supplied us with a copy of the statement of receipts and disbursements in connection with the petition filed by J. Willard Dutton.

We are of the opinion that the petition form satisfies the formal requirements of Article XVI of the Maryland Constitution and the applicable provisions of Article 33, Sections 23-3 to 23-7 of the Annotated Code of Maryland (1967 Replacement Volume). We are also of the opinion that the statement of receipts and disbursements is legally sufficient.

You have informed us that 9,420 votes were cast in Charles County at the last gubernatorial election. Therefore, subject to your audit, under the provisions of Section 3 of Article XVI a sufficient number of signatures were filed with you before June 1, 1968 to suspend the operation of this public local law until June 30 when additional signatures and any later financial reports will be due.

We further point out that Section 6 of Chapter 753 provides that if a referendum petition is filed pursuant to the

provisions of Article XVI, the act is not to take effect unless a majority of the votes cast are cast in favor of the act as provided by Article XVI. Similarly, see Ch. 414 of the Acts of 1961 which affirmatively required a referendum, and was subsequently approved by the voters of St. Mary's County. The result of the referendum is reported in Laws of Maryland, 1963, at page 2253. We therefore advise you that as of this time the operation of Chapter 753 of the Acts of 1968 has been suspended.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

REFERENDA—SECRETARY OF STATE—REFERENDUM PETITIONS—LOCAL BOND BILL—RAPID TRANSIT FACILITIES.

June 26, 1968.

Honorable C. Stanley Blair.

You have requested our opinion as to whether the petition to place Chapter 738 of the Acts of 1968 on referendum in Prince George's County is legally sufficient. This Act would authorize the County Commissioners for Prince George's County to borrow up to $88,000,000 to finance the construction of rapid transit facilities. You have supplied us with a copy of one of the separate papers which form the petition. This paper contains a formal request to refer the act to a vote, the text of the act requested to be referred, some signatures with addresses and place of voter registration, and the affidavit of the person procuring the signatures. You have advised us that the papers were filed with you on May 31, 1968 and purport to contain 5500 signatures of registered voters in Prince George's County. You have also supplied us with a copy of the statement of receipts and disbursements in connection with the petition.

We are of the opinion that the petition form satisfies the formal requirements of Article XVI of the Maryland Constitution and the applicable provisions of Article 33, Sections 23-3 to 23-7 of the Annotated Code of Maryland (1967 Replacement Volume). While the statement of receipts and disbursements does not contain the post office address of the organization which was paid for printing the petition as required by Section 23-6, we view this as a technical error which would not invalidate the petitions. We therefore are also of the opinion that the statement of receipts and disbursements is legally sufficient.

You have informed us that 100,568 votes were cast in Prince George's County at the last gubernatorial election. Therefore, subject to your audit, under the provisions of Section 3 of Article XVI, a sufficient number of signatures

were filed with you before June 1, 1968 to suspend the operation of this public local law until June 30 when additional signatures and any later financial reports will be due.

As discussed in our opinion to you dated June 19, 1968, we do not believe this Act comes within any of the exceptions to the Referendum Article found in Section 2 of Article XVI. We therefore advise you that as of this time the operation of Chapter 738 of the Acts of 1968 has been suspended.

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

REFERENDA—SECRETARY OF STATE—REFERENDUM—MANDATORY PROVISION REQUIRING ELECTION DISTRICT AND PRECINCT TO BE SHOWN ON PETITIONS.

June 26, 1968.

Honorable C. Stanley Blair.

You have requested our interpretation of Section 23-3 of Article 33 of the Annotated Code of Maryland which is a recodification of former Section 169 of Article 33. By virtue of Chapter 392 of the Acts of 1967, effective July 1, 1967, Sections 1 to 301 of Article 33 were repealed and new Sections 1-1 to 28-14 were enacted in lieu thereof. (In 1968 by virtue of Chapter 613 of the Acts of 1968, effective July 1, 1968, Sections 26-1 through 26-26 were repealed and new Sections 26-1 through 26-19 were enacted in lieu thereof.)

Former Section 169 provided:

> "In every petition (including an associated or related set of petitions) 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, and immediately below the signature of any such signer, there shall be either printed or typed, the name of such signer."

Section 23-3 now provides:

> "In every petition (including an associated or related set of petitions) under the provisions of Article XVI of the State Constitution, there shall be appended to the signature of each signer his residence, the precinct *and* ward or precinct *and* election district wherein he is registered as a voter, and immediately below the signature of any such signer, there shall be either printed or typed, the name of such signer." (Emphasis supplied).

As you point out, Section 23-3 now requires that the "precinct and ward or precinct and election district" be included

along with the name (signed and printed) and residence of the signer of referenda petitions. Former Section 169 only required the "precinct or district" to be included along with the residence and name of the signer.

You have asked us whether or not you may count as valid those signatures which do not contain both the signer's precinct and ward, on the one hand, or the precinct and election district, on the other. It is our opinion that where both the precinct and ward or the precinct and election district are provided for under local law they must be included along with the signature in order for it to be valid. One can certainly not overlook this deliberate change made by the Legislature in recodifying Section 169.

The Maryland Court of Appeals in *Barnes v. State ex rel. Pinkney*, 236 Md. 564 (1964), discussed the validity and import of Section 169. In holding Section 169 to be constitutional the Court noted that the provisions contained therein are reasonable and constitute proper legislative enactments in furtherance of and not in conflict with the purposes of Article XVI (the Referendum Article) of the Maryland Constitution. We are of the opinion that that statement applies with equal force to Section 23-3 where one additional requirement is introduced. The Maryland Court in the *Barnes* case went on to specifically discuss the question as to whether or not the requirements contained in Section 169 are merely directory or whether they are mandatory. As the Court stated:

> "Section 169 provides that each signature on a referendum petition 'shall' (not 'may') be supported by a statement of the signer's residence and voting precinct or district and by his name in print or type. The use of the words 'shall' or 'may' is not controlling in determining whether a particular provision is mandatory or directory; the question of construction turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes of the legislation. *Hitchins v. City of Cumberland*,

> 215 Md. 315, 323, 138 A. 2d 359 (1958). However, the word 'shall' of itself demonstrates a mandatory intent unless the context indicates otherwise. 2 Sutherland, *Statutory Construction*, Section 2803, (3rd ed. 1943); Crawford, *Statutory Construction*, Section 262 (1940). Here the context supports rather than negatives the mandatory intent of the statutory provision. Section 169 is clearly designed to provide additional means by which fraudulent or otherwise improper signatures upon a referendum petition may be detected. If the provisions of the section were only directory, laws enacted by the Legislature could be suspended, even if the Secretary of State had found that the referendum petition lacked the necessary number of valid signatures. Courts in other jurisdictions have held that similar statutory provisions are mandatory rather than directory." [Citations omitted].

The reasoning presented with respect to former Section 169 is equally applicable to the present Section 23-3. We therefore conclude that the provisions of Section 23-3 are mandatory and therefore a signature which does not contain a reference to the appropriate precinct and election district or precinct and ward is invalid on its face and may not be counted as a valid signature. See 48 Opinions of the Attorney General 163 (1963). See also *Headley v. Ostroot*, 76 S. D. 246, 76 N.W. 2d 747 (1956).

FRANCIS B. BURCH, *Attorney General.*

LEWIS A. NOONBERG, *Assistant Attorney General.*

REGISTERS OF WILLS

INHERITANCE TAX—WIDOW'S ELECTIVE SHARE IS TO BE COMPUTED WITHOUT DEDUCTION FROM IT OF ESTATE TAXES AND IS TO BE TAXED ACCORDINGLY WHERE IT IS EXEMPT FROM ESTATE TAXES BY REASON OF THE MARITAL DEDUCTION PROVISIONS OF THE FEDERAL ESTATE TAX LAW AND TESTATOR DIED SUBSEQUENT TO JUNE 1, 1965.

January 2, 1968.

Mr. Leroy C. Shaughnessy.

You have asked our opinion as to the effect of the Maryland Estate Tax Apportionment Act, Article 81, Section 162, as newly amended by Chapter 907 of the Acts of 1965, to a situation arising upon an election by a widow to take the statutory share provided by Article 93, Section 329. By reason of Section 12 of the 1965 Act, the 1965 Act is applicable to the present situation, which involves the estate of a testator dying on November 1, 1966.

The specific question presented relates to the effect of the 1965 Act on the decision of the Court of Appeals in *Weinberg v. Safe Deposit and Trust Co.*, 198 Md. 539 (1951). In the *Weinberg* case, it was held that the marital deduction provisions in the federal estate tax act relieving the estate of federal estate taxes on the widow's share did not operate to relieve the widow of the burden of a proportionate share of the federal estate taxes assessed on the remainder of the estate. It was further held that the benefit of provisions in a will purporting to exonerate a widow from liability for estate taxes was unavailable to a widow electing to take against the will.

In the present case, the question presented relates essentially to the effect of the 1965 act upon the first of these holdings of the *Weinberg* case. If the widow's statutory share is not subject to reduction by an apportioned part

of the federal estate tax under the terms of the 1965 act, it is unnecessary to consider the effect of the directions in the will purporting to relieve it of liability for the tax.

We think it clear that Article 81, Section 162 (5) (b), as amended by the 1965 Act, operates to overrule the first holding of the *Weinberg* case, notwithstanding the fact that the Legislature has not amended Article 93, Section 329 relating to the widow's allowance. In *Weinberg,* the Court of Appeals made clear that the primary basis of its first holding was the then existing language of Code, 1951, Article 81, Section 126 (4), which stated that in ascertaining the share of the surviving spouse in the true estate, for apportionment purposes "whether upon testacy or intestacy or upon renunciation in case of testacy, the amount of the estate tax paid by the executor and not reimbursed by contributions under this section shall be deducted with the administration expenses of the decedent as a general obligation of the true estate." The language of Article 93, Section 329 (Section 314 of the 1951 Code) defining the widow's share in one-half the "surplus personal estate" was relied on only as establishing that the widow's interest consisted of her share less the taxes, if any, for which it was liable under Section 162 (Section 126 of the 1951 Code). We think it plain that, by restricting the liability of the widow's share for federal taxes by the 1965 amendment of Section 162, the Legislature effectively increased the widow's statutory share under Article 93, Section 329 without the necessity of amending that section.

This conclusion is reinforced by examination of the history and background of the 1965 provision. Article 81, Section 162 (5) (b), as amended, which provides that "[a]ny exemption or reduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing that relationship or receiving the gift", is drawn, as the short title in Article 81, Section 162 (10) makes clear, from the Uniform Estate Tax Apportionment Act. The identical provision of the Uniform Act is drawn from

the previously existing estate tax apportionment acts of Pennsylvania and Nevada. See the *1958 Handbook of the National Conference of Commissioners on Uniform State Laws*, p. 224. In *Weinberg*, the Court of Appeals cited, as an example of a State statute leading to a result opposite to that which it felt impelled to reach, the Pennsylvania act as construed in *Estate of Norris*, CCH Inheritance, Estate and Gift Tax Reporter, No. 17125 (Orphans' Court, Schuylkill County) and *Harvey Estate*, 350 Pa. 53, 38 A. 2d 262. See *Weinberg v. Safe Deposit Co.*, 198 Md. at 552. See also Trans. Md. State Bar Assn., p. 143 (1965).

Accordingly, it is our conclusion that the widow's elective share provided by Article 93, Section 329, is to be computed with respect to the estates of persons dying after June 1, 1965, without deduction from it of federal estate taxes where the widow renounces and likewise (by reason of Article 81, Section 162 (1) (f) as amended), without deduction from it of the Maryland Estate tax and is to be valued accordingly for purposes of computing the Maryland inheritance tax in cases where, and to the extent that, the widow's share is exempt from estate taxation by reason of the marital deduction provisions of the federal estate tax law.

The direction in the will purporting to throw the burden of the Maryland inheritance tax on the residuary estate is to be narrowly construed, in accordance with our prior opinions (See 40 Opinions of the Attorney General 520) and in our view is ineffective to benefit a widow electing to take against the will even in the absence of an express statutory provision (such as that existing with respect to estate taxes at the time of the *Weinberg* case) denying the benefits of exoneration to persons taking against a will.

We further stress that the applicability of this opinion is limited to the estates of persons dying after June 1, 1965 and that we are not here concerned with the different situation existing during the period of effectiveness of Chapter 747 of the Acts of 1957.

In summary, we conclude that, in the event the widow here elects to take against the estate, her statutory share is to be computed without deduction of estate taxes to the extent to which her share is excluded from the gross estate for purposes of computing such taxes, and the Maryland inheritance tax is to be imposed upon the amount thus determined.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS — INHERITANCE TAX — EXEMPTION FROM INHERITANCE TAX OF INTANGIBLE PERSONALTY LOCATED IN MARYLAND BUT BELONGING TO THE ESTATE OF A DECEASED RESIDENT OF A FOREIGN STATE OR COUNTRY (ARTICLE 81, SECTION 174) DOES NOT APPLY ON A PRO TANTO BASIS AS TO RECIPROCAL EXEMPTIONS —IF THE FOREIGN JURISDICTION WOULD TAX PART OF THE INTANGIBLE PERSONALTY OF A MARYLAND DECEDENT, THE MARYLAND EXEMPTION IS INAPPLICABLE.

February 21, 1968.

Mr. Bernard F. Nossel.

Pursuant to your recent letter, I have studied the matter of an estate with regard to the claim for refund of part of the inheritance taxes paid to this State.

In this case the decedent was domiciled in Great Britain and at the time of her death left a large amount of intangible personal property situate in this State. Under the terms of Code Article 81, Section 174, Maryland accords to the estates of domiciliaries of our sister states and foreign countries an exemption from inheritance and estate taxes and the tax on commissions provided the sister state or foreign country either does not impose a death tax of any character with regard to similar property of residents of this State situate in such foreign state or country or exempts such property from taxation on a reciprocal basis.

The claim for refund states:

> "Under the Tax Treaty or Convention between the government of the United States of America and the government of the United Kingdom of Great Britain and Northern Ireland, Great Britain exempts from taxation debts secured or unsecured, including bonds of Maryland residents which are deemed to be situate at the place where the decedent was domiciled.

> "On the other hand, Great Britain taxes bonds of American companies owned by a decedent domiciled in Great Britain. This is also interpreted to include bank accounts, cash or accrued income."

The treaty itself limits its applicability by express terms to the estate duty in Great Britain and the United States *federal* estate tax. If it could be demonstrated, in fact, that the net result of the treaty is that Great Britain levies no tax on the intangible assets of Maryland decedents, then that effect would be sufficient to warrant a similar exemption for deceased residents of Great Britain having intangibles located here. This would be the case regardless of the terms of the treaty because of the provisions of Maryland Code Article 81, Section 174.

However, since the tax treaty provides that certain intangible personalty (such as bank or currency notes, other currency recognized as legal tender, negotiable bills of exchange and negotiable promissory notes [Article III (2) (b)] and judgment debts [Article III (2) (k)]) shall be taxed where located and the administration account filed in this case shows that all items of intangible personalty located here were taxed here, while the claim for refund seeks the return of the tax collected on only some of the items of intangible personalty (i.e., those taxed in Great Britain), the effect is clear that under the treaty and the practice pursuant to it Great Britain does tax at least "in respect of" part of the intangible personalty covered by Section 174, owned by a Maryland resident-decedent but located in Great Britain.

The exemption in Section 174 exonerates from taxation (inheritance, estate or death or transfer tax of any character, including tax on commissions) the intangible personal property of a foreign decedent provided the foreign state or nation either "did not impose a transfer tax or death tax *of any character* in respect of personal property of residents of this state" or provided "a reciprocal exemption . . . [for Maryland estates] . . . from transfer taxes or death taxes *of every character in respect of personal*

property" except *tangible* personal property having a situs in the foreign jurisdiction. (Emphasis supplied).

In view of the above, we are of the opinion that any death tax imposed by a foreign state on any personal property of a Maryland decedent, except tangible personalty having an actual situs in the foreign state, renders the terms of Section 174 inoperative. Thus, since the exemption is not *pro tanto*, all of the intangible personalty of this decedent located in Maryland is subject to inheritance tax and, to the extent that any federal estate tax is due under the treaty and a State death tax credit is allowed, is part of the "Maryland estate" for purposes of the Maryland estate tax. Code Article 62A, Section 2. See 35 Opinions of the Attorney General 292, to the same effect with regard to an Austrian resident, and 36 Opinions of the Attorney General 276, applying the earlier opinion to the estate of an English domiciliary.

FRANCIS B. BURCH, *Attorney General.*

THOMAS A. GARLAND, *Assistant Attorney General.*

REGISTERS OF WILLS — INHERITANCE TAX — NON-RESIDENT DECEDENT'S INTEREST IN CONTRACT OF PURCHASE FOR MARYLAND REAL ESTATE NOT TAXABLE IN MARYLAND.

March 27, 1968.

Mrs. Ruth Towler.

You have asked our opinion as to the applicability of Maryland inheritance tax to a situation arising with respect to the estate of a resident of Pennsylvania who died on June 10, 1959. The decedent on May 25, 1959 entered into a binding contract of purchase for certain real estate situated in Cecil County, Maryland, and made a $3,500.00 down payment on the contract of purchase, but died before the real estate was conveyed to him. Subsequent to his death the terms and conditions of the contract of purchase were fulfilled by the executors and the real estate was conveyed to them on October 1, 1959. We find no prior law in this State dealing with the question here presented. It is of course clear that if the purchase were at the option of the executor no tax would be payable, (see 14 Opinions of the Attorney General 273), but we are here concerned with what is assumed to be a binding contract of purchase of a character meeting the tests summarized in *Birckner v. Tilch,* 179 Md. 314, 323. A number of cases in the State, however, have dealt with the situation presented where a Maryland resident enters into a contract of sale for foreign real estate prior to his death. In these circumstances it has been held that the normal rule of equitable conversion is not applicable. In *State v. Fusting,* 134 Md. 349 (1919) the Court of Appeals quoted various authorities to the effect that "the doctrine of equitable conversion is not applicable in the law of inheritance taxation" (134 Md. at 352) and further stated "the law of equitable conversion

ought not to be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different states." (See 134 Md. at 353). See 1 Beale, *Conflict of Laws,* Section 118 D 6.

This office has also held with respect to the situation presented where a non-resident decedent owning real estate in Maryland enters into a contract of sale prior to death that the Maryland real estate is subject to a Maryland inheritance tax, the doctrine of equitable conversion being not applicable. See 21 Opinions of the Attorney General 797; 42 Opinions of the Attorney General 364. The same rule has been applied where a direction to sell is included in a will. See 11 Opinions of the Attorney General 291; 19 Opinions of the Attorney General 509.

On the basis of these authorities and on the basis of our frequent expression of the general rule that the recorded title to property at the time of death controls, (see 46 Opinions of the Attorney General 220, 221 and authorities there cited; 40 Opinions of the Attorney General 606, 608; 41 Opinions of the Attorney General 368), we are constrained to hold that the decedent in the present case is not taxable in Maryland on the basis of his interest in the property in question. We consider that this result necessarily follows from our prior observations and the prior observations of the Court of Appeals with respect to the inapplicability of the doctrine of equitable conversion. Our conclusion is reinforced by the fact that it is only rarely that the existence of interests of this character will come to the attention of a Maryland Register of Wills. In reaching this result we are cognizant of the fact that the interest in land conferred by a purchase contract is an interest which may pass by devise. See Page, *Wills,* Section 950 n. 16 and cases there cited. We also recognize that an excep-

tion to the principle which we here announce exists in instances where the decedent at his death possessed the present right to a conveyance of title but in which the deed had not actually been transferred. See our opinion at 25 Opinions of the Attorney General 617. That, however, is not a matter for you or the Orphans' Court. See 40 Opinions of the Attorney General 606, 608; 41 Opinions of the Attorney General 368.

Accordingly, our advice to you must be that there is no inheritance tax due in the above estate.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS—TESTAMENTARY LAW—BEQUESTS TO HUSBAND AND WIFE AND THIRD PERSONS CREATE TENANCY BY THE ENTIRETIES IN ONE-HALF THE PROPERTY AND TENANCY IN COMMON WITH THIRD PARTY.

April 1, 1968.

Mrs. Mary Bell.

You have asked our opinion as to the effect of a devise in the will of a decedent. The devise in question provides as follows:

> "To A (my son), to B (my daughter-in-law), and to C (my son), I do hereby convey all my rights and interests in my property, sold to me at public auction July 1, 1950."

We think it clear from the rule announced by the Court of Appeals of Maryland in *Kolker v. Gorn,* 193 Md. 391, 397, that the devise in question establishes a tenancy by the entireties in one-half of the property in favor of A and B (his wife), and tenancy in common between these spouses and C, the owner of the remaining one-half interest in the property. This result we think follows from the rule announced in the *Kolker* case and the principle of Article 50, Section 9, of the Code, which establishes that joint tenancy is not to be presumed. In the *Kolker* case it was stated:

> "Where the conveyance is to husband and wife and a stranger, without qualifying words, it is the common-law rule that husband and wife take one-half as tenants by the entireties and the third party takes the other half as tenant in common. *Haid v. Haid,* 167 Md. 493, 175 A. 339; *Bartholomew v. Marshall,* 257 App. Div. 1060, 13 N.Y.S. 568. See also *Tizer v. Tizer,* 162 Md. 489, 492, 160 A. 163, 161 A. 510 and *Baker v. Baker,* 123 Md. 32, 90 A. 776."

While here the conveyance, unlike that in the *Kolker* case, was not "to A, B and C, his wife," we do not think that omission of the words "his wife" changes the result. We note that in *Kolker* the court spoke in the disjunctive of "the presumption arising from the word 'wife', or the fact that the grantees are husband and wife" (193 Md. 398). In *Kolker* the court also approvingly cited the case of *Bartholomew v. Marshall,* 257 App. Div. 1060, 13 N.Y.S. 2d 568, where a conveyance to three persons not mentioning the marital relationship was held to create a tenancy by the entireties in one-half the property. (193 Md. at 397). We also find significant the reference in *Kolker* to *Brewer v. Bowersox,* 92 Md. 567, 572 (193 Md. at 396), where it was stated:

> "It is not because a conveyance or gift is made to husband and wife as joint-tenants that the estate by entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since in the contemplation of the common law they are but one person, they take and can only take, not by moieties, but the entirety. The marital relation with its common law unity of two persons in one, gives rise to this peculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife."

We consider that you may assess the inheritance tax on this basis though, of course, resolution of any controversy between the parties as to the propriety of this construction of the bequest rests with the Circuit Court.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS—INHERITANCE TAX—ANTICIPATION OF TAX ON REMAINDER INTEREST—MINOR MAY NOT POSTPONE ELECTION.

July 11, 1968.

Mr. Leroy C. Shaughnessy.

You have asked our opinion as to a situation arising in an estate which may be summarized as follows:

A decedent died in March of 1952 leaving a will which bequeathed the residue of her estate to "A" for life and upon her death to "B", "C" and "D" equally. In 1954 a petition was filed in the estate to value the life estate of "A" and the tax on the life estate was paid in 1954. "C" was five years of age at the time. "A" died on October 17, 1967, and an undivided one-third interest in the remainder vested in possession of "C". "A's" executors desire to pay the collateral inheritance tax on the value of the remainder vesting in possession. "C's" attorney has now claimed that "C" is entitled to have the remainder interest valued pursuant to Article 81, Section 161 as though "C" had elected in 1954 to anticipate payment of the inheritance tax on her remainder interest. "C" thus asserts that because she was a minor in 1954, a petition for valuation filed after a fourteen-year lapse is a petition filed "within a reasonable time after the valuation of the preceding interest" within the meaning of Article 81, Section 161. Thus "C" contends that she may have her interest valued as though she elected to anticipate the inheritance tax fourteen years ago, even though she did not, in fact, endeavor to pay the tax until the interest in question had actually vested in possession in her. We think it clear that this may not be done. See 32 Opinions of the Attorney General 468, 471 (1947), also involving a minor, which is directly controlling.

We made clear in 51 Opinions of the Attorney General 204, that:

> "The Legislature, in enacting Section 161, did not effectively alter the scheme of our inheritance

> tax law so as to make it essentially an estate tax if Section 161 were employed. On the contrary, the Legislature engrafted on to the previously existing system a limited right to accelerate or postpone the taxable occasion, essentially a gamble on the part of the applicant thereunder, and there is no reason to extend the specific terms of the act to justify its coverage of all conceivable situations."

In the present case the beneficiary seems to seek to have the benefit of a "gamble" without having taken any risk, and seeks to secure the benefits of both a low tax predicated upon early payment and the interest earned by the tax monies during the 14 year period. Cf. *Shaughnessy v. Perlman,* 198 Md. 619, 626 (1951). The provisions of Article 81, Section 161 have, as one of their valid objects, encouragement of prompt determination of inheritance tax liability. Cf. *Salomon v. State Tax Comm.,* 278 U.S. 484 (1929). This reason for application of the provisions is not present where, as here, no effort to pay the tax is made by or on behalf of the beneficiary until after the estate has vested in possession after a lapse of fourteen years.

While an election to anticipate the tax could not have been made at an earlier time by a minor beneficiary, such an election could have been made by the executor who is directed to pay death taxes and the making of such elections by executors is a recognized part of post-mortem estate planning and is part of the recognized responsibility of executors toward the beneficiaries of the estates which they administer. See Wolf, *Post-Mortem Estate Planning,* 20 Md. L. Rev. 309, 328 (1960). It is "frequently advisable for the executor to pay all inheritance taxes immediately". Page, *Maryland Death Taxes,* 25 Maryland Law Review, 89, 101. Where the executor has not made such an election and no action is taken by a parent or guardian on behalf of an infant legatee, that choice is binding. Apart from this, the words "reasonable time" in the statute cannot properly be construed to embrace the fourteen year period

for the reasons already given. Accordingly, our advice to you must be that the tax is payable on the full value of the remainder vesting in possession and the claim of the attorney for "C" must be rejected.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS — INHERITANCE TAXES — ERRONEOUS PAYMENT OF 1% TAX ON REMAINDER INTEREST OF COLLATERAL HEIR NOT EFFECTIVE AS ELECTION TO ANTICIPATE TAX ON REMAINDER INTEREST—HOWEVER, CREDIT FOR TAX PREVIOUSLY PAID MAY BE GIVEN.

July 18, 1968.

Mr. Thomas M. Eichelberger.

You have asked our opinion as to a situation arising in an estate. The decedent died in 1944 leaving his estate to his wife for life, and at her death, to a foster son. On November 15, 1944, a 1% inheritance tax was paid on the entire net estate. No distinction was made between the tax on the life estate and the tax on the remainder interest. The life tenant has now died and the estate has now vested in the foster son, a collateral heir. You inquired as to what tax may now be collected from the foster son.

We think it apparent that the payment of a 1% tax on the entire estate in 1944 was not an effective election to anticipate a tax on the remainder interest pursuant to Article 81, Section 161 (a). Rather this is a case similar to the type dealt with in Article 81, Section 161 (b) which provides that:

> "In the event any interest shall ultimately vest in possession in someone other than the person by or on whose behalf application may have been made (and the tax paid thereon) under subsection (a) hereof, such person shall pay a tax according to his relationship to the original decedent and based upon the value of the property or interest therein at the time when the same vests in possession; provided, however, that the tax or taxes previously paid with respect to such property shall be credited to such new tax and only the balance shall be assessed."

While, strictly speaking, the foster child here was not "someone other than a person" on whose behalf application

may have been made, since the error here was due to a misunderstanding as to the foster child's relationship to the testator, we nonetheless think the principles of Section 161 (b) are applicable. We are not inclined to hold either (a) that a proper election was made and that the foster child can escape with a tax at the 1% rate on the 1944 value or (b) that the principles of Section 161 (b) do not apply and that the foster child must now pay a 7½% tax on the full present value without any credit for the tax previously paid. It appears to us that the principles of Article 81, Section 161 (b) are properly to be deemed controlling and that the tax now due is to be arrived at by imposing a 7½% tax on the entire value of the estate as of the date of the death of the life tenant and subtracting therefrom that portion of the small tax previously paid which was apportionable to the remainder interest value as of March 28, 1944. While this will result in only a slight reduction in the tax in the present case, we deem it appropriate to make the applicable rule clear since it might result in greater consequences for tax liability in other estates.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS—INHERITANCE TAXES—UNILATERAL "DECLARATION OF TRUST" BY BENEFICIARY NOT EFFECTIVE TO SHIFT THE BURDEN OF INHERITANCE TAX.

July 18, 1968.

Mr. Leroy C. Shaughnessy.

You have asked our opinion as to the application of the Maryland inheritance tax to a situation arising in an estate. The Will in the estate left the entire estate outright to the decedent's daughter-in-law. A document entitled "Declaration of Trust" made after the date of the Will by the daughter-in-law stated ". . . in the event at the time of the death of the said (Testatrix), her daughter is still living, that I will hold all such property coming to me under the will of the said (Testatrix) as trustee for the care, maintenance, and support of her said daughter * * *. In the event, however, at the time of the death of her said daughter there should be any such property, then such remaining property shall, under the terms of the will of said (Testatrix) belong to me free of any trust".

This purported Declaration of Trust was executed by the daughter-in-law alone and does not appear to have been acknowledged by the Testatrix.

You advise us that the Testatrix died recently, that her daughter is sixty-eight years of age and that the daughter-in-law is sixty-two years of age. You further state that the attorney for the daughter-in-law has claimed that she should not have to pay inheritance tax at the collateral rate on the full value of this estate since it must be held in trust for the daughter, and may be consumed by the daughter whom he describes as a "life tenant".

We are of the opinion that this contention must be rejected. The Declaration of Trust is not a codicil to the Will of the decedent but a voluntary act of the daughter-in-law. It is clear that under the terms of the Will she is entitled to and will receive full dominion over the entire

estate. The so-called "Declaration of Trust" can be effective to reduce the burden of tax only if it is regarded as a renunciation. We are of the opinion that no renunciation is present here. It has long been established that the "burden of proving a renunciation is upon those alleging it", *Chilcoat v. Reid,* 154 Md. 378, 386 (1928).

The presumption that a devise has not been renounced is especially strong where the devise is beneficial to the person to whom it is made. Of course, even in such cases it is true that "the presumption is a rebuttable one, and, where it is sufficiently shown that the devisee effectively renounced the legacy, the presumption is completely destroyed", *Bouse v. Hull,* 168 Md. 1, 4 (1935). The *Bouse* case held that where a full and proper renunciation was made the devise renounced was not taxable to the devisee. The rule of the *Bouse* case was said to be applicable to a case "where a legatee or devisee renounces a devise or legacy made to him in a will, without having previously done anything inconsistent with such renunciation" (*Bouse v. Hull,* 168 Md. 1, 5). In the *Bouse* case "Each of those legatees made a formal and effective written renunciation filed in the orphans' court" (168 Md. at 2).

It is clear that the presumption against the renunciation of a beneficial bequest cannot be said to have been overcome in the present case. Apart from the absence of any formal renunciation filed with the Orphans' Court, it is apparent that the daughter-in-law's reservation of a remainder interest under the Declaration of Trust is an act "inconsistent with * * * renunciation" within the meaning of the *Bouse* case. As stated in 22 Opinions of the Attorney General 653, 654 (1937): "So far from renouncing the legacy, the beneficiary confirms it, when an assignment of her interest is executed."

We think it evident that *Hart v. Mercantile Trust Co.,* 180 Md. 218 (1942) where the court considered an agreement by the beneficiaries relating to the portions of an estate to be received in distribution is in no respect inconsistent with the views here expressed. The Court in *Hart*

in holding that a tax was payable by the takers under the agreement and not by the apparent takers under the will rested its decision on the ground that the "[tax] statutes cited are concerned with the persons who receive portions of the testator's estate in distribution", 180 Md. at 222. The case involved settlement of a caveat proceeding judicially ratified. We note that in the recent case of *Mercantile Safe Deposit and Trust Co. v. Register of Wills,* CCH Inheritance Estate and Gift Tax Rep. Paragraph 20,006, the Tax Court, in applying the *Hart* rule, was at pains to note the presence of "arm's length bargaining of a truly adversary character." It is clear in the present case that the Declaration of Trust does not regulate, and does not purport to regulate, the distribution of the estate by the executor. The executor's obligations in the present case will be fully discharged when he pays over the entire estate to the daughter-in-law. In 38 Opinions of the Attorney General 282, 284 (1953), we made clear that "transfers made independently of the settlement of an estate do not fall within the rule of *Hart v. Mercantile Trust Company.*" See also 34 Opinions of the Attorney General 278 (1949); 22 Opinions of the Attorney General 653 (1937). The Declaration by the daughter-in-law in no sense amounts to renunciation by her of dominion over the bequest. Indeed, it recites that "*I will hold* all such property * * *". In spite of the attorney's characterization of the daughter's interest under the purported Declaration of Trust as a life tenancy, the Declaration makes no provision for the payment of the income to the daughter. The cautionary words of the Court in *Hart v. Mercantile Trust Co.,* 180 Md. 218, seem pertinent here, "The court is not unaware of the danger that agreements might be made which, following this solution of the problem, would by a merely pretended change in distribution defraud the State of the greater amount of taxes due it upon the actual distribution".[1]

We think it apparent for the reasons we have given that the principles of neither the *Bouse* nor the *Hart* cases can be extended so far as to cause the purported "Declaration of Trust" here to be given effect for inheritance tax pur-

poses. Devisees frequently may wish that a testator had engaged in more sophisticated tax planning and had availed himself of the various modern devices for postponement of tax liability. It would, however, give what has been described as "Post-Mortem Estate Planning", (see Wolf, *Post-Mortem Estate Planning,* 20 Md. L. Rev. 309 (1960)), hitherto undreamed-of scope for us to hold that unilateral declarations by beneficiaries such as that involved here have inheritance tax consequences such as those contended for. The fact that here the unilateral act of the beneficiary may not have been post-mortem should not make any difference; the dangers and applicable principles are the same in either case.

Accordingly, our advice to you must be that the taxes are presently due on the entire estate.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

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[1] A number of states, including Minnesota, Pennsylvania and California have recognized that similar dangers exist with respect to renunciations such as that involved in the *Bouse* case. See CCH Inheritance, Estate and Gift Tax Reporter, Paragraph 1510B. Thus the California Revenue and Tax Code, Paragraph 13409, provides, in pertinent part, "if a transferee under a will renounces his rights under a will . . . the tax is nevertheless computed in accordance with the terms of the will admitted to probate." The validity of this provision was upheld in *Estate of Nash v. Cranston,* CCH Inheritance, Estate & Gift Tax Rep., Paragraph 20,122 (Dist. Ct. App. 1967).

REGISTERS OF WILLS — INHERITANCE TAX — REMAINDER INTERESTS—CHAPTER 696 OF THE ACTS OF 1966, RELATING TO EXTENT OF CREDIT FOR TAXES PAID ON LIFE ESTATES APPLICABLE TO VESTING IN POSSESSION OF REMAINDER INTEREST IN ESTATE OF DECEDENT WHO DIED IN 1925.

November 14, 1968.

Mr. Bernard F. Nossel.

You have asked our opinion as to the propriety of a claim for refund of collateral inheritance tax paid in an estate. The decedent died on June 9, 1925, leaving a will creating a certain trust of which the Maryland National Bank was trustee. Upon the death of the last life tenant, the executor of the decedent paid a collateral inheritance tax at the rate of 5% on the full value of the estate valued as of the death of the last life tenant on October 17, 1967. A claim for refund has now been filed predicated on the basis that a tax was properly due in 1967 only on 8/15 of the value of the trust estate as of that date, the executor claiming that the controlling law is Article 81, Section 118 of the 1929 Supplement of the Maryland Code, as amended by Chapter 226 of the Laws of 1929, which provided that the Orphans' Court shall determine "what proportion the party entitled to (a) life estate shall pay of * * * tax * * * and as the remainder of said estate shall vest * * * determine what proportion of the residue of said tax shall be paid."

For reasons hereafter stated, we regard this claim as entirely unfounded. We may note, however, that even if the 1929 Act supplied the controlling law, the deduction of 7/15 of the value of estate would be improper. The decedent, as noted, died in 1925 leaving a life estate to his mother (on which no tax was payable, she being a direct heir). Upon the mother's death in 1932, life estates in portions of the property were passed to three other persons, one-half to "A", one-fourth to "B", and one-fourth to "C",

and on the deaths of "B" and "C" their life interests passed to "A" as designated surviving life tenant. The 7/15 figure is arrived at by adding the value of the life estate of "A", "B" and "C" valued as of 1932 to the value of the additional life estates of "A" passing to her on the death of "B" and "C" in 1945 and 1957, the latter life estates being valued as of 1945 and 1957. We note that no tax was paid on the life interests passing to "A" in 1945 and 1957 until August 16, 1968, and no penalty appears to have been paid thereon despite the applicability of the penalty provision to the tax on these life interests. See 50 Opinions of the Attorney General 389.

Even if the 1929 Act is applicable, we consider it clear that it has been misapplied and that the claimant would be entitled to a refund of only 19/60 of the tax and not 7/15 of it by reason of the tax paid on the life estates.

However, it is clear beyond doubt that the 1929 Act is not applicable. We reach this conclusion for two reasons. The first reason is supplied by the express provisions of Article 81, Section 161 as amended by Chapter 696, Section 1 of the Acts of 1966. That amendment expressly provides that "This Act shall take effect according to its terms June 1, 1966, *regardless of the date of death of the decedent*". There is, of course, no constitutional barrier to the application of that provision to this estate. See *Diamond Watch Co. v. State Tax Commission,* 175 Md. 234. We consider that the 1966 Act is applicable. Even if it were not, we think it clear that the applicable law would be Article 81, Section 137 of the 1924 Code as enacted by Chapter 493, Section 115½ of the Acts of 1894. We do not understand why counsel for the Claimant has assumed the applicability of Chapter 226 of the Acts of 1929. The decedent here died on June 9, 1925 and Section 14 of the Act of 1929 expressly provides that, "all collateral inheritance taxes in respect of any part of the estate of any decedent dying before June 1, 1929, shall in all respects be levied, assessed, collected and paid as if this Act had never been passed". Perhaps the explanation for this peculiar assumption is found in the

inclusion in the provisions of Article 81, Section 118 of the 1924 Code prior to its amendment of the language, "The orphans' court * * * shall determine *in its discretion*" and also the inclusion in that section of the language "the judgment of the said court shall be final and each of the parties successively entitled in the remainder or reversion shall pay his portion of the said tax to the Register of Wills * * *."

Since the applicable law, in our view, is the law as set out in the present Article 81, Section 161, it follows that a refund claim is strictly proper only for "the tax or taxes previously paid with respect to" the trust. Thus, the claim for refund is proper only as to the sum of $2,454.87 paid as taxes on the life interest in 1932. The taxes paid on August 20, 1968, after the due date and payment cannot literally be determined taxes "previously paid" within the meaning of Article 81, Section 161 (b). We are of the opinion, however, that effectuation of the manifest statutory purpose of Section 161 (b) demands that taxes paid in respect to life interests be credited against the tax due upon the vesting of the remainder. Accordingly, it would seem proper for you to honor the refund claim also to the extent of the taxes paid on August 20, 1968, in respect to the contingent life interests. The taxes thus paid amounted to $1,685.72 making a total valid refund claim of $4,140.59. There is no interest involved in this claim. We also consider that this amount of $4,140.59 must be reduced by the penalty which should have been paid at the time of the belated payment of the taxes on the contingent life interests. This penalty amounts to $421.43 and no credit for it is allowable even under the most expansive construction of Article 81, Section 161 (b). Accordingly, the net valid refund claim is $3,718.16, rather than $17,640.58 as claimed.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

REGISTERS OF WILLS—INHERITANCE TAX—TANGIBLE PERSONAL PROPERTY HAVING ACTUAL SITUS IN A JURISDICTION OTHER THAN MARYLAND AND NOT BROUGHT INTO MARYLAND FOR PURPOSES OF ADMINISTRATION—TAXABLE STATUS OF.

November 29, 1968.

Mr. Leroy C. Shaughnessy.

Re: Estate of Gertrude Stein

Your letter of November 6, 1968 brings the following facts to our attention: the decedent died in 1947 a resident of Paris, France. Her will bequeathed a life interest in the rest and residue of her property to her friend, Alice B. Toklas, who died in Paris in 1967. The remaindermen are three children of a deceased nephew of Miss Stein. The assets consist of Miss Stein's art collection (principally oil paintings and drawings of Picasso, Matisse and Gris) recently sold by the remaindermen to the Museum of Modern Art for $6,375,000. This collection has remained since Miss Stein's death in her Paris apartment. Miss Stein's estate continues to be administered in Maryland because of a recitation of Maryland domicile contained in her will. No Maryland inheritance tax was paid upon the art collection of the decedent at the time of the distribution to Miss Toklas as life tenant. You have asked this office to advise whether this tangible personal property of the decedent is now subject to Maryland inheritance tax. For purposes of this opinion, we shall assume that Miss Stein was domiciled in Maryland at the time of her death.

The Supreme Court of the United States has held that the state in which a decedent was domiciled at the time of his death cannot constitutionally impose a tax upon tangible personal property having an actual situs in another jurisdiction. *Frick v. Pennsylvania,* 268 U.S. 473 (1925). This case is particularly pertinent because it involved, *inter alia,* the efforts of the Commonwealth of Pennsylvania to tax the decedent's art collection, valued at $13,132,391, the situs

of which was the State of New York. This became the prestigious Frick Collection, displayed since the decedent's death in New York City. In denying Pennsylvania's right to tax the art collection, the Court made the following statement at pages 492 and 493:

> "This property, by reason of its character and situs, was wholly under the jurisdiction of [New York], and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York. . . . In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the [state] of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer. . . .
>
> "We think it follows from what we have said that the transfer of the tangible personalty in New York . . . occurred under and in virtue of the jurisdiction and laws of [that state], and not under the jurisdiction and laws of Pennsylvania, and therefore that Pennsylvania was without power to tax it."

The same principle was applied by the Supreme Court several years later in the case of a New York decedent whose paintings were on display in a Pennsylvania museum at the time of his death (*City Bank Farmers Trust Co. v. Schnader,* 293 U.S. 112, 118-119 (1934)):

> "The power to regulate the transmission, administration and distribution of tangible personal property rests exclusively in the State in which the property has an actual situs, regardless of the domicile of the owner. If at the time of his death the actual situs of Clarke's pictures was in Penn-

> sylvania, they were wholly under the jurisdiction of that State. The fact that being a resident of New York he, by will probated in that State, disposed of the pictures detracted nothing from the exclusive jurisdiction of Pennsylvania to tax the transfer effected by his death."

See also 2 *Cooley, Taxation* (4th Ed.), Section 452.

The Maryland inheritance tax law is in conformity with the principles announced by the Supreme Court in these cases. Sections 149 and 150 of Article 81 of the Annotated Code of Maryland, as amended (1965 Replacement Volume), impose direct and collateral inheritance tax upon "all property *having a taxable situs in this State,* passing at the death of any resident or non-resident decedent . . ." (emphasis supplied). This office has ruled that "[i]t is well settled that the Maryland inheritance tax fails to encompass tangible personal property which has acquired a permanent situs in a foreign jurisdiction." 33 Opinions of the Attorney General 390. See also 25 Opinions of the Attorney General 599; 24 Opinions of the Attorney General 884; *State v. Dalrymple,* 70 Md. 294 (1889); and 1 *Sykes, Probate Law and Practice,* Section 797 (footnote 81).

The only exception to this general rule occurs when tangible personal property, physically located in a jurisdiction other than Maryland at the time of the decedent's death, is brought into Maryland for the purposes of administration. In such event, this office has stated that because Maryland "has afforded the protection of its laws," in that "[these laws] are being invoked to pass title to that property and to govern its devolution," there is actual situs in Maryland for tax purposes and inheritance tax at the applicable rate is imposed in accordance with Article 81, Section 174 with no reciprocal exemption available. 35 Opinions of the Attorney General 340.

The art collection of Miss Stein has remained in France since her death, has never been reduced to possession by the administrator *de bonis non cum testamento annexo* in

Maryland and the passage of title has not been made dependent upon Maryland law, as it was controlled and facilitated by the law of France. For these reasons, this tangible personal property has never lost its actual situs in France and is not subject to Maryland inheritance taxation.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Assistant Attorney General.*

RETIREMENT SYSTEMS, STATE

SECRETARY-TREASURER OF THE WASHINGTON COUNTY SANITARY DISTRICT NOT AN APPOINTED OFFICIAL FOR MEMBERSHIP PURPOSES AND, THEREFORE, MEMBERSHIP NOT OPTIONAL.

August 20, 1968.

Mr. Christ G. Christis.

This is in reply to your inquiry concerning the position of the Secretary-Treasurer of the Washington County Sanitary District. Specifically, you wish to know if said Secretary-Treasurer is an appointed official within the meaning of Article 73B, Section 3 (5) of the Annotated Code of Maryland, 1957 Edition as amended to date, so that his membership in the Employees' Retirement System of the State of Maryland would be optional.

The Washington County Sanitary District was originally created by Chapter 694 of the Laws of 1957 (codified as Sections 528-554 of the Public Local Laws of Washington County, 1957 Edition) and was thoroughly revised by Chapter 743 of the Laws of 1961. Further revisions were made by Chapters 568 and 825 of the Laws of 1963, but are not deemed germane for the purpose of this opinion. The Secretary-Treasurer is appointed by the Commission and he does not serve for a "fixed term".

Section 3 (5) supra deals with membership in the System as to certain officials. It provides in part as follows:

> "*Optional membership of certain officials*—Notwithstanding anything to the contrary in this article, membership in the Retirement System shall be optional with any class of officials elected or appointed for fixed terms; . . ."

Since the Secretary-Treasurer of the Washington County Sanitary District does not serve for a "fixed term", it is clear that membership in the Retirement System is not optional as to him under the aforesaid provision.

FRANCIS B. BURCH, *Attorney General.*

RICHARD C. RICE, *Special Asst. Attorney General.*

RETIREMENT SYSTEM, STATE—MASTER FOR JUVENILE CAUSES OF CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY NOT AN APPOINTED OFFICIAL FOR MEMBERSHIP PURPOSES AND, THEREFORE, MEMBERSHIP NOT OPTIONAL.

August 20, 1968.

Mr. Christ G. Christis.

This is in response to your inquiry concerning the office of the Master for Juvenile Causes of the Circuit Court for Prince George's County, Maryland. Specifically, you have asked whether he is an appointed official within the meaning of Article 73B, Section 3 (5) of the Annotated Code of Maryland, 1957 Edition as amended to date, so that his membership in the Employees' Retirement System of the State of Maryland would be optional.

The powers and duties of the Master for Juvenile Causes are set out in Section 47-1 of the Code of Public Local Laws of Prince George's County, 1963 Edition, 1967 Supplement. The powers and duties remain essentially unchanged from those as set out in the statute creating the position (Chapter 803 of the 1957 Laws of Maryland). The appointment is not for a fixed term.

Section 3 (5) supra deals with membership in the System as to certain officials. It provides in part as follows:

> "*Optional membership of certain officials*—Notwithstanding anything to the contrary in this article, membership in the Retirement System shall be optional with any class of officials elected or appointed for fixed terms; . . ."

Since the Master for Juvenile Causes is not appointed for a "fixed term" it is clear that membership is not optional as to him under the aforesaid provision.

FRANCIS B. BURCH, *Attorney General.*

RICHARD C. RICE, *Special Asst. Attorney General.*

RETIREMENT SYSTEM, STATE — COMMITTING MAGISTRATE FOR FREDERICK COUNTY IS A PUBLIC OFFICIAL OF THE STATE OF MARYLAND AND HENCE ENTITLED TO OPTIONAL MEMBERSHIP IN THE SYSTEM.

November 22, 1968.

Miss May Town.

In your letter of October 28, 1968 you have asked whether a committing magistrate in Frederick County is an official of the State of Maryland or of the County. This distinction is determinative of whether this official is entitled to optional membership in the Employees' Retirement System under Article 73B, Section 3 (5) of the Annotated Code of Maryland which applies *inter alia* to "officials elected or appointed for fixed terms".

Committing magistrates and trial magistrates collectively form that category of public officials known as justices of the peace. Article 52, Section 97 (a) of the Annotated Code of Maryland. This distinction came about as a result of Chapter 720 of the Acts of 1939 and Chapter 727 of the Acts of 1945.

The office of justice of the peace is created by the Constitution of Maryland (Article IV, Sections 42 and 43). This office has ruled that justices of the peace are officials of the State of Maryland (42 Opinions of the Attorney General 204). Similarly, those justices of the peace designated trial magistrates have been determined to be State officials (letter from Attorney General to John P. Mannion, Director, Employees' Retirement System, August 8, 1956).

It follows that those justices of the peace designated committing magistrates are officials of the State of Maryland and we so hold with respect to the committing magistrate in question in Frederick County. You should be aware

that the term "committing magistrate" sometimes has been applied by the General Assembly to persons who are not state officials but are county employees not exercising the powers of justices of the peace.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Assistant Attorney General.*

RETIREMENT SYSTEM, STATE—WARDEN OF MARYLAND HOUSE OF CORRECTION IS "APPOINTED OR ELECTED" OFFICIAL OF THE STATE OF MARYLAND AND HENCE ENTITLED TO RECEIVE BENEFITS IN THE EVENT OF RETIREMENT, REGARDLESS OF AGE PROVIDED HE HAS COMPLETED SIXTEEN (16) YEARS OF CREDITABLE SERVICE.

November 22, 1968.

Mr. Malcolm S. Barlow.

In your recent letter you requested our opinion on whether the Warden of the Maryland House of Correction is an "appointed or elected" State official under Section 11 (12) of Article 73B of the Annotated Code of Maryland (1965 Replacement Volume). Appointed or elected State officials become entitled under this subsection to receive benefits in the event of retirement, regardless of age, provided they have completed sixteen (16) years of creditable service.

The determinative factors for this decision have been set out by the Court of Appeals of Maryland in *Gary v. Board of Trustees,* 223 Md. 446, 449 (1960). Cf. *Jackson v. Cosby,* 179 Md. 671 (1941); see also *Moser v. Howard County Board,* 235 Md. 279 (1964). These same tests have been applied administratively by this office in its opinions (i.e., 48 Opinions of the Attorney General 400).

It is not necessary to measure the office now under discussion by these tests, however, because the Court of Appeals of Maryland, in an analogous case, has ruled that the Superintendent of the Maryland State Reformatory for Males is a "public office". *State, Use of Clark, v. Ferling,* 220 Md. 109 (1959). In that case, the following statement appears at page 113:

> ". . . the incumbent's duties are continuing in their nature and not occasional and call for the exercise of some portion of the sovereignty of the State; hence, there can be no doubt that the occu-

pant thereof fills a public civil office and exercises important governmental functions in the performance of his duties."

The positions of Superintendent of the Maryland State Reformatory for Males (now known as the Maryland Correctional Institution—Hagerstown) and the Warden of the Maryland House of Correction are both authorized and directed by Article 27, Section 682 of the Annotated Code of Maryland (1967 Replacement Volume). For this reason, there is no meaningful distinction between the two positions, and the ruling of the Court of Appeals of Maryland in *Ferling* requires a finding that the Warden of the Maryland House of Correction is a public official and, hence (under the *Gary* case), an "appointed or elected" official of the State of Maryland under Article 73B, Section 11 (12) of the Annotated Code of Maryland (1965 Replacement Volume).

To this same effect is our letter to your office dated March 21, 1967 which determined that the Warden of the Maryland State Reformatory for Females (now known as the Maryland Correctional Institution for Women—Jessup) is an "appointed or elected" official of the State of Maryland.

FRANCIS B. BURCH, *Attorney General.*

HENRY R. LORD, *Assistant Attorney General.*

SHERIFF

EXECUTION—LIFE ESTATE IN REAL PROPERTY SUBJECT TO EXECUTION—TESTAMENTARY LAW.

September 5, 1968.

Sheriff Ralph W. Offut.

You have asked our opinion as to whether a life estate in a parcel of improved real property is subject to execution in Maryland. You indicate that a life estate in a property was devised to the judgment debtor under the terms of a will but that the Orphans' Court has issued a certificate of transfer of the real estate indicating that the real estate was transferred for purposes of assessment to the remaindermen.

We are of the opinion that the subsisting life interest in the property is subject to execution at the instance of a judgment creditor of the life tenant. The general rule in the United States is that "the interest of a judgment debtor in an estate for life is subject to levy under execution, in the absence of any statutory provisions to the contrary, and in the absence of any clause in the instrument creating the estate restricting the power of alienation", 33 C.J.S., Section 36E.

Article 26, Section 21 of the Code provides that "A judgment of a court of law or equity shall be a lien upon real or leasehold estates as provided by the Maryland Rules".

Rule 620a of the Maryland Rules of Procedure provides that "A judgment shall constitute a lien to the amount and from the date thereof upon all real estate of the judgment debtor lying in the county wherein the judgment was entered, and upon all leasehold interests and terms for years of the judgment debtor in land, except leases from year to year and leases for terms of not more than five years and not renewable". It is clear that "A life estate in realty is a freehold interest or 'estate' therein, Venable, *Law of Prop-*

erty in Land, p. 8 . . ." *Domain v. Bosley,* 242 Md. 1, 5 (1966).

Article 83, Section 1 of the Code provides that "Any sheriff or other officer to whom any execution may be directed may seize and expose to sale any legal or equitable estate or interest which the defendant named in such writ may have or hold in any lands, tenements or hereditaments." The procedure for the sale and subsequent conveyance is set out in Article 83, Section 2 and subsequent sections; and is the same in connection with an execution upon a life estate as with respect to execution upon the interest of a mortgagee or the holder of a leasehold interest of more than five years. Cf. *Shryock v. Morris,* 75 Md. 72, 78-9 (1891). The sale and ensuing deed should be of the life estate only. We consider it apparent that the certificate of transfer of real estate given by the Orphans' Court to the tax assessors showing that the real estate had been transferred to the remaindermen is not effective to divest the life tenant of her interest given the lack of jurisdiction of the Orphans' Court over questions of title to real estate. See 1 Sykes, *Probate Law and Practice,* Section 211 and authorities cited therein.

FRANCIS B. BURCH, *Attorney General.*

GEORGE W. LIEBMANN, *Assistant Attorney General.*

SOCIAL SERVICES, DEPARTMENT OF

ATTORNEYS' FEES — DEPARTMENT MUST ESTABLISH FEE SCHEDULE IN CASES NOT COVERED BY ARTICLE 88A, SECTION 7.

May 7, 1968.

Mr. Raleigh C. Hobson.

You have advised us that some attorneys representing local welfare departments, appointed under the provisions of Article 88A, Section 7 (a) to institute and defend all civil cases in which the local welfare department is an interested party, are unwilling, without an additional fee, to represent the local departments in the following matters:

(a) Petitions for guardianship for incompetents.
(b) Petitions for guardianship for adoption.
(c) Petitions to change type of guardianship.
(d) Claims on recoveries.
(e) Reciprocal support cases.
(f) Contested adoptions.
(g) Settling estate for foster child.
(h) Matters related to confidential nature of records.
(i) Civil suit against department by ex-employee.
(j) Fraud.
(k) Neglect petitions.
(l) Consultation to local department on legal matters.
(m) Obtaining divorces.
(n) Matters of custody.
(o) Legitimation of children.
(p) Litigation to pursue possible damages from accidents.

You inquire whether the enumerated matters, or any of them, must be performed by local counsel without additional compensation.

We believe that subsection (a) of Section 7, Article 88A, is merely the mandatory authorization to local governing

authorities to appoint counsel to institute and defend all civil cases in which the local welfare department is an interested party.

Subsection (b) establishes the method by which the attorney is to be compensated in those civil matters enumerated in that subsection, and provides:

> "Whenever such attorneys institute suit for the recovery, from the estate of a recipient of any type of public assistance, of the amount paid to such recipient during his lifetime, or whenever such attorneys institute suit for the recovery, from a recipient of any type of public assistance, of the amount paid to such recipient prior to his coming into possession of any property or income in excess of the amount stated in his application for assistance and in excess of his need, such attorneys may be allowed such fees for their services as may be fixed by the court, and the amount of such fees allowed by the court shall be deducted from the gross amount of the recovery in each case, and the net amount of the recovery turned over to the local welfare department, to be divided between the State, the county or Baltimore City as the case may be, and the federal government in proportion to the amount paid by each respectively."

Among the matters enumerated in (a) through (p), claims for recovery and civil fraud [(d), (j) and possibly (p)] appear to be matters covered by Section 7 (b). Those which are not within subsection (b) shall be governed by the fee provisions of subsection (c). That subsection provides:

> "For such other legal services as are required of such attorneys on behalf of local welfare departments and not provided for otherwise, they shall be paid such fees as may be established, from time to time, by the State Department, the

cost thereof to be borne from regular administrative funds."

We have been advised that it is the usual practice of the local governing authority to appoint attorneys at a set salary. Under such circumstances, we are of the opinion that, except as noted above, the attorney is not entitled to additional compensation beyond the salary he receives. However, where no such salary arrangement is made, we believe that subsection (c) requires that the State Department establish a fee schedule to cover the attorney's compensation in matters not expressly provided for in subsection (b). It should be kept in mind, however, that the responsibility of the attorney, whether salaried or not, is limited, in any event, to civil cases "in which its local welfare department is an interested party". We have some doubt in foreseeing a situation in which the local welfare department would be a party in those cases covered by (m) through (p) and therefore believe that, generally, these matters are not those "civil cases" which the attorney is required to perform as part of his obligation under subsection (a). As to those matters, he should be entitled to be compensated separately by the client.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

SOCIAL SERVICES, DEPARTMENT OF—SUPPORT PAYMENTS—BOARD OF COUNTY COMMISSIONERS MAY NOT RETAIN SUPPORT PAYMENTS NOR CREDIT THESE SUMS AGAINST ITS APPROPRIATION TO LOCAL DEPARTMENTS OF PUBLIC WELFARE.

June 4, 1968.

Thomas C. Hayden, Jr., Esq.

You have advised us that in Charles County, when the Circuit Court issues support orders involving clients of the County Department of Public Welfare, the support payment is ordered to be paid to the Department of Parole and Probation and, upon receipt of the payment by that Department, it is forwarded to the County Department of Public Welfare. This procedure is followed throughout the Seventh Judicial Circuit.

You have further advised us that the Board of County Commissioners of Charles County is of the opinion that it would be a more workable arrangement if the Court were permitted to order these support payments to be paid to the Board of County Commissioners and then held by it to be used as a portion of its annual appropriation to the County Department of Public Welfare. You have consulted with the Chief Judge of the Seventh Judicial Circuit and the local office of the Department of Parole and Probation and each has assented to this plan.

You have inquired whether this suggested procedure can be initiated under existing law or whether additional legislation would be necessary to implement this proposal.

We have been advised by the State Department of Public Welfare that the existing method with respect to the collection and accountability of support payments was initiated because the local welfare departments would otherwise spend an enormous amount of time verifying whether or not the payment ordered by the Court had been paid directly to the recipient. This verification is essential since

the local welfare department must adjust grants to the recipient depending upon whether or not support payments as ordered have, in fact, been received by the client. This calculation must be made by the local welfare departments on a monthly basis. Where the support payments are to be channeled to the local welfare departments, these monthly adjustments are largely unnecessary since, if paid, they are merely debited against the overpayment, or, if not paid, credited against the overpayment, rather than making a monthly adjustment to the recipient's actual check.

Moneys paid to welfare recipients involve, in addition to local funds, both State and federal appropriations, and local welfare departments are accountable to all three jurisdictions with respect to these payments.

The policy of the State Department of Public Welfare, with respect to its accountability to federal authorities for payments recovered, is set in compliance with Federal Handbook, Part IV, Section 3124 (Court-ordered Support Payments). That section provides:

> "The most economical method from the standpoint of the family and the welfare department is usually to have the payments made to the welfare agency, either directly by the absent parent or by the court. It is desirable that this method of payment be adopted Statewide so far as it meets approval of the courts. Where this method is used and need is met according to the agency's standard, the agency must make regular payments to the family in an amount that is not reduced by the amount due or received from the parent. *The support payments from the absent parent will be treated as a refund of assistance paid. . . . See V-3341 for procedures for handling a refund.*" (Emphasis supplied).

Section V-3341 pertains to fiscal operations and is based on a principle that any moneys recovered or refunded must have the federal share "paid to the United States Govern-

ment" in the same proportion as the payment included a federal share of funds. The policy further states that, when the amount is a "refund" (as compared to a recovery after death), "the refund constitutes an adjustment of the award and should be reported as a decrease in expenditures in the appropriate item".

The proposed plan is inconsistent with federal requirements with respect to the State Department of Public Welfare's accountability for federal funds which form a portion of the moneys recovered or refunded through court-ordered support payments. Moreover, since these support payments are treated as a refund for overpayments to welfare recipients and the original grant to the recipient is a combination of local, State and federal moneys, it is our view that it would be improper to permit the Board of County Commissioners to use the payments as a portion of the Board's annual appropriation to the local welfare department. Only a portion of the refund represents local contributions.

FRANCIS B. BURCH, *Attorney General.*

FRANK A. DECOSTA, JR., *Assistant Attorney General.*

TAXATION

ASSESSMENT OF LAND DEVOTED TO FARM OR AGRICULTURAL USE—RECOUPMENT OF TAXES WHEN SUCH PROPERTY CONVERTED TO NON-FARM USE—IMPOSITION OF TRANSFER TAX AT HIGHER RATE WHEN SUCH PROPERTY CONVERTED TO NON-FARM OR MORE INTENSIVE USE—CONSTITUTIONALITY OF PROPOSED LEGISLATION UNDER PROPOSED CONSTITUTION.

February 19, 1968.

Honorable John A. Whitney.

In your letter of January 24, 1968, you requested our opinion as to the constitutionality of House Bill 65 and House Bill 67 in the event the proposed Constitution is adopted. Specifically, you wanted to know whether the provisions of these Bills violated Sections 603 and 604 of the proposed new Constitution.

As we understand House Bill 65, it provides that whenever the "use of land is converted from farm or agricultural use, the owner of record shall at that time pay the difference between taxes that would have been incurred if the land had been assessed" for non-farm use and the taxes paid on the basis of assessment as farm or agricultural use from the effective date of the Act. The maximum amount payable is limited to 25% of the assessed value. In addition, interest at the rate of five percent (5%) per annum would be charged from the effective date of the Act. House Bill 67 provides for a transfer tax of six percent (6%), to be paid by the transferor, on the transfer of any land assessed, while owned by the transferor, at any time during the five years preceding the transfer as farm or agricultural use. Further, a six percent (6%) transfer tax is levied on real property rezoned to a more intensive use at the instance of the transferor or transferee.

The applicable provisions of the new Constitution are as follows:

"603.

"Assessments with respect to any tax shall be made pursuant to uniform rules and pursuant to classifications of property, taxpayers and events prescribed by law, which classes shall include agricultural property as defined by the General Assembly by law."

604.

"The State shall prescribe and administer uniform rules and methods for determining property tax assessments. State funds distributed to units of local government on the basis of assessments of property shall be determined by assessments equalized among those units, as prescribed by the General Assembly by law."

We view Section 603 and Section 604 of the proposed new Constitution as perpetuating in the law of this State the present power of the Legislature to classify "property, taxpayers and events" and to impose taxes thereon pursuant to uniform rules. This power has not always been as broad as it now is. As the Court of Appeals pointed out in *State Tax Commission v. Gales,* 222 Md. 543, Article 15 of the Maryland Declaration of Rights, as well as the Fourteenth Amendment to the Federal Constitution, required uniformity of assessment within a class, "although there may be differentiation as to the basis of assessments as between different kinds of property when based upon a permissible and reasonable classification." At that time, the Court, applying Article 15 as it then existed, held that attempts "to set up a separate classification of land for tax purposes" contravened the limitations upon classifications contained in Article 15 of the Declaration of Rights. Following that decision, Article 15 was amended to permit separate classifications of land for agricultural purposes.

The present Constitution and the terms of the proposed Constitution both require that all taxes for the support of the State and local governments shall be uniform. *Murray*

v. Comptroller, 241 Md. 383, at 392. This general rule has never been interpreted, however, as preventing variations, for purposes of local taxation only, between one taxing district or territory and another. *Daly v. Morgan*, 69 Md. 460; *McGraw v. Merryman*, 133 Md. 247.

It appears that House Bill 65 creates a classification of property—land converted from farm or agricultural use to some other use for purposes of local taxation only. Whether this classification is reasonable under the Fourteenth Amendment is subject to some doubt in view of the retrospective operation of the statute and its essentially penal features. We can find no analogous statute to which it can be compared, other than in the Internal Revenue Code, but on balance we are inclined to resolve the doubt in favor of its constitutionality.

Section 603 of the proposed Constitution requires that assessments shall be made according to uniform rules and classifications determined by the General Assembly. A classification may relate to the nature of the property, the taxpayer, or an event. As the tax is imposed upon the owner of record at the time the conversion occurs, and the purpose of the legislation is, in your words, the "recoupment of county real estate taxes", we see no violation of proposed Section 603 in this proposal.

Further, as we view Section 604, it relates only to the responsibility of the State to implement uniform rules and methods for determining property tax assessments and the obligation of the State to insure that any State funds distributed to units of local government are distributed on the basis of equalized assessments. For that reason, we do not believe Section 604 would in any way affect the constitutionality of House Bill 65.

Similarly, House Bill 67 classifies, as a taxable event, the transfer of two types of real estate—any property assessed in the five years preceding the transfer as farm or agricultural use, and property rezoned to a more intensive use at the instance of the transferor or transferee. The action

of the Legislature in making these classifications would not appear to be an unreasonable exercise of the Legislature's power. For that reason, we do not think that the proposal contained in House Bill 67 would in any way violate Sections 603 or 604 of the proposed Constitution.

We note, in passing, that the language in House Bill 67, as it is now drafted would apply to the sale of farm property by one farmer to another even although the use of the land for farm purposes is continued, a result we are not certain was intended.

FRANCIS B. BURCH, *Attorney General.*

EDWARD L. BLANTON, JR., *Assistant Attorney General.*

TAXATION—REAL PROPERTY—ARTICLE 81 OF THE CODE DOES NOT REQUIRE THE SEPARATE ASSESSMENT AND TAXATION OF AN UNDIVIDED INTEREST OF A TENANT IN COMMON, JOINT TENANT, OR TENANT BY THE ENTIRETY IN A SINGLE PARCEL OF REAL PROPERTY BUT REQUIRES A SINGLE ASSESSMENT UPON ALL UNDIVIDED INTERESTS IN A SINGLE PARCEL WITH SEPARATE ASSESSMENT NOTICES AND TAX BILLS BEING SENT TO EACH JOINT OWNER.

April 11, 1968.

Mr. Albert W. Ward.

You have asked us what requirements are imposed by Article 81 of the Annotated Code of Maryland with respect to the setting up of accounts and sending out of notices to joint owners who hold undivided interests in single parcels of real property. You state that the Supervisor of Assessments for Dorchester County has adopted the practice of maintaining a separate account for each joint owner of an undivided interest and assessing and billing each such owner for his fractional share. In our opinion Article 81 does not require the maintenance of separate accounts or the rendering of separate assessment notices or bills to such owners but requires that a single account be maintained for a parcel of real property jointly owned, with notices and bills with respect to a single lump sum assessment upon such a parcel being sent to each of the joint owners.

No specific statutory provision deals with the question posed by your letter. Section 8 (1) of Article 81 provides that all nonexempt real property in the State shall be subject to assessment and taxation to the "owner" thereof. Although Section 4 of Article 81 provides that under certain circumstances a fiduciary, the holder of a life estate, or the holders of leasehold interests in real property shall be deemed "owners" for purposes of assessment and taxation, this section does not deal with the question of joint ownership.

In Section 19 (a) of Article 81 the Legislature has provided for the separate valuation and assessment of land and improvements and for the separate assessment of mineral rights where they are in separate ownership. There is no legislative mandate, however, requiring the separate assessment of the undivided interests of joint owners in real property. We believe, therefore, that Section 8 of Article 81 should be construed to require only a single assessment and billing to all joint owners for their undivided interests in a single parcel of real property. Our opinion extends to parcels held by co-tenants, joint tenants, as well as by tenants by the entireties.

This construction is in accord with the general rule prevailing in other jurisdictions, in the absence of some statutory direction to the contrary. In 84 C.J.S., *Taxation*, Section 404 (e) it is stated that "real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all". See also 3 Cooley, *Taxation* (4th Ed.), Section 1104. The case of *Toothman v. Courtney*, 62 W.Va. 167, 58 S.E. 915 (1907), provides a well-reasoned justification for such a practice. There the court held invalid a title obtained through a tax sale, resulting from the separate assessment of a joint owner's undivided interest in a parcel of real estate. The court stated on p. 921:

> "Good reason for adopting the plan is found in the consequences which would flow from general use of the departure now under consideration. If fifty persons, owning equal undivided shares of a tract of land, were separately charged with their respective interests on the land book, the state's lien for taxes would be severed into fifty parts, and fifty suits might be maintained, and possibly would be necessary for the collection of the taxes on the tract. It would require fifty separate and distinct sheriff's sales for delinquency, and, if made to the state for want of private bidders, she would be compelled to make fifty purchases, in-

> stead of one, undergoing multiplied risks of complication, delay, and loss, and the state would find herself, in thousands of instances, in a relation of co-tenancy with private persons in the ownership of land, not only as the results of such sales, but also of forfeiture for nonentry. It would not only bring upon the state embarrassment in the enforcement of her constitutional rights and powers, but upon the people interminable confusion of land titles, contrary to the spirit of the Constitution, which, by its system of forfeiture and transfer, endeavors to prevent and eradicate uncertainty of such titles." See also 80 A.L.R. 862.

It is our opinion, therefore, that the maintenance of a single assessment account for single tracts or parcels of real estate jointly owned is the proper approach under the relevant provisions of Article 81. We are further of the view that a single notice to record owners advising them of the change to a single account would be sufficient to put such owners upon notice as to the change of procedure in Dorchester County.

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY, *Assistant Attorney General.*

TAXATION—FRANCHISE TAX MEASURED BY NET EARNINGS OF FINANCIAL INSTITUTIONS ESTABLISHED BY SECTION 128A OF ARTICLE 81 IS EFFECTIVE JANUARY 1, 1968, AND IMPOSED FOR TAXABLE YEAR WHICH COINCIDES WITH THE CORPORATION'S FISCAL YEAR—SECTION 128A (E) PERMITS THE DEPARTMENT OF ASSESSMENTS AND TAXATION TO ALLOCATE TO MARYLAND TAXABLE NET INCOME, INCOME DERIVED THROUGH AN OFFICE OF A FINANCIAL INSTITUTION LOCATED WITHIN MARYLAND.

June 27, 1968.

Mr. Albert W. Ward.

Your letter of May 21, 1968, asks our opinion upon the effect of certain provisions of the new Section 128A of Article 81 of the Annotated Code of Maryland created by Chapter 452 of the Laws of Maryland, 1968. Section 128A, which becomes law on July 1, 1968, levies and provides for the collection of a franchise tax measured by the net earnings of financial institutions, imposed upon such institutions for the privilege of existing as domestic corporations during any part of the taxable year, or, in the case of national banks and foreign corporations, for the privilege of transacting any business within this State during any part of a taxable year.

You first ask our opinion regarding the period which your annual tax bill should cover for the franchise tax imposed by Section 128A. Section 128A (a), in pertinent part, reads as follows:

> "A franchise tax is hereby annually levied and imposed for each year beginning after December 31, 1967, and for the period after December 31, 1967 to the end of any taxable year which is a fiscal year as defined in Section 279 (h) of this Article, upon every domestic financial institution for the privilege of existing as a corporation during any part of its taxable year, and upon every

> financial institution organized under the laws of the United States or another state or nation for the grant to it of the privilege of transacting or for the actual transaction by it of any business within this State during any part of its taxable year, in corporate or organized form."

In our opinion, the term "each year beginning after December 31, 1967," within the context of the above section, means the "taxable year" as defined in Section 279 (g) of Article 81 which coincides with the fiscal or calendar year that a financial institution utilizes for normal accounting purposes. Furthermore, in our view, the measure of the franchise tax is the net earnings of a financial institution attributable to the same "taxable year" for which the franchise tax is imposed for the privilege of doing business within the State. In our opinion, the effective date of the franchise tax is January 1, 1968, and a liability for this tax accrues to any financial institution doing business within the State from and after this date, although the tax is not payable until the time specified in Section 128A (d) of the article. A corporation whose fiscal year spans 1967 and 1968 would pay a tax, however, measured by only that pro rata portion of its net earnings which are attributable to the year 1968.

Statutes are presumed to operate prospectively unless such a presumption is rebutted by a clear expression of legislative intent to the contrary. *Diamond Match Company v. State Tax Commission*, 175 Md. 234 (1938). We find an expression of legislative intent to impose a retroactive tax by that portion of Section 128A (a) which provides that the franchise tax is imposed "for each year beginning after December 31, 1967, and for the period after December 31, 1967 to the end of any taxable year which is a fiscal year." In this connection, see our opinion dated June 8, 1967, to the Comptroller of the Treasury where we held that similar language contained in Chapter 142 of the Laws of 1967 established a retroactive effective date of January 1, 1967, for the income tax imposed by that Act. Limited retro-

activity in taxing statutes is not prohibited under the Fourteenth Amendment to the United States Constitution or by Article 23 of the Maryland Declaration of Rights. *Welch v. Henry,* 305 U. S. 134 (1938); *Diamond Match Company v. State Tax Commission, supra; Comptroller v. Glenn L. Martin Company,* 216 Md. 235 (1958).

Your second question regards your right, under Section 128A (e), "to allocate net income of financial institutions in accordance with gross volume of transactions by such financial institutions within and without this State, without regard to methods of allocation which may be prescribed by Section 316 of this Article or regulations of the Comptroller thereunder." You ask whether you may properly allocate to the Maryland net income of financial institutions income earned on transactions conducted through places of business of such institutions located within this State, even though out-of-state borrowers or customers participated in the transaction.

It is our opinion that such income is clearly income attributable to transactions by financial institutions within this State and that you have the right under Section 128A (e) to make such an allocation. The franchise tax is levied for the privilege of conducting business within Maryland, and we think it clear that transactions conducted by offices of financial institutions within this State are part of such an institution's Maryland operation, regardless of the residence of customers. Moreover, such an allocation is not constitutionally objectionable. See, e.g., *Equitable Life Assurance Society of the United States v. Commonwealth of Pennsylvania,* 238 U. S. 143 (1915); *Minnesota Mining and Manufacturing Company v. Wisconsin Department of Taxation,* 322 U. S. 435 (1944).

FRANCIS B. BURCH, *Attorney General.*

ANTHONY M. CAREY III, *Assistant Attorney General.*

TAXATION—STATE INCOME TAX APPLIES TO DIVIDENDS RECEIVED ON OR AFTER JANUARY 1, 1968 UPON STOCK OF NATIONAL BANKS AND OF DOMESTIC CORPORATIONS.

July 5, 1968.

Mr. Benjamin F. Marsh, Chief.

You have asked our opinion whether dividends received upon stock of national banks and domestic corporations become subject to the State income tax on January 1, 1968, or July 1, 1968.

The taxable net income of an individual taxpayer of this State is his federal adjusted gross income with certain modifications. Section 280 (a), Article 81, Code of Maryland (1967 Cumulative Supplement). Prior to the enactment of Chapter 452 of the Acts of 1968, one of the modifications to the federal adjusted gross income was the subtraction of "dividends received upon stock of national banks located within or without the State and also domestic corporations the shares of which are subject to ordinary taxes." Article 81, Section 280 (c) (2). Chapter 452 eliminated Section 280 (c) (2). Your question is prompted by the fact that Chapter 452 became effective on July 1, 1968.

It is our opinion, for the reasons to be stated, that the State income tax applies to dividends received on or after January 1, 1968 upon stock of national banks and domestic corporations which heretofore were exempt from State income tax.

The most cogent reason that the dividends in question became taxable on January 1, 1968, is that the taxable net income of an individual taxpayer of this State is his federal adjusted gross income. Article 81, Section 280 (a). The dividends in question have always been included in federal adjusted gross income, and thus when an individual taxpayer determines his taxable income for State income tax for the calendar year 1968, all such dividends received on or after January 1, 1968 will be included in his federal

adjusted gross income. The modification for the dividends in question having been eliminated, all such dividends received and included in federal adjusted gross income, by force of definition, are included in the taxable income for State income tax.

Another perspective for viewing the resolution of the question is that an individual's federal adjusted gross income is not determined until the end of the calendar year. This is the point of reference for determining the taxable income for State income tax. At the end of the 1968 calendar year when an individual determines his federal adjusted gross income, which in turn determines his taxable income for State income tax, there will be no modification in Section 280 which permits the subtraction of the dividends in question from federal adjusted gross income. If such dividends were to be exempt from State income tax until July 1, 1968, the Legislature should have repealed and reenacted Section 280 (c) (2), instead of repealing it altogether, so that it would have read "dividends upon stock of national banks located within or without the state and also domestic corporations the shares of which are subject to ordinary taxes which have been received before July 1, 1968". But the Legislature simply eliminated the modification altogether and thus we must conclude that all dividends included in federal adjusted gross income on or after January 1, 1968, are included in taxable income for the State income tax on or after January 1, 1968.

Further support for our conclusion is found in the circumstances surrounding the elimination of the exemption for dividends received upon stock of national banks and certain other domestic corporations. Chapter 452 was an omnibus act which implemented many of the major proposals of the Joint Legislative-Executive Committee to Study Taxation and Fiscal Problems. It contains many substantive revisions and changes in the State tax laws in addition to the elimination of the exemption discussed here. Chapter 452, however, was not the sole statutory vehicle for carrying out the Committee's recommendations. There

were other bills prepared as a consequence of the Committee's studies and report, one being a technical amendments act to the income tax laws which was intended principally for purposes of clarification. (See Report of the Joint Legislative-Executive Committee to Study Taxation and Fiscal Problems, January 1, 1968, Section XVIII, Amendments to 1967 Taxation and Fiscal Reform Legislation, page 15). Section 2 of the technical amendments act, which is Chapter 656 of the Acts of 1968, provides that "all provisions of this Act, being clarification of the intent of Chapter 142, Acts of 1967, or of prior law shall apply to all taxable years ending after December 31, 1966". Thus Section 2 of Chapter 656 clearly illustrates the legislative intent that the measure for taxable income for the State income tax be on a calendar year basis. Applying the July 1st date of effect of Chapter 452 to the elimination of the exemption for dividends received upon stock of national banks and certain other domestic corporations would not be consonant with the practice of the Legislature of using the calendar year as the measure for taxable income for State income taxes.

We also note that the title to Chapter 452 states that the Act provides for the elimination of "the provision for subtraction of certain dividends in arriving at taxable net income of individuals". If the Legislature had intended to depart from its practice of using the calendar year as the measure for the State income tax, or if the Legislature had intended to permit the dividends in question to be exempt from State income tax until July 1, 1968, we believe that both the title to Chapter 452 as well as the statute itself would have indicated so in unequivocal terms.

Accordingly, for the reasons above, it is our opinion that the State income tax applies to dividends received on or after January 1, 1968 upon stock of national banks and domestic corporations.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

TAXATION — EXCISE TAX ON BOATS — APPLICABILITY OF SOLDIERS' AND SAILORS' RELIEF ACT.

August 9, 1968.

Mr. Joseph H. Manning, Director.

This is in response to your request of July 31, 1968, concerning the applicability of Article 14B, Section 4E (b) of the Annotated Code of Maryland, to non-resident military personnel who are stationed in Maryland solely by reason of military service assignments.

In 1960 Maryland enacted that statute, known as the "State Boat Act" which provided, among other things, that certain vessels be numbered and registered. Section 4E was enacted to take effect July 1, 1965, and provides as follows:

> "4E . . .
>
> "(a) *Fee for issuance of original and duplicate certificate.*—A fee of two dollars ($2.00) shall be charged by the Department for every certificate of title issued by it, including a transfer of title, and a fee of two dollars ($2.00) shall be charged for every duplicate and/or corrected certificate of title issued by the Department. Such fees shall accompany each application.
>
> "(b) *Levy of excise tax; amount; in lieu of sales tax or use tax; owners prior to June 1, 1965, exempt.*—Except as provided in Section 4B, in Section 4D, in Section 4D (b) and in subsection (c) of this section, and in addition to the fees prescribed in subsection (a) of this section, a tax is hereby levied on the issuance of every original certificate of title required under this article for a vessel and on the issuance of every subsequent certificate of title for the sale, resale or transfer of the vessel.
>
> "1. The Department shall be paid a tax by the applicant for a certificate of title at the rate of

three per centum (3%) of the gross sales price, or if no sale immediately precedes the application for title, the fair market value of the vessel for which a certificate of title is applied for and issued. The Department may require the submission to it of proof satisfactory to it in order to establish the tax due.

"2. The tax imposed by this section shall accompany all applications for certificates of title issued on and after July 1, 1965, and shall be in lieu of the collection of any tax on the sale of vessel required under Sections 325 or 373 of Article 81 of this Code, as amended from time to time unless otherwise exempt from the tax.

"3. Notwithstanding the provisions of this subsection, no tax shall be paid on the issuance of any certificate of title where the owner of the vessel for which a certificate of title is applied for was the owner of the vessel prior to June 1, 1965. The Department may require the applicant for titling to submit proof satisfactory to it to prove the ownership of the vessel by the applicant prior to June 1, 1965."

The fee set forth in subsection (a) is a fee charged for certificates of title. Subsection (b) provides that an excise tax at the rate of 3% of the gross sales price, or the fair market value of the vessel, shall be levied on the issuance of every original certificate of title.

In 1958 Congress passed the "Federal Boating Act of 1958" (46 U. S. Code Section 527), which provided for numbering of vessels. Subsection (c) (10) of that statute specifically authorizes the states to charge fees in connection with the award of certificates of number and renewals thereof.

Section 514 of The Soldiers' and Sailors' Relief Act of 1940 (50 U. S. Code App. 574) provides that:

"(1) For the purposes of taxation in respect of any person, or of his personal property . . . by any State, . . . such person shall not be deemed to have lost a residence or domicile in any State . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have become resident in or a resident of, any other State, . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property . . . of any such person by any state of which such person is not a resident or in which he is not domiciled . . . personal property shall not be deemed to be located or present in or to have a situs for taxation in such State. . . . Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State . . . in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. . . .

"(2) When used in this section, (a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."

In *California v. Buzard*, 382 U.S. 386, 15 L. Ed. 2d, 86 S. Ct. 478 (1966), the Supreme Court, in a unanimous opinion by Justice Brennan, held that the State require-

ment of registration was not inconsistent with Section 574 of the Soldiers' and Sailors' Civil Relief Act, but that the personal property tax could not validly be imposed on non-resident servicemen.

The Court also upheld the rationale of the earlier case of *Dameron v. Broadhead,* 345 U.S. 322, 97 L. Ed. 1041, 73 S. Ct. 721 (1953), which held the statute (Soldiers' and Sailors' Civil Relief Act) applied irrespective of whether or not the serviceman's home state imposed a like tax.

Our predecessors have had several occasions to consider the applicability of the Civil Relief Act, and have expressed the opinion that it applies to automobiles (32 Opinions of the Attorney General 260) and to house trailers (43 Opinions of the Attorney General 358).

It is clear that the Soldiers' and Sailors' Civil Relief Act broadly defines personal property, and in the view we take of this matter, includes boats.

We note that the United States Court of Appeals for the Second Circuit has so held in the recent case of *United States v. Sullivan,* decided July 10, 1968.

In view of the specific congressional authorization contained in the Federal Boating Act of 1958, supra, and the decision of the Supreme Court of the United States in *California v. Buzard, supra,* we believe that the registration fee required by Article 14B, Section 4E (a) of the Annotated Code of Maryland is a fee validly essential to the registration and numbering program and should be collected from all individuals applying for certificates of title.

However, we believe that the 3% excise tax imposed by Article 14B, Section 4E (b) of the Annotated Code of Maryland cannot be validly imposed upon non-resident servicemen.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Assistant Attorney General.*

TAXATION—DEFINITION OF "GROSS INCOME" FOR TAX CREDIT FROM REAL PROPERTY TAXATION FOR THE ELDERLY AS CONTAINED IN ARTICLE 81, SECTION 12F DOES NOT INCLUDE GROSS REVENUES FROM BUSINESS ENTERPRISE WITHOUT DEDUCTION OF BUSINESS EXPENSES AND DOES NOT INCLUDE GROSS RENTALS WITHOUT DEDUCTION OF OPERATING COSTS.

August 20, 1968.

Dr. Paul D. Cooper, Director.

You have asked for our opinion of the meaning of "gross income" as that term is defined in Section 12F of Article 81 of the Annotated Code of Maryland. Section 12F was repealed and reenacted in Chapter 516 of the Laws of Maryland of 1968. You state in your letter that your request has been prompted by the number of inquiries you have received concerning the legislative intent in defining the term "gross income". Specifically, you ask whether "gross income" would include all of the revenue received from a business enterprise rather than the net profit realized after deduction of the business expenses for the enterprise and whether "gross income" would include all of the revenue received from rental properties rather than the net profit realized after deduction of the operating costs for such properties.

It is our opinion for the reasons hereafter stated that the term "gross income" as it is defined in Section 12F means the net profit realized from a business enterprise after deduction of those business expenses which are chargeable against the enterprise and that the term also means the net profit realized from rental properties after deduction of the operating costs which are chargeable against such properties.

Section 12F creates a mandatory minimum tax credit from real property taxation for subdivision purposes for certain homeowners by reason of age and income. The pro-

vision for such a tax credit was added to Article 81 by Chapter 142 of the Laws of Maryland of 1967, which is commonly known as the Agnew-Hughes-Lee Bill. While Section 12F was a new State statute in 1967, similar tax credits for certain homeowners for reasons of age and income had been provided by local law by some of the subdivisions for some time prior to the enactment of Chapter 142.

After Chapter 142 became effective on July 1, 1967, we were asked for a definition of "gross income" as that term was used in Section 12F (b) of Article 81. Our opinion was required there because the term "gross income" was not then defined in the statute. Instead, the Legislature had provided that "gross income" as used in Section 12F "means gross income as defined in Section 280 of this article". The problem stemmed from the fact that the Legislature had amended Section 280 of Article 81 at the same time and in the same Act (Chapter 142) in which it enacted Section 12F. Consequently the question arose whether the definition of "gross income" referred to the term in the old Section 280 which existed prior to the enactment of Chapter 142 or whether the term referred to the new Section 280 in Chapter 142. We concluded in our opinion of August 14, 1967 to Mr. Bernard F. Nossel, 52 Opinions of the Attorney General 456, that "gross income" referred to the term as defined in the old Section 280. Our opinion also contained a footnote which pointed out the necessity for providing a definition for "gross income" in the future:

> "This Opinion is limited to the application of Section 12F for the current fiscal year (July 1, 1967-June 30, 1968). It is not intended as a guide for future fiscal years. The new Section 280 refers to 'federal adjusted gross income' and nowhere therein refers to 'Gross Income'. Since 'Gross Income' is no longer defined in the Laws of Maryland, the Legislature may deem it necessary to amend Section 12F at the next legislative session to either include a definition of 'Gross Income', or

> else to tie the applicant's income to some other test which is ascertainable from the existing law. Absent such an amendment, recourse may have to be made to new Section 280 and its reference to 'federal adjusted gross income' in order to bring all sections of Chapter 142 into balance for future years."

The General Assembly heeded our warning and Section 12F was amended at the 1968 legislative session so that it now includes a definition of "gross income" which reads as follows:

> "Gross income means total gross income from all sources, including but not limited to gifts, and whether or not included in the definitions of gross income for Federal or State income tax purposes."

The unquestionable legislative objective in enacting Section 12F was to provide tax relief for homeowners sixty-five years old or older in the form of a tax credit from subdivision real property taxes. The test of eligibility for such tax relief was the amount of the homeowner's gross income which he received in the calendar year preceding the date of his application for the tax credit. The amount established by the Legislature was five thousand dollars and the definition of the homeowner's gross income was his "total gross income from all sources, including but not limited to gifts, and whether or not included in the definitions of gross income for Federal or State income tax purposes." We think that it is clear that this definition was intended to determine the actual disposable income which the homeowner could command for his living expenses. The inclusion of gross revenues from a business enterprise and gross rents from rental properties within the definition of "gross income" in the context for which that term is employed in Section 12F would bear no relationship whatsoever to the actual disposable income which the homeowner might have for his living expenses. The owner of a business enterprise might have gross sales of twenty thousand dollars but his cost of goods sold might be eighteen

thousand dollars leaving him with a net profit of two thousand dollars. To hold that his gross income within the meaning of Section 12F is twenty thousand dollars rather than two thousand dollars would not only be patently unfair but it would evade the objective of the Legislature in enacting Section 12F which was to afford tax relief for persons sixty-five years old or older whose actual disposable income in a calendar year is not in excess of five thousand dollars. In a similar vein, it would also defeat the purpose of Section 12F by measuring a homeowner's gross income by taking his gross rents from rental properties without allowing him to deduct his operating expenses for such properties.

It is our opinion, therefore, that "gross income" as that term is defined in Section 12F of Article 81 would include net profits realized from a business enterprise or from rental properties but that the term would not include net revenues received from a business enterprise without allowance for the business expenses which would be chargeable against the net revenues and that the term would not include net rentals received from rental properties without allowance for operating expenses which would be chargeable against the net rentals.

FRANCIS B. BURCH, *Attorney General.*

JON F. OSTER, *Assistant Attorney General.*

TRIAL MAGISTRATES

ANNE ARUNDEL COUNTY—JURISDICTION—NON-SUPPORT OF MINOR CHILD WHERE DIVORCE DECREE OUTSTANDING.

February 26, 1968.

George N. Manis, Esquire.

In your recent letter, you requested this office to render an opinion on the following facts:

A divorce decree, granted in Baltimore City, provided for support of $30.00 per week to be made, on behalf of a minor child, to its mother who was given custody; the mother and child live in Anne Arundel County; the father has neglected to make his payments, as required, and is in substantial arrears; the mother has obtained a warrant in Anne Arundel County for non-support against the husband under Article 27, Section 88; the father has been served and is brought before the People's Court of Anne Arundel County.

Quaere:

1. Does the People's Court of Anne Arundel County have jurisdiction over a divorce decree which has been granted in a different jurisdiction, and the father is delinquent in payments?

2. If found guilty of non-support, is it within the jurisdiction of the People's Court Judge to change the divorce decree in any manner whatsoever; i.e. increase or decrease support payments?

3. If found guilty of non-support, may the People's Court Judge render a sentence which would be in contradiction to the divorce decree?

Article 27, Section 88 (b) is a criminal statute and provides, in the main, that, "Any parent who shall . . . wilfully neglect to provide for the support and maintenance

of his or her minor child shall be deemed guilty of a misdemeanor, . . ." It further provides that said parent, charged with such violation, "may be prosecuted in the jurisdiction where he . . . or the child resides." Article 27, Section 88 (e) provides that the trial magistrate of Anne Arundel County shall have concurrent jurisdiction with the circuit courts of that county to try persons violating the provisions of this subtitle.

It is well-established that the magistrates of this State do not have jurisdiction over divorce decrees, since this matter is within the exclusive jurisdiction of the Equity Courts (Article 16, Section 22; *Courson v. Courson*, 213 Md. 183). However, in *State v. James*, 203 Md. 113, the Court of Appeals endorsed the findings of a line of cases which held that:

> "[T]he purpose of a non-support statute is not only to prevent a neglected wife or child from becoming a public charge, but that the higher and more important purpose of the Legislature was to assist deserted or neglected wives or children in directly procuring support, [and] to punish the infliction of this kind of wrong upon them, . . ."

It is clear that the People's Court of Anne Arundel County does have jurisdiction to hear those criminal cases where the issue is non-support of a minor child. In *Ewell v. State*, 207 Md. 288, the Court of Appeals ruled that jurisdiction under this statute attaches even though there is a pending divorce action between husband and wife. In this same case, the Court, at pages 297-298, approved the following principles:

> "A separate maintenance or alimony decree does not bar prosecution by the State for non-support when the alimony awarded the wife in the civil suit is not being paid, despite the remedies of contempt proceedings or suit on the decree."

There is good reason to believe that the approved prin-

ciples would apply to the non-support of a minor child as well.

Therefore, it is the opinion of this office that while the People's Court of Anne Arundel County does not have jurisdiction over a divorce decree, and, therefore, cannot change the terms of a divorce decree in any manner, it does have jurisdiction to hear the complaint of non-support, which originated out of warrant issued under Article 27, Section 88. The trial judge should then proceed to hear the case in accordance with the provisions of Section 88 (b) thereof, which provides that:

> "[B]efore the trial with the consent of the defendant, or after conviction, instead of imposing the punishment hereinbefore provided, or in addition thereto, the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have the power to pass an order which shall be subject to change by it from time to time, as the circumstances may require, directing the defendant to pay a certain sum weekly for the space of three years to the person or institution having custody of the minor child or children, . . . and to release the defendant from custody on probation for the space of three years upon his or her entering into a recognizance in such sum as the court shall direct, with or without sureties."

FRANCIS B. BURCH, *Attorney General.*

HENRY J. FRANKEL, *Assistant Attorney General.*

TRIAL MAGISTRATES—VACANCIES IN THE OFFICE OF JUSTICE OF THE PEACE OR MAGISTRATE MAY BE FILLED BY THE GOVERNOR WITHOUT SENATORIAL CONFIRMATION.

March 13, 1968.

The Honorable Robert P. Dean.

In your recent letter you state that during the 1967 session of the General Assembly, the Governor sent down two nominations for Trial Magistrate for one of the counties to fill a vacancy created by the expiration of a term. Neither of these nominations was acceptable to you and therefore neither nomination was confirmed.

After adjournment of this session, the Governor made an appointment to fill this vacancy; however, the name of this appointee has not been presented to the Senate Committee on Executive Nominations during succeeding sessions.

You inquire whether the interim appointee is subject to Senate confirmation during this session of the General Assembly.

Article IV, Section 43, of the Constitution of Maryland reads, in part, as follows:

> "In the event of a vacancy in the office of a Justice of the Peace, the Governor shall appoint a person to serve, as Justice of the Peace, for the residue of the term; . . ."

In *Johnson v. Duke*, 180 Md. 434 (1942), the Court of Appeals of Maryland held, in effect, that the Governor is not required to submit recess appointments of justices of the peace or magistrates to the Senate for confirmation. The rationale of this decision is based on the fact that under Article IV, Section 43, *supra*, the tenure of office of a person holding a recess appointment as justice of the peace or magistrate is different from that of other recess appointments. Of like import, see 32 Opinions of the Attor-

ney General 192 (1947) ; see, also, 40 Opinions of the Attorney General 280 (1955) where this office held that vacancies in the office of justice of the peace or magistrate may be filled by the Governor without senatorial confirmation even while the Senate is in session.

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

TRIAL MAGISTRATES—HAVE AUTHORITY TO SIT IN ANY COURT, OR AREA OTHER THAN THAT DESIGNATED BY HIS CERTIFICATE OF APPOINTMENT.

July 13, 1968.

Lloyd J. Hammond, Esq.

In your recent letter you state that a meeting was held by law enforcement officers of Baltimore County to formulate plans for the handling of criminal cases in the event of a riot, or civil disturbance in that County.

You inquire as to whether a trial magistrate has authority, during a riot or civil disturbance, to sit in any court or area in Baltimore County, other than that designated by his certificate of appointment.

Article 52, Section 108 (3) of the Annotated Code of Maryland (1968 Repl. Vol.) reads, in pertinent part, as follows:

> "(3) *Baltimore County.*—There shall be sixteen magistrates, one of whom shall sit in Catonsville, one in Cockeysville, one in Dundalk, one in Edgemere, one in Essex, one in Fullerton, one in Halethorpe, one in Kingsville, one in Parkton, one in Parkville, one in Pikesville, one in Reisterstown, one in Sparrows Point, one in Towson, one in Woodlawn, and one at a suitable location on the Pulaski highway."

In addition to designating the area where the trial magistrate shall sit, this section of the Code also specifies the minimum number of days per week magistrates shall hold sessions, and their salaries.

It is clear that Section 108 (3), designating certain geographical areas for magistrates to sit, was enacted for public convenience, and not intended to limit the territorial jurisdiction of a magistrate to the area or district to which he was assigned.

This office has previously held that the jurisdictions of magistrates are county-wide. See 40 Opinions of the Attorney General 203; 37 Opinions of the Attorney General 265; 22 Opinions of the Attorney General 366; 21 Opinions of the Attorney General 422; 10 Opinions of the Attorney General 144. Moreover, Article 52, Section 13 provides that trial magistrates are vested with jurisdiction to hear, try, and determine all cases, within their respective counties, not punishable by confinement in the penitentiary, or involving felonious intent.

Since it is established that the jurisdiction of a magistrate is coextensive with the geographical limits of the county to which he is appointed, it necessarily follows that a judgment rendered by him while sitting in an area other than the one to which he was appointed, would not be void or invalid for that reason. See *Rema v. State,* 72 N.W. 474. See also A. Thomas, *Procedure in Justice Cases,* Section 35 (2d ed. 1917), where it is stated:

> "In many States Justices are elected or appointed as county officers, but required by law to hold their office in particular places. Such requirements are merely directory, and a violation thereof does not invalidate the proceedings of the Justice."

In answer to the specific question posed by you, it is the opinion of this office that magistrates in Baltimore County are required, by law, to sit and hold sessions in the area designated by their certificate of appointment. They may, however, in addition, sit and hold sessions in other areas of the County, in the event of a riot or civil disturbance.

FRANCIS B. BURCH, *Attorney General.*

DAVID T. MASON, *Assistant Attorney General.*

TRIAL MAGISTRATES—COMMITTING LUNATICS—TREATMENT OF ALCOHOLICS—ALCOHOLICS.

July 25, 1968.

Honorable J. Otis McAllister.

In your recent letter you requested this office to render an opinion relative to an interpretation of House Bill 800 (1968), an Act to add a new Section 15A to Article 59 of the Annotated Code of Maryland, 1964 Replacement Volume and 1967 Supplement, title "Lunatics and Insane," subtitle "Insanity as a Defense in Criminal Cases." Your letter indicates that you interpret this Act to restore to courts of limited jurisdiction the power to commit persons to a mental institution to determine their sanity. Your interpretation is correct, for that Act expressly provides that:

> "Jurisdiction imposed herein shall include all courts of limited jurisdiction including the Municipal Court of Baltimore City."

However, in relation to the question which you raise in regard to Eastern Shore State Hospital and the Department of Mental Hygiene, the Act provides as follows:

> "Whenever any person shall be arrested and brought before a judge of any court of this State . . . charged with any offense, and such person shall appear to be . . . insane or lunatic and shall be committed in default of bail to await further proceedings . . . said judge shall commit him to the jail of the County or City where the charge is pending or to such institution for the care of the insane as may from time to time be designated by the Department of Mental Hygiene. . . ."

With the aforesaid in mind, it is, therefore, the opinion of this office that commitment of such persons who appear to be insane or lunatic as referred to herein shall take

place only in the event that such person shall be held or committed to jail in default of posting bail to await further proceedings in regard to the original charge pending against him. Furthermore, said commitment to an institution for the care of the insane shall be only to such institutions designated as such by the Department of Mental Hygiene. The Act further provides that the Department of Mental Hygiene shall be notified of said commitment and it shall examine said person, except in cases not punishable by death or confinement in Penitentiary, in which event the Superintendent of the institution shall examine and report in accordance with the Act.

You will note that the provisions of this Act require that the Department of Mental Hygiene report its findings to the court within two weeks after notification; and the Superintendent of the institution to which the defendant has been confined pending trial, in cases not punishable by death or penitentiary confinement, within three weeks after admission. Because the defendant, conceivably, could be confined for some period of time before these findings are reported, this office, at the request of Governor J. Millard Tawes, on December 3, 1963, ruled that certain safeguards should be undertaken by the magistrate before the defendant is committed. At that time, we felt that, although the Act did not require it, a medical examination by a licensed medical doctor should be made as a prerequisite to any commitment; that every possible safeguard should be adopted to make certain that a defendant is not committed to such an institution unless there is great reason to believe that such examination and commitment are necessary; that the County Commissioner or Court Council be requested to provide funds for such an examination; and that the medical society of each county be contacted so that the aid of a physician could be arranged with the minimum of inconvenience and the maximum expeditiousness. We feel these safeguards still apply, and the judges should consider them.

In said letter, you also request an opinion from this office

relating to an interpretation of Senate Bill 389—an Act repealing Article 2C of the Annotated Code of Maryland (1957 Edition and 1967 Supplement), title "Alcoholism" and enacting in its place a new Article 2C.

This Act creates a misdemeanor described as "Disorderly Intoxication" (Section 201). It provides therein that said offense shall consist of (1) being intoxicated and endangering the safety of another person or property, or (2) being intoxicated or drinking alcoholic beverages in a public place and making a public disturbance. A penalty is provided of a fine of not more than One Hundred ($100.00) Dollars and/or imprisonment for not more than ninety (90) days.

Persons found intoxicated who are not chargeable with the offense of disorderly intoxication or any other crime, that is to say, persons found drunk in a public place without violation of any criminal law, are to be cared for as directed by the statute by authorized personnel activated and supervised by the Division of Alcoholism Control (Sections 301-303). This responsibility is to be shared by the police until the Division is able to assume its statutory function. The police may, under Section 303, take or send home or to a public or private health facility a person found intoxicated in a public place. They are authorized to arrange for commercial transportation for such purpose and they may take reasonable measures for the intoxicated person to pay in advance the cost of transportation.

According to the statute, the inebriate, if incapacitated, a condition defined as the state of being incapable of making a rational decision, or if required as an emergency measure occasioned by a threat to his health or safety, should be taken to a detoxification unit. This procedure should also be followed when an intoxicated person charged with a crime appears to need emergency medical treatment. The intent of the statute is stated to be that the police shall make every reasonable effort to protect the health and safety of intoxicated persons.

Plans for the transportation of inebriates should include provision for the care of homeless drunks. In such cases it is provided by law that the individual be taken to the nearest detoxification unit or other available medical facility. At the present time the necessary facilities are in short supply. In some areas they do not exist at all. It is a realistic prospect that for some period of time until the program begins to function properly, there will not be facilities available for homeless alcoholics and hospitals may deny them admittance. For homeless alcoholics where there is no other available facility the police station has to be utilized in conformity with the provisions of Chapter 146.

FRANCIS B. BURCH, *Attorney General.*

HENRY J. FRANKEL, *Assistant Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND

Failure to File Notice of Intention to Make Claim Within Statutory Period—Effect of Such Failure on Minors' Claims.

January 4, 1968.

John H. Calhoun, Esquire.

We have reviewed the file which involves the question of whether two minor claimants who failed to file notice of intention to make claim within the statutory period are thereby barred from recovery from the Unsatisfied Claim and Judgment Fund. The factual situation is that the plaintiffs were injured on November 29, 1964. At the time of the accident one of the plaintiffs was 19 years of age and the other was 18 years of age.

UCJ-201 form, Notice of Intention to Make Claim, was not signed by these plaintiffs until September 7, 1966, and notice was not received by the Unsatisfied Claim and Judgment Fund Board until September 22, 1966.

The plaintiffs were previously represented by an attorney, but the file is not clear as to when this attorney was consulted by the plaintiffs. However, we can assume that prior to April 23, 1965, they were represented by counsel since your file indicates medical reports from the plaintiffs' doctor were submitted to the attorney on that date.

It is apparent from a reading of the medical reports that neither of the plaintiffs was so physically disabled that he was incapable of giving notice and we need not concern ourselves with that section of the statute.

The question presented here is whether the infant plaintiffs should be allowed to collect from the Fund even though their Notice of Intention to Make Claim was not filed until nearly two years after the occurrence of the accident, or to put it more succinctly, does their infancy alone allow

the filing of late notice. We limit our opinion to the facts of this case and express no opinion of other situations which involves late notice.

The Maryland statute provides as follows:

> "Any qualified person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after the first day of June 1959, and whose damages may be satisfied in whole or in part from the fund or the personal representative of such person, shall, within one hundred and eighty (180) days after the accident, as a condition precedent to the right thereafter to apply for the payment from the fund, give notice to the Board, as prescribed by it, of his intention to make a claim thereon for such damages, if otherwise uncollectible, and shall otherwise comply with the provisions of this section . . ." Annotated Code of Maryland, Article 66½, Section 154 (a).

The statute also indicates that medical reports and other information are to accompany the Notice of Intention to Make Claim.

The statute gives the Board broad authority to extend the period of filing of any of the documents which accompany the notice, but the Board is not given any such discretion to extend the time for actual filing of the notice, Article 66½, Section 154 (a).

The point has not been decided by the Court of Appeals, but there are two lower court decisions which might be helpful.

In the case of *Lenahan v. Jewell,* (decided June 3, 1965) Judge Jenifer of the Circuit Court for Baltimore County dismissed the petition because of a failure to furnish medical reports. The Court ruled that the time requirement as set forth in Section 154 was mandatory upon the Peti-

tioners, and although the Board was given statutory authority to waive the requirement of late filing of the supporting documents, the Trial Court was without authority to compel such waiver and substitute its judgment for that of the Board.

In that case the plaintiff was an infant who sued by his father and next friend and even though notice was given within the statutory period, the accompanying documents were not forwarded to the Fund until one year after the accident. Counsel for the plaintiff had the reports in his possession during the 180 days' period. This case was never appealed.

In the only other Maryland case to which we have been referred, *State of Maryland, etc. v. Mowen,* decided January 18, 1962, Judge McLaughlin of the Circuit Court for Washington County ruled that the minor surviving child of the deceased was not barred from recovery even though the Notice of Intention was filed five months after the accident (at that time the statutory period for filing the Notice was 90 days, since increased to 180 days by the Acts of 1961). In that case the deceased was killed in an accident and was survived by his wife and a six months old infant son. Judge McLaughlin ruled that the wife's claim was barred, but allowed the claim of the infant, relying heavily on the New Jersey case of *Giles and Murray v. Gassert,* 23 N.J. 22, 127 A. 2d 161 (1956), discussed infra. *State v. Mowen,* was not appealed, apparently because at the time of this decision there was no right of appeal in these cases.

In the *Giles and Murray* case, the decedent was survived by a wife and four minor children and the New Jersey Court ruled that the non-appointment of a personal representative within the allotted statutory time could not defeat the action and allowed the claims to stand. By way of dictum, the Court stated at 127 A. 2d, p. 167:

> ". . . certainly, the dependent minor children could not be barred of their right to invoke the benefit of the Fund by a failure of notice."

There have been several other New Jersey cases which followed *Giles and Murray*. In *Moore v. Truesdale,* 137 A. 2d 433 (1958), a fourteen year old infant was injured and his cause of action against the defendant was prosecuted by his father in the representative capacity of guardian *ad litem*. The lower court ordered payment and the Fund appealed. No notice was filed within the statutory time following the accident, but notice was filed within the stated time after the guardian was appointed. The Appellate Court reversed on other grounds, but held the infant was not barred from recovery by failure to give notice.

In *Trevorrow v. Boyer,* 145 A. 2d 154 (1958), the New Jersey Court went a step further and held that even where the guardian *ad litem* did not file notice within the statutory period following the accident, the claim would be allowed where the required notice was filed within the statutory limit after suit was commenced.

A statement in the opinion by the Court is of significance here. The Court stated that "physically incapable does not mean an infant so as to excuse noncompliance." However, the Court relied not only upon *Giles and Murray* but the additional ground that the New Jersey Fund Law does not create a cause of action for the plaintiffs. The cause of action is created by another section of the New Jersey statutes which gives the infant plaintiff time in which to commence his action until after becoming of age and provides that the guardian *ad litem* may bring a suit for the infant during his infancy.

At this point it ought to be noted that in Maryland the Fund Statute does not create the right of action. Article 57, Section 2 of the Annotated Code of Maryland provides that limitations do not run against persons under the disability of infancy until the removal of the disability.

Thus, it can readily be seen that neither of the plaintiffs in the case at bar would be required to file suit against the defendant until three years after the disability of infancy was removed. But of paramount importance is the

fact that we are not here concerned with whether or not they are allowed to file suit, but only with the language of Section 154 (a) which clearly states that "as a condition precedent to the rights thereafter to apply for a payment from the Fund," the notice must be given.

New York has a similar statute, but there is one significant difference. The New York statute reads:

> "Where the qualified person is an infant or is mentally or physically incapacitated or is deceased, and by reason of such disability or death is prevented from filing the affidavit . . . within the applicable period specified therein, the Corporation may accept the filing of the affidavit after the expiration of said applicable period. . . ." New York Insurance Law, Sec. 608 (c) (2).

The New York "affidavit" may be equated with our Notice of Intention to Make Claim and the "Corporation" referred to is the Fund.

The statute goes on to give *the Court* authority in its discretion to grant leave to file the affidavit within a reasonable time after the expiration of the statutory period within which notice must be given.

Against this background we find the New York Court frequently allowing claims in which there was late notice.

Lavin v. Motor Vehicle Accident Indemnity Corporation, 201 N.Y.S. 2d 471 (1960) allowed late notice on behalf of an infant seventeen days after the statutory period expired. There the Court relied on Section 608 which allowed the Court in its discretion to grant leave to file the affidavit within a reasonable time.

In the Matter of Frey, 175 N.E. 2d, 461, 204 N.Y.S. 2d, 959, (1961), the notice was also seventeen days late and the Court again relied on the statute allowing the claim to be filed.

In *Gibson v. M.V.A.I.C.*, 256 N.Y.S. 2d 500 (1965), the Court stated that an infant claimant four years old was

excused as a matter of law for his failure to comply with the statute and the Court so held even though the claimants had retained an attorney.

In the *Application of Munoz*, 268 N.Y.S. 2d 397 (1966), the Court held that two months late notice did not bar the claim where neither the father nor the mother could read or write English, there was no prejudice to the M.V.A.I.C., and notice was filed immediately upon the retention of a lawyer. In this case the infant plaintiff was fourteen years of age and it was the Court's view that the youth could not himself take the necessary steps to effectuate proper compliance with the statute.

But New York has also *denied* relief where notice was not filed within the proper time. *Rodriguez v. M.V.A.I.C.*, 191 N.Y.S. 2d 866 (1959) held that the late notice was not due to the infancy but to the alleged inability of the claimant's attorney to ascertain the ownership of the property. The Court said that the excuse given that the claimant's attorney was not aware of the requirements of the statute did not excuse timely filing of the notice since the failure to file was not due to the infancy.

Likewise, in *Sullivan v. M.V.A.I.C.*, 202 N.Y.S. 2d 414 (1960) a seventeen year old boy gave no notice until after the expiration of the statutory period and contended that infancy alone was a sufficient reason for the New York Court to exercise the discretion granted it by statute to allow late filing of notice of claim, but the Court refused to approve his contention.

The New York cases lose significance in view of the broader language of the New York statute and even the New Jersey cases seem to have extenuating circumstances not present in this case. Here we have two youths who are minors in name only and whose age does not prevent them from following the statutory requirements. Indeed, they were, in fact, represented by an attorney shortly after the accident who waited until almost two years later to file the notice. Thus, the untimely filing of the notice was not due to the infancy of either of the plaintiffs.

It might be suggested that we ought to follow the New Jersey decisions, but on at least one occasion the Court of Appeals has indicated that it would not necessarily follow those decisions.

In *Mundey v. Unsatisfied Claim and Judgment Fund Board,* 233 Md. 169 (1963), the Court was faced with the proper construction of the notice provision of Section 154. The Court held that the claimant was not "physically incapable" of giving notice. While this case concededly does not govern the case at bar, nevertheless, the language of the Court is of pertinence here, for the Court said that while the statute should be liberally construed to advance the remedy, the Court should not read into relatively simple words a meaning that they do not ordinarily carry in order to effect a more generous remedy which might be thought to be socially desirable.

The Court of Appeals recently decided the case of *MacBride v. Gulbro, Adm'x.,* 247 Md. 727 (decided November 7, 1967), where suit filed on behalf of a minor against an administratrix, which was not filed within six months of administratrix's qualification, was barred by the statute of limitations. The Court specifically rejected the contention that since the plaintiff was an infant, he had the right to rely on the full period of limitations provided in Article 57, Section 1, after his disability was removed. The Court said that since there was no common law action against an executor or administrator of a deceased tort-feasor, the statute which created such a cause of action is in derogation of the common law and is to be strictly construed. The statute contains its own special period of limitations and provides no extension period for persons under disability.

The Court also referred to the practical consideration that were the rule otherwise, Estates would be open for a longer period of time than necessary to the detriment of everyone concerned.

There is also a practical consideration here which cannot be ignored. In the case of *Dell v. Smith,* Superior Court of Baltimore City, Docket 1960/1122/62821, Judge Sodaro

ruled that the Fund, being a public trust, is required to prorate judgments obtained in the same ratio that each judgment bears to the aggregate. Thus, where there is a possibility that maximum limits would be exceeded, the Court should not order payment from the Fund until all claims have been reduced to certainty. It does not require great vision to foresee a situation wherein plaintiffs in a given case could be forced to wait more than twenty years until an infant's disability is removed before being able to obtain payments of their judgments. It seems obvious that this was not the legislative intent.

Accordingly, it is our opinion that the plaintiffs in the above-entitled case ought to be informed that they are ineligible to collect from this Fund because of late notice and that any petition for payment on their behalf will be resisted.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Assistant Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND—ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS—TIME WITHIN WHICH IT MUST BE BROUGHT—INTERPRETATION OF ART. 93, SEC. 112.

October 23, 1968.

Henry B. Suter, Esquire.

This will acknowledge receipt of your letter of October 10 in which you request our opinion concerning the proper procedure to be followed where the plaintiff has allowed more than six months to pass without filing an action against the estate of a decedent.

The appropriate statute governing actions against executors and administrators is found in Article 93, Section 112 of the Annotated Code of Maryland which formerly provided that such actions must be brought within six months after the date of the qualification of the executor or administrator or be barred.

By Acts of 1967, the Legislature corrected certain inequities which had previously occurred by virtue of a strict application of the statute. The statute as amended provided that if the deceased was covered by an existing insurance policy at the time of the occurrence, the regular statute of limitations applies, i.e., three years. The fact that there was an insurance policy available is specifically made inadmissible as evidence and recovery in the event of a judgment is limited to the amount of the policy.

The statute goes on to say that:

> "The provisions as to such time for filing of a suit shall be deemed to also permit claims made against the Unsatisfied Claim and Judgment Fund of the State of Maryland, in the event such claim could otherwise legally be made."

We believe that the inclusion of this sentence and the use of the term "also" clearly evidences the Legislature's intent

that the same procedure is to be followed in cases where there is no insurance as in the cases where there is available insurance and that the Fund was not mentioned in the previous sentences because of the conflict which could arise between the six months period referred to in the statute and the requirement of Article 66½, Section 154 wherein notice of intention to make claim against the Unsatisfied Claim and Judgment Fund must be filed within 180 days.

Thus, if the plaintiff is eligible and has perfected his right to proceed against the Unsatisfied Claim and Judgment Fund, but fails to file suit within six months of the date of qualification of the executor or administrator of a decedent, he is still protected by Article 93, Section 112.

We believe that such a suit should be filed against the executor or administrator of the estate or against an administrator *de bonis non* as the case may be.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Assistant Attorney General.*

UNSATISFIED CLAIM AND JUDGMENT FUND—RECIPROCITY WITH OTHER STATES.

November 14, 1968.

John H. Calhoun, Esquire.

You have requested our opinion as to whether a New Jersey resident injured in Maryland by an uninsured motorist may recover from the Maryland Unsatisfied Claim and Judgment Fund and, if so, what is the maximum amount collectible. You have also asked us to explore the broader question of reciprocity generally.

The questions involve an interpretation of Article 66½, Section 150 (g) of the Annotated Code of Maryland (1957 Edition), in which "Qualified Person" is defined in pertinent part as "a resident of another state . . . in which recourse is afforded to residents of this State, of *substantially similar character* to that provided for by this subtitle". (Emphasis supplied).

At the time of the accident in question, the New Jersey financial responsibility laws required insurance coverage in the amount of $10,000/$20,000, which was also the maximum amount collectible from the New Jersey Unsatisfied Claim and Judgment Fund.

The question is complicated by the fact that Maryland's Financial Responsibility requirements and the limitations on amounts recoverable for personal injuries from the Unsatisfied Claim and Judgment Fund were raised, effective April 1, 1965, to $15,000/$30,000.

We are not unmindful of the fact that Article 66½, Sections 150 (h) and 159 (c) indicate that a motor vehicle is deemed "uninsured" unless there is in force a liability policy meeting the required minimum limit, i.e., $15,000/$30,000, and that an argument could be made that the New Jersey resident insured in a lesser amount is technically an uninsured motorist. However, we feel that such a strained and technical interpretation flies in the face of the obvious intent of the Maryland Legislature.

The Fund statute was passed to meet the growing and serious social problem resulting when innocent victims of motor vehicle accidents were unable to obtain redress from uninsured motorists, *Allied American Mutual Fire Insurance Company v. Commissioner of Motor Vehicles*, 219 Md. 607, 150 A. 2d 421 (1959).

By expanding the benefits of the statute to residents of States having reciprocal legislation, the Legislature obviously desired to afford even more protection to Maryland residents by encouraging enactments awarding similar benefits to Marylanders injured or damaged by uninsured motorists in other states. The Legislature was under no compulsion to do this; indeed, North Dakota's Fund Statute makes no provision for reciprocity.[1]

The New Jersey Unsatisfied Claim and Judgment Fund Statute is found at N.J.S.A. Title 39, 6-61 to 91. A reading of that statute in its entirety leads to the inescapable conclusion that New Jersey affords recourse to Maryland residents of "substantially similar character" to that provided by Maryland to New Jersey residents. Therefore the New Jersey resident meets the Maryland definition of "qualified person".

Rule I, B, 1 of the Maryland Unsatisfied Claim and Judgment Fund specifically provides that residents of New Jersey shall be deemed qualified persons to make claim against the Fund, but only to the extent that a resident of Maryland would be qualified to make claim against the New Jersey Fund.

Therefore we believe that if the New Jersey resident meets the financial responsibility requirements of New Jersey and would be otherwise eligible to recover from that State's Unsatisfied Claim and Judgment Fund, he is a "Qualified Person" and eligible to recover from the Maryland Fund.

We turn now to consideration of the question of the maximum amount available to the New Jersey resident.

"Substantially" has been defined by Black's Law Dictionary, 4th Ed., as "essentially, without material qualification; in the main; in substance; materially; in a substantial manner". The same source, as well as Webster's New International Dictionary, Second Edition, defines "Similar" as "Nearly corresponding; resembling in many respects; having a general likeness". The term does not mean identical (See 39 Words and Phrases, *Similar*, p. 395).

New York has made the administrative decision that the Fund statutes of New Jersey and Maryland are substantially similar [2] and the Attorney General of New Jersey has ruled that the New York statute is substantially similar to that of New Jersey.[3]

We believe that the Maryland Unsatisfied Claim and Judgment Fund statute is substantially similar to both the New Jersey and New York statutes.

We also believe that the better practice is to take the more restrictive view toward individual questions of reciprocity. For instance, prior to 1962, the New Jersey Fund statute specifically excluded guest passenger claims (N.J.S.A. Title 39, Section 6-70 (1958)) while the Maryland Fund statute had no such prohibition. Thus, since a Maryland guest passenger in a vehicle operated by a New Jersey motorist in New Jersey could not then recover from the New Jersey Fund, a New Jersey guest in a vehicle operated by a Maryland motorist in Maryland could not recover from the Maryland Fund.

Such restrictions have been held not to be a denial of equal protection of the laws, *Moon v. Coombs*, 47 N.J. 348 (1966), and *Benson v. Schneider*, 68 N.W. 2d 665 (North Dakota 1955).

In *Betz v. Director*, 142 A. 2d 632 (New Jersey 1958), the New Jersey Supreme Court stated that the test of reciprocity most often applied in specific cases is whether the state from which the nonresident plaintiff comes would extend an equal benefit to a nonresident upon the same facts, and concluded that since New York would not extend

benefits to a New Jersey resident in similar circumstances, the administrator of a New York decedent was not a "qualified person". *Betz* was re-affirmed in *Rudnick v. Bentler*, 168 A. 2d 813 (New Jersey 1961).

And in several New York cases recovery has not been allowed to New Jersey residents because the New York resident could not recover in New Jersey, *Farina v. MVAIC*, 228 N.Y.S. 2d 20 (1962), *White v. MVAIC*, 241 N.Y.S. 2d 566 (1963), and *Martin v. MVAIC*, 292 N.Y.S. 2d 3 (1966).

We have discussed this problem with our counterparts in New Jersey and New York and such a view agrees with the practice of both states.[4]

We feel the legislative policy behind the extending of Fund benefits to residents of other states is to provide a degree of protection and security to Marylanders while operating vehicles in other states. It would be contrary to that policy and manifestly unjust to allow citizens from a foreign jurisdiction to recover from the Maryland Fund when a Maryland citizen would be denied recovery in a similar situation in the foreign jurisdiction.

Thus residents of States extending reciprocity to Maryland residents may, if otherwise qualified, recover from the Maryland Unsatisfied Claim and Judgment Fund only in amounts equal to those which Maryland residents could recover in that State.

FRANCIS B. BURCH, *Attorney General.*

WILLIAM E. BRANNAN, *Assistant Attorney General*

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[1] North Dakota Rev. Code Sections 39-1701 to 1710 (Supp. 1957).

[2] Letter from Director of New York Motor Vehicle Accident Indemnification Corporation, October 16, 1959.

[3] Formal Opinion, Attorney General of New Jersey No. 1-1959.

[4] An excellent article by Peter Ward, Professor of Law, Cornell University School of Law, "The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity", Buffalo Law Review, Vol. 9, No. 2, Winter, 1960 also advocates the "common sense" approach to reciprocity.

VETERANS' COMMISSION

STATE SERVICE OFFICER WHO HAS REACHED THE AGE OF 70 MUST BE RETIRED.

February 6, 1968.

Mr. David E. Kaiser, Chairman.

This is in reference to your recent letter wherein you asked whether or not your State Service Officer, who is in the classified Service and has reached the age of 70, may be continued in office under a newly created position in the unclassified Service.

Under the provisions of Article 73B, Section 3 (1) of the Annotated Code of Maryland (1967 Replacement Volume), every person who enters employment with the State of Maryland, *whether in the classified or unclassified Service,* must become a member of the State Employees' Retirement System, and pursuant to Article 73B, Section 11 (1) (b) it is mandatory for members of the Retirement System who are not *elected* or *appointed* officials to retire at the age of 70 years.

It is obvious that the State Service Officer is not an elected official (the Code specifically provides for his appointment by the Commission), but the question remains as to whether or not he is an appointed official. The Court of Appeals of Maryland has construed "appointed official" as used in Article 73B as being synonymous with "public officer". *Gary v. Board of Trustees, Of the Employees Retirement System of Maryland,* 223 Md. 446.

In commenting on the tests used to distinguish between an employee and an officer, the Court in the *Gary* case had this to say:

> "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?

"The two tests which would seem to have been deemed most significant are the requirement of the oath and the delegation of sovereignty."

There is no provision in Article 96½, Annotated Code of Maryland (1964 Replacement Volume), the Veterans' Statute, which requires that the State Service Officer take *an oath.*

In the case of *Howard County Metropolitan Commission v. Westphal,* 232 Md. 334, the Court of Appeals recognized the tests in the *Gary* case and decided that the exercise by the public servant of the sovereign powers of government for the benefit of the public was the most important fact to be considered.

In setting forth the duties of the State Service Officer, Section 6 of Article 96½ above has this to say:

". . . It shall be the duty of the State Service Officer to *supervise* the State service centers provided for in Section 7 of this article, and to keep in contact with the United States Veterans Administration so that the status of any claim shall be known at any time; to continue to survey the State in order that no veterans or their dependents may be neglected *and to perform such other duties as the Commission may direct . . .*" (Emphasis supplied).

Regarding the State's Service Centers which the State Service Officer is to supervise, Section 7 provides:

* * *

> "At said principal office and service center, and at such additional service centers as may be established, as herein provided, the Maryland Veterans Commission, in addition to its other duties as set forth in this subtitle, shall furnish information for the benefit of such male and female veterans, and shall, as far as possible, coordinate its efforts with those of all other appropriate agencies, so as to avoid overlapping of effort, and to make available, if possible, at one location, or in one general local area, complete information to such male and female veterans on all problems pertaining to veterans' affairs . . ."

* * *

We believe that there is nothing in these sections or any of the applicable sections of Article 96½ which shows that any part of the sovereignty of the State has been delegated to the State Service Officer. Furthermore, the fact that he must "perform such other duties as the Commission may direct", as reflected in Section 6 above, indicates that the State Service Officer is to be under the direction and control of the Commission and, therefore, he is an employee of the Commission and not a "public officer".

Accordingly, it is our opinion that the State Service Officer who has reached age 70, must, pursuant to Section 11 (1) (b) of Article 73B, *supra*, "be retired forthwith . . .".

It may be of some value to you to note that as a result of certain amendments to Section 11 (14) of Article 73B, the law now provides: "A retired member who is receiving a service retirement allowance may accept employment in which all or part of the compensation comes from State funds . . . without any reduction in his retirement allowance" if he notifies the Board of Trustees of his intention

to accept the employment and the compensation to be received. This section is subject to the limitation that the retirement allowance and salary, taken together, do not exceed the average final compensation upon which the retirement allowance was based.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

VETERINARY MEDICAL BOARD

CIRCUMSTANCES UNDER WHICH BOARD MAY SUSPEND OR REVOKE A LICENSE.

January 18, 1968.

Dr. Victor I. Sorgen, D.V.M.

This is in reference to your recent letter wherein you ask under what circumstances the State Board of Veterinary Medical Examiners of Maryland may suspend or revoke a license without resorting to court action or having to await the results of court action.

The power of the Board to suspend or revoke a license is set out in Sections 152 and 152A of Article 43 of the Annotated Code of Maryland (1965 Replacement Volume).

In listing the general powers of the Board, Section 152 (f) provides the power:

> "(f) To suspend or revoke, after a hearing, the license of any person licensed under the provisions of this subtitle who has been *convicted* of violating any of the provisions of this subtitle or of any unlawful or fraudulent practices, or fraudulent, misleading or deceptive representations or advertising as respects his professional qualifications or the quality of the materials, drugs, etc., used by him in his professional work or treatment of animals, or has been found guilty of a crime or misdemeanor involving moral turpitude;" (Emphasis supplied).

In setting forth standards of conduct and ethics, Section 152A of Article 43 provides:

> "Section 152A.
>
> "The State Board shall have the power to prescribe, according to this subtitle, reasonable stand-

ards of conduct and ethics for the practice of veterinary medicine, and this power includes the authority to refuse, suspend, or revoke any application or any certificate if the veterinarian:

"(a) Has been adjudicated insane.

"(b) Has been convicted of a violation of any federal or State law relating to narcotic drugs.

"(c) Has been convicted of a felony, or of a crime involving moral turpitude.

"(d) Has obtained the certificate to practice by fraud or misrepresentation, either in the application thereof, or in passing the examination thereof.

"(e) Has been guilty of employing or permitting to practice veterinary medicine any person, who does not hold a certificate to practice veterinary medicine in this State.

"(f) Violates any of the following requirements or limitations on advertising.

* * *

"(g) Does not conduct his practice in a conformity to the rules prescribed by the Board for proper sanitary and hygienic methods to be used in the care and treatment of animals.

"(h) Employs directly or indirectly a solicitor for the purpose of obtaining patients.

"(i) Obtains a fee on the assurance that an incurable disease or diseased condition can be cured.

"(j) Divides fees or charges or has any arrangement to share fees or charges with any other person, except on the basis of services performed.

"(k) Fails to report promptly to the proper official any dangerous infectious, or contagious disease.

"(l) Fails to report promptly the results of tests when required to do so by law or regulation.

"(m) Wilfully makes any misrepresentation in the inspection of foodstuffs.

"(n) Fraudulently applies or reports any intradermal, cutaneous, subcutaneous, seriological, or chemical test.

"(o) Fraudulently issues or uses any health certificate, inspection certificate, vaccination certificate, test chart, or other blank form used in the practice of veterinary medicine pertaining to the dissemination of animal disease, transportation of diseased animals or the sale of inedible products of animal origin for human consumption."

It is our interpretation of the above sections that prior court action is needed before your Board can revoke or suspend a license only under Section 152A (a), (b) and (c).

We believe that the word "convicted" as used in Section 152 (f) applies to administrative determinations made by your Board as well as to action of the Court. There is some indication from some of the employment of the term "conviction" in Section 152 (f) and from the provisions of Section 156 and Section 157, which makes violation of the subtitle or of the rules and regulations of the Board a misdemeanor, that only a conviction in a court of law may be the basis of suspension and revocation. However, these provisions do not stand alone. Section 153 provides for administrative hearings on written "complaint or charge" in which the "accused" shall have the right to confront witnesses against him and the Board may compel the attendance of witnesses by subpoena. Section 154 charges the Board with enforcement of the subtitle and with the duty to aid in prosecutions. We conclude, therefor, that Sections 154 and 153 complement Section 152 (f) and authorize the Board to act independent of prior judicial conviction.

Accordingly, the Board may suspend or revoke a license

for the violation of subsections (d) through (o) of Section 152A of Article 43, supra, without prior court action, assuming, of course, that the Board has found the licensee guilty of any of these violations after a proper hearing in accordance with Section 153 of Article 43. In addition, we believe that the Board may, after proper hearing, revoke or suspend a license without prior court action for a violation of Section 156 (b), which makes it unlawful for any person to practice veterinary medicine under a name other than on his license and annual registration, or to induce any person so to practice, or for a violation of Section 156 (d) which makes it unlawful for a person to practice unless his license and annual registration are displayed in his regularly established office or place of business.

FRANCIS B. BURCH, *Attorney General.*

JAMES R. KLEIN, *Assistant Attorney General.*

WATER RESOURCES

STATE DEBT—DEPARTMENT OF WATER RESOURCES CANNOT CONTRACT WITH FEDERAL GOVERNMENT TO OBLIGATE THE STATE TO PAY NON-FEDERAL SHARE OF BLOOMINGTON DAM AND RESERVOIR PROJECT COSTS UNDER ARTICLE 96A, SECTION 53A.

February 26, 1968.

Mr. Paul W. McKee.

Mr. Herbert M. Sachs, Chief of Planning, Department of Water Resources, requested a comment from this office with respect to a proposed contract between the United States of America and the State of Maryland for the construction and operation of the proposed Bloomington Dam and Reservoir on the North Branch of the Potomac River.

The construction of the Bloomington Reservoir on the North Branch of the Potomac River, Maryland, and West Virginia, is authorized by Title II, Public Law 87-874, in accordance with the recommendations of the Chief of Engineers as contained in House Document Number 469, Eighty-seventh Congress, Second Session (1962). The reservoir will be designed and operated to provide approximately 92,000 acre-feet of storage for water supply for initial needs, as well as for future requirements, of downstream users. The authorizing act requires that responsible local interests pay that portion of costs allocated to water supply as specified in House Document 469.

In Chapter 671, 1967 Laws of Maryland, the Maryland Legislature added to the Water Resources Law, Code Article 96A, a new Section 53A, providing, among other things, as follows:

> "The Department shall contract with the appropriate federal authorities for repayment of costs for initial water supply. The Department shall furnish reasonable assurance that costs allocated

to future water supply for use in Maryland will be repaid. When the future water supply is required, the Department shall contract with the federal authorities for repayment."

The proposed contract estimates that the present cost of constructing the project is $73,500,000. According to Article 7 of the proposed agreement, the State would have to obligate itself as follows, in consideration of the agreement by the United States Government to design, construct, operate and maintain the project:

"(1) To pay 89.8 percent of the 33.2 percent, presently estimated at $21,903,000, allocated to water supply, of the total construction cost of the project, to be paid in a lump sum prior to commencement of construction or in installments prior to commencement of pertinent items of project work in accordance with construction schedules to be furnished the State, or as an alternative:

(2) Repay within a period of 50 years 5.8 percent of the construction cost of the project presently estimated at $4,263,000 (.058 x $73,500,000), plus interest during construction on this amount, and with interest on the unpaid balance, at a minimum rate of 1/50th of the total cost plus interest, with payments to begin when storage is first available for water supply, and

(3) Pay the remaining cost amounting to 24.0 percent (29.8 percent — 5.8 percent) of the construction cost presently estimated at $17,640,000, plus interest during construction on this amount and with interest on the unpaid balance, both at the current water supply rate, at a minimum annual rate of 1/50th of the total cost, with payments to begin 10 years after storage is first available for water supply and final payment to be made within 50 years thereafter, except that no interest will be charged on the unpaid balance for

the first 10 years after storage is first available for water supply, and

(4) Pay annually 89.8 percent of the 27.3 percent allocated to water supply of the project's total annual operation and maintenance costs, and

(5) Pay 89.8 percent of the 31.4 percent allocated to water supply of the project's major replacement costs as they occur."

It is our opinion that your Department cannot execute this contract on behalf of the State of Maryland. In order to implement the authorization granted to your Department pursuant to Section 53A, cited above, funds would have to be appropriated or otherwise made available to cover the debt for which the State obligates itself. It is beyond the power of any official of the State to obligate the State to make payment of any obligation for which monies have not been appropriated. Sections 32 and 52, Article III, Maryland Constitution. A further difficulty exists in the proposed State obligation to repay the costs of construction, with interest, over a 50-year period because of the 15-year limitation on the contracting of State debt existing in the present Maryland Constitution. Article III, Section 34.

Because of the necessity that the United States Government receive assurances from several states, the District of Columbia, and a number of political subdivisions, all of which will be the beneficiaries of this major project on the Potomac River, the most convenient vehicle for financing and allocating costs of the project would be an interstate compact agency having the power to finance and manage projects of the type involved here. As you already know, a proposed Potomac River Basin Compact will probably be submitted to the Maryland General Assembly at the next session.

In the absence of an interstate commission of the type contemplated or an appropriation from the Legislature to finance the entire obligation, the only alternative that we can suggest is a regional authority or water district within

the State of Maryland encompassing all those counties along the Potomac River which will benefit from the project.

Under the present state of the law, it is not possible for a department of the executive branch of the government of Maryland to bind the State to a contract requiring repayment over a 50-year period or to pledge the faith and credit of the State to any obligation for which funds have not been appropriated. It is our opinion, therefore, that the proposed contract cannot be executed on behalf of the State of Maryland.

FRANCIS B. BURCH, *Attorney General.*

LORING E. HAWES, *Assistant Attorney General.*

WATER RESOURCES—PATUXENT RIVER—WASHINGTON SUBURBAN SANITARY COMMISSION PERMITS REQUIRE MAINTENANCE OF FLOW IN PATUXENT RIVER—DEPARTMENT OF WATER RESOURCES—POWER TO ENFORCE PERMITS ISSUED BY PREDECESSOR AGENCIES.

March 14, 1968.

Mr. Paul W. McKee.

Re: Maintenance of flow in Patuxent River by Washington Suburban Sanitary Commission

You have requested our opinion with respect to the continuing validity of permits issued to Washington Suburban Sanitary Commission by the former Water Resources Commission (1933-1941) and the former Department of Geology, Mines and Water Resources (1941-1964), to the extent such permits require the maintenance of flow in the Patuxent River. Specifically your inquiries are as follows:

"1. Is the Washington Suburban Sanitary Commission required to maintain a dependable flow at Laurel of 10.5 million gallons per day (mgd.)?

"2. Does the power of the old Water Resources Commission now reside in the Department of Water Resources?"

Answering these questions in reverse order, it is our opinion that your department, the Department of Water Resources, has succeeded to all of the powers and duties of the former Water Resources Commission that existed from 1933 to 1941 with respect to dams, reservoirs, waterway obstructions, change in course and cross section of streams and use or appropriation of waters in this State.

The original Water Resources Commission was created in 1933 by Chapter 526, 1933 Laws of Maryland, having substantially the same powers as your agency as set forth in Sections 10 through 22, Article 96A, Annotated Code of Maryland (1957 Edition). Pursuant to Chapter 508, 1941

Laws of Maryland, these same powers were transferred to a new agency created in 1941 called the Department of Geology, Mines and Water Resources. The reorganization of the natural resources agencies in 1964, pursuant to Chapter 73, 1964 Laws of Maryland, resulted in the transferral of such powers to the Department of Water Resources. Section 1 (b) of Code Article 96A, enacted in 1964, provides as follows:

> "In the exercise of this responsibility there is hereby created a State Department of Water Resources, which shall have the powers and duties provided for in this article. In addition, the Department shall have those powers and duties formerly exercised by the Water Pollution Control Commission and the present Department of Geology, Mines and Water Resources which are transferred herein to the Department."

Consequently, there being a continuing line of authority from 1933 respecting the powers devolved upon your department as set forth in Code Article 96A, Sections 10-22, the permits issued by your predecessor agencies pursuant to those code sections continue to have vitality and remain in full force and effect in all respects until modified or terminated by your department in accordance with procedures prescribed by law.

Your question regarding the requirement that Washington Suburban Sanitary Commission maintain a "dependable flow" at Laurel of 10.5 mgd. is referable to four permits issued to the Commission by your predecessors. On January 20, 1938, the former Water Resources Commission issued a permit to W.S.S.C. for the construction of an intake structure on the Patuxent River at Mink Hollow, subject to certain terms and conditions, among which is the following condition:

> "The diversion of water from the Patuxent River is hereby permitted, subject to the conditions, terms and reservations hereinafter set

forth, for such intervals of time only when the residual flow of the Patuxent River at Mink Hollow is not less than 8.7 million gallons per day or is sufficient, in the opinion of the Water Resources Commission and upon the advice of the Maryland State Department of Health, to afford ample dilution for the effluent from the Laurel sewage treatment plant."

An additional permit was issued on April 9, 1941 in connection with the Brighton Dam (Tridelphia Reservoir) with the following proviso among the several terms and conditions:

"The diversion of water from the Patuxent River at the existing water works intake near Mink Hollow and from the proposed intake upstream from Laurel is hereby permitted, subject to the conditions, terms and reservations set forth, for such intervals of time only when the residual flow of the Patuxent River at Laurel is not less than 10.5 million gallons per day or is sufficient, in the opinion of the Water Resources Commission and upon the advice of the Maryland State Department of Health, to afford ample dilution for the effluent from the Laurel sewage treatment plant.

"This permit is issued on condition that the permittee agrees to furnish water to the town of Laurel in accordance with the provisions of Chapter 390 of the Acts of 1937; namely, that when and if the town of Laurel specifically requests water from the Patuxent River as an additional source of public water supply, the Washington Suburban Sanitary Commission shall furnish to the town of Laurel at or near the proposed water supply intake or other mutually satisfactory location, a connection from which water may be made available to the Laurel water works system and said town may draw therefrom an amount of

water sufficient, in the opinion of the Water Resources Commission, to meet the water supply requirements of Laurel. It is further provided that the charge by the permittee for supplying the prescribed amount of water at the point of connection shall be the actual cost incurred by the permittee."

"12. This permit does not supersede, but supplements, the permit issued by this Commission to the Washington Suburban Sanitary Commission on January 20, 1938 authorizing the diversion of water from the Patuxent River at Mink Hollow."

Additional water was authorized to be taken from the Patuxent River by permit dated September 21, 1949, subject to rights of riparian owners and to the terms and conditions of the aforementioned permits of January 20, 1938 and April 17, 1941.

On October 17, 1951, a further permit was issued to W.S.S.C. by the Department of Geology, Mines and Water Resources, for the Rocky Gorge Dam and Reservoir, subject to, *inter alia*, the following conditions:

"2. To and inclusive of all the exceptions, conditions and requirements specifically stated and provided in the permits heretofore granted by the Water Resources Commission or this Commission to Sanitary Commission dated January, 20, 1938, April 17, 1941, and September 21, 1949."

"7. To supply water from the said dam and also from the Brighton Dam to such persons, communities or municipalities, which would ordinarily secure their water supply from the Patuxent River or its tributaries, either upon proper agreement being entered into therefor at such charge or rate as may mutually be agreed to, or determined by the Maryland

Public Service Commission or as may otherwise be provided by law."

"The said dam, when constructed, shall be operated and maintained as required by law, and subject to such control, rules, regulations, and direction as may be requested or required legally by the Commission.

"This permit is further subject to such change at any time as the Commission may deem necessary in the interest of public safety and welfare as may be permitted by law."

It is clear that your predecessor agencies in issuing the foregoing permits intended to restrict the amount of water the W.S.S.C. could remove from the Patuxent River and further intended to exercise continuing supervision over the maintenance of residual flow downstream from the W.S.S.C. projects. The amount of residual flow required to be maintained at Laurel is not less than 10.5 mgd. as set forth in the permit of April 9, 1941, and that provision was incorporated in all subsequent permits as a condition of the issuance thereof. Nevertheless, it appears that your department does have a certain amount of discretion to reduce the 10.5 mgd. requirement if the residual flow at Laurel "is sufficient, in the opinion of the Water Resources Commission and upon the advice of the Maryland State Department of Health, to afford ample dilution for the effluent from the Laurel sewage treatment plant", and provided that the W.S.S.C. furnish the town of Laurel water under conditions set forth in the permit of April 9, 1941. The "Water Resources Commission" cited in the foregoing quote from the 1941 permit is the former Commission, the powers of which are presently exercised by your department.

In any event, we think it desirable that formal procedures should be complied with by W.S.S.C., including advertisement and public hearing as provided in Sections 12 and 15 of Article 96A, if a reduction below the 10.5 mgd. level is indicated. The availability of a dependable flow of

waters for the benefit of downstream users and for the estuary is so critical in a watershed such as the Patuxent, that the matter of reduced flow for whatever purpose should be thoroughly aired in public. A contrary view would be difficult to justify in the light of the legislative charge to your department under Section 6 and the declaration of state water policy in Section 10 of Article 96A.

FRANCIS B. BURCH, *Attorney General.*

LORING E. HAWES, *Assistant Attorney General.*

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